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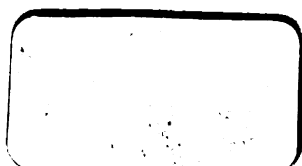
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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1874:

COMPRISING

REPORTS OF CASES

**In the House of Lords, In the Privy Council,
and in the Exchequer Chamber;**

IN THE

Courts of Chancery and Bankruptcy;

IN THE COURTS OF

**Queen's Bench and the Bail Court, Common Pleas,
and Exchequer;**

IN THE COURT FOR

Crown Cases Reserved;

**In The High Court of Admiralty, The Court of Probate,
The Court for Divorce and Matrimonial Causes, and
The Ecclesiastical Courts;**

MICHAELMAS TERM, 1873, TO MICHAELMAS TERM, 1874.

The House of Lords Cases are in the Chancery and Common Law Volumes respectively; the Decisions in the Exchequer Chamber will be found with the Reports of Cases in the respective Courts from which the Errors and Appeals come; the Appeals from Revising Barristers are in the Common Pleas; and the County Court Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.

THESE CASES (EQUITY AND COMMON LAW) FORM TWO DISTINCT VOLUMES OF REPORTS.

THE CASES RELATING TO THE POOR LAWS, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS.

THE PRIVY COUNCIL CASES, THE PROBATE CASES AND DIVORCE AND MATRIMONIAL CASES, THE ECCLESIASTICAL CASES, AND THE ADMIRALTY CASES, ARE SEPARATELY ARRANGED, AND FORM DISTINCT VOLUMES OF REPORTS.

THE REPORTS ARE EDITED BY

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FRANCIS TOWERS STREETEN, Esq.,**

AND

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CHANCERY.

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NAMES OF THE BARRISTERS BY WHOM THE CASES ARE REPORTED.

In the House of Lords,
EDMUND STORY MASKELYNE, Esq.

In the Privy Council,
EDWARD BULLOCK, Esq.

In the Lord Chancellor's Court, and the Lords Justices' Court,
CHARLES EDWARD HAWKINS, Esq.,
EDWARD THURSTAN HOLLAND, Esq., and CHARLES T. MITCHELL, Esq.

Exchequer Chamber,
The Decisions in Error and on Appeal in the Court of Exchequer Chamber are reported by the Barristers who report the Cases in the respective Courts from which the Errors and Appeals come.

Rolls Court,
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Court of the First Vice Chancellor,
HENRY ROBERT YOUNG, Esq., and CHALONER W. CHUTE, Esq.

Court of the Second Vice Chancellor,
WILLIAM WORSLEY KNOX, Esq., and GEORGE J. FOSTER COOKE, Esq.

Court of the Third Vice Chancellor,
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Court of Bankruptcy,
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Court of Queen's Bench, and the Bail Court,
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And (in the BAIL COURT) THOMAS SIRRELL PRITCHARD, Esq.

Court of Common Pleas,
WILLIAM PATERSON, Esq., and JOHN EDWARD HALL, Esq.

Court of Exchequer,
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Courts of Probate, and Divorce and Matrimonial Causes,
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High Court of Admiralty,
ROBERT ALBION PRITCHARD, Esq., D.C.L.

Ecclesiastical Cases,
GEORGE CALLAGHAN, Esq.

JUDGES AND LAW OFFICERS.

MICHAELMAS TERM, 1873, to MICHAELMAS TERM, 1874.

IN THE COURTS OF CHANCERY.

The Right Hon. LORD SELBORNE, Lord High Chancellor.
The Right Hon. LORD CAIRNS, Lord High Chancellor.
The Right Hon. Sir WILLIAM MILBOURNE JAMES, Knt., Lord Justice.
The Right Hon. Sir GEORGE MELLISH, Knt., Lord Justice.
The Right Hon. Sir GEORGE JESSEL, Master of the Rolls.
The Hon. Sir RICHARD MALINS, Knt., Vice Chancellor.
The Hon. Sir JAMES BACON, Knt., Vice Chancellor.
The Hon. Sir CHARLES HALL, Knt., Vice Chancellor.

IN THE COURT OF BANKRUPTCY.

The Hon. Sir JAMES BACON, Knt., Chief Judge.

IN THE COURTS OF PROBATE AND MATRIMONIAL CAUSES.

The Right Hon. Sir JAMES HANNEN, Knt.

IN THE HIGH COURT OF ADMIRALTY, AND IN THE ECCLESIASTICAL COURT.

The Right Hon. Sir ROBERT JOSEPH PHILLIMORE, Knt.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. Sir ALEXANDER J. E. COCKBURN, Bart., G.C.B., Lord Chief Justice.
The Hon. Sir COLIN BLACKBURN, Knt.
The Hon. Sir JOHN MELLOR, Knt.
The Hon. Sir ROBERT LUSH, Knt.
The Hon. Sir JOHN RICHARD QUAIN, Knt.
The Hon. Sir THOMAS DICKSON ARCHIBALD, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. LORD COLERIDGE, Lord Chief Justice.
The Hon. Sir HENRY SINGER KEATING, Knt.
The Hon. Sir WILLIAM BALIOL BRETT, Knt.
The Hon. Sir WILLIAM ROBERT GROVE, Knt.
The Hon. GEORGE DENMAN.
The Hon. Sir GEORGE ESSEX HONYMAN, Bart.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir FITZROY KELLY, Knt., Lord Chief Baron.
The Hon. Sir SAMUEL MARTIN, Knt.
The Hon. Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
The Hon. Sir GILBERT PIGOTT, Knt.
The Hon. Sir ANTHONY CLEASBY, Knt.
The Hon. Sir CHARLES EDWARD POLLOCK, Knt.
The Hon. Sir RICHARD PAUL AMPHLETT, Knt.

Sir HENRY JAMES, Knt., Attorney General.
Sir RICHARD BAGGALLAY, Knt., Attorney General.
Sir WILLIAM VERNON HARCOURT, Knt., Solicitor General.
JOHN HOLKER, Esq., Solicitor General.

PREFERMENTS AND MEMORANDA.

In Michaelmas Term, 1873, CHARLES HALL, Esq., of the Middle Temple, was appointed a Vice-Chancellor in the room of Sir JOHN WICKENS, deceased. He received the honour of Knighthood.

In the same term, Sir JOHN DUKE COLERIDGE, Her Majesty's Attorney-General, was appointed to the vacant office of Lord Chief Justice of the Court of Common Pleas, and upon receiving the degree of the coif, he gave rings with the motto "*Audiat rex quod præcipit lex.*" He was raised to the peerage by the title of Baron COLERIDGE, of Ottery St. Mary, near Exeter.

HENRY JAMES, Esq., Her Majesty's Solicitor-General, was appointed Her Majesty's Attorney-General, and received the honour of Knighthood.

WILLIAM GEORGE GRANVILLE VENABLES VERNON HARCOURT, Esq., of the Middle Temple, one of Her Majesty's Counsel, was appointed Her Majesty's Solicitor-General. He received the honour of Knighthood.

In Hilary Term, 1874, Sir SAMUEL MARTIN, one of the Barons of the Court of Exchequer, resigned his seat. He was succeeded by RICHARD PAUL AMPHLETT, Esq., of Lincoln's Inn, one of Her Majesty's Counsel, who having been first created a Serjeant-at-Law, gave rings with the motto "*In medio tutissimus ibis.*" He received the honour of Knighthood.

In the vacation after Hilary Term, CHARLES CLARK, Esq., of the Middle Temple; SAMUEL JOYCE, Esq., of Gray's Inn and the Middle Temple; THOMAS EWING WINSLOW, Esq., of the Middle Temple; FREDERICK WALLER, Esq., of the Inner Temple; WILLIAM H. G. BAGSHAW, Esq., of the Middle Temple; WILLIAM PEARSON, Esq., of the Inner Temple; CHARLES HENRY HOPWOOD, Esq., of the Middle Temple; JOHN WESTLAKE, Esq., of Lincoln's Inn; JOSEPH CHITTY, Esq., of Lincoln's Inn; JOHN PATRICK MURPHY, Esq., of the Middle Temple; ALFRED GEORGE MARTEN, Esq., of the Inner Temple; ROBERT GRIFFITH WILLIAMS, Esq., of the Middle Temple; ARTHUR COHEN, Esq., of the Inner Temple; and SAMUEL DANKS WADDY, Esq., of the Inner Temple, were appointed Her Majesty's Counsel learned in the Law.

In the same vacation Lord SELBORNE resigned the office of Lord High Chancellor. The Great Seal was delivered, for the second time, to the Right Hon. Lord CAIRNS.

Sir HENRY JAMES resigned the office of Her Majesty's Attorney-General, and was succeeded by Sir JOHN BURGESS KARSLAKE, Knt.

Sir WILLIAM VERNON HARCOURT resigned the office of Her Majesty's Solicitor-General, and was succeeded by Sir RICHARD BAGGALLAY, Knt.

In the same vacation PHILIP CHASEMORE GATES, Esq., of the Inner Temple; FREDERIC ANDREW Inderwick, Esq., of the Inner Temple; EDWARD HENRY PEMBER, Esq., of Lincoln's Inn; FREDERICK ADOLPHUS PHILBRICK, Esq., of the Middle Temple; and GEORGE PARKER BIDDER, Esq., of Lincoln's Inn, were appointed Her Majesty's Counsel learned in the Law.

In Easter Term Sir JOHN BURGESS KARSLAKE resigned the office of Her Majesty's Attorney-General in consequence of ill-health, and was succeeded by Sir RICHARD BAGGALLAY, Her Majesty's Solicitor-General.

JOHN HOLKER, Esq., of Gray's Inn, one of Her Majesty's Counsel, was appointed Her Majesty's Solicitor-General.

In the vacation after Trinity Term, BENJAMIN COULSON ROBINSON, Esq., Serjeant-at-Law, received a patent of precedence giving him rank next after GEORGE PARKER BIDDER, Esq., one of Her Majesty's Counsel.

At the same time ALDBOROUGH HENNIKER, Esq., of Gray's Inn; W. TALFOURD SALTER, Esq., of the Middle Temple; HENRY ROWCLIFFE, Esq., of the Inner Temple; WILLIAM AMBROSE, Esq., of Lincoln's Inn; J. MORGAN HOWARD, Esq., of the Middle Temple; and JOHN EDWARDS, Esq., of Gray's Inn, were appointed Her Majesty's Counsel learned in the Law.

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery,

AND ON APPEAL TO THE HOUSE OF LORDS.

COMMENCING WITH

MICHAELMAS TERM, 37 VICTORIÆ.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} In re THE BANK OF HINDUSTAN, CHINA AND JAPAN (LIMITED). CAMPBELL'S CASE. HIPPLESLEY'S CASE.
JAMES, L.J.	
MELLISH, L.J.	
1873.	
Nov. 5, 6, 10, 18.	

SELBORNE, L.C.	} In re THE SAME BANK. ALISON'S CASE.
MELLISH, L.J.	
1873.	
Nov. 10, 18.	

Company—Amalgamation ultra vires—Void Shares—Return of Purchase Money—Interest—Acquiescence—Alteration of Articles of Association—Companies Act, 1862, ss. 12, 50, 51.

In 1864 an agreement was entered into between the H. Company and the I. Company, and approved of and confirmed at meetings of the shareholders of the respective companies for an amalgamation and a transfer of the property and business of the I. Company to the H. Company, and for the purpose of carrying out the agreement, special resolutions were passed and approved of, and confirmed at general meetings of the H. Company, pursuant to the 50th and 51st sections of the Companies Act, 1862, for the increase of their capital by the issue of new shares to the shareholders of the I. Company at the premium and upon the terms therein mentioned. A.

NEW SERIES, 43.—CHANC.

was a shareholder in the I. Company, and applied for and was allotted shares in the H. Company, and paid 150l. for deposit and on account of premium thereon; but the shares were afterwards declared forfeited for non-payment of calls. In December, 1866, the H. Company was ordered to be wound up. In May, 1868, at the hearing of a cause instituted by shareholders in the I. Company, who dissented from the amalgamation, for the purpose of setting it aside, it was held by one of the Vice-Chancellors to be ultra vires and inoperative. No decree, however, was drawn up, compromises were effected with the dissentient shareholders, and all proceedings in the suit stayed, and the H. Company retained possession of the assets of the I. Company, which had been handed over to them under the agreement. An action at law was commenced against A. for the unpaid calls upon his shares, and upon a special case, in which it was incorrectly stated that a decree had been made in the Chancery suit, and no mention was made of the subsequent compromise, it was held by the Court of Common Pleas and affirmed in the Exchequer Chamber that the amalgamation being void A. never was a shareholder in the H. Company. A. then took out a summons in the winding-up of the H. Company for repayment of the money paid by him in respect of the shares:—Held, affirming the decision of the Court below, that he

B

was entitled to recover the money paid for deposit and on account of premium, with interest at 5l. per cent. from the date of the summons.

C. and H. were original shareholders, in the I. Company, and they also accepted and had allotted to them shares in the H. Company upon the terms of the amalgamation, and paid the deposit, premiums and calls upon them. Upon summonses taken out by C. and H.,—Held, reversing the decision of one of the Vice-Chancellors, that the Court was not bound by the decision of the Court of law pronounced in A.'s case upon a case erroneously stated, and that C. and H. having entered voluntarily into the contracts of which they had had the full benefit, and which had become binding on the company before anything was done to avoid them, were not now entitled to be relieved therefrom.

Held also, that the increase of capital was well effected by the resolutions without formally altering the articles of association.

The two first of these appeals were from the decision of Wickens, V.C., reported 42 Law J. Rep. (N.S.) Chanc. 771. The other was from the decision of James, L.J., sitting for Wickens, V.C., reported 42 Law J. Rep. (N.S.) Chanc. 505.

The facts are fully stated in the former reports, but for the sake of convenience they are shortly repeated here.

The Bank of Hindustan, China and Japan (Limited) (hereinafter called the Hindustan Bank) was registered under the provisions of the Joint Stock Banking Companies Act, 1857, and the Acts incorporated therewith, on the 11th of July, 1862, with a capital of 1,000,000l. divided into 10,000 shares of 100l. each, with power, which was afterwards exercised, to increase it to 2,000,000l.

The Imperial Bank of China, India and Japan (Limited), hereinafter called the Imperial Bank, was a company registered and incorporated under the provisions of the Companies Act, 1862, on the 22nd of April, 1864, with a nominal capital of 2,000,000l. divided into 40,000 shares of 50l. each.

In 1864 negotiations were entered into for an amalgamation of the two banks

and the transfer of the business of the Imperial Bank to the Hindustan Bank. Circulars on the subject were accordingly sent to the shareholders of both banks, and an agreement was entered into on the 24th of August, 1864, and approved of and confirmed at meetings held on the 25th of August and the 12th of September, 1864, by the Imperial Bank, by which the amalgamation of the banks was purported to be carried out.

The proposed agreement had been approved of by the directors of the Hindustan Bank on the 1st of August, 1864, and it had been resolved that their capital should be increased from 2,000,000l. to 4,000,000l. by the issue of 20,000 new 100l. shares at 6l. premium, to be issued to the shareholders of the Imperial Bank for the purpose of carrying out this arrangement. This was approved of and confirmed at meetings held on the 25th of August and the 12th of September, 1864, by the Hindustan Bank, and notice thereof registered with the Registrar of Joint Stock Companies, and after these resolutions the liquidators of the Imperial Bank (the agreement involving its winding-up), pursuant to the agreement, transferred its assets to the Hindustan Bank. On the 15th of September the Hindustan Bank issued to each of the shareholders of the Imperial Bank a circular informing him that in right of his being a registered holder of shares in the Imperial Bank he was entitled under the terms of arrangement to an allotment of a like number of shares in the Hindustan Bank at 6l. per share premium, and that his directors had paid on his account to the Hindustan Bank 5l. per share on account of the deposit to be paid thereon. To entitle the shareholders to that option they were required to sign and transmit to the directors a form of application enclosed in the circular on or before the 20th of September then instant.

Forty-three of the shareholders in the Imperial Bank repudiated the agreement for amalgamation, and refused to become shareholders in the Hindustan Bank upon the terms prescribed; and after two of them had succeeded (in June, 1865) in obtaining orders for striking out their names from the register of shareholders of the

Hindustan Bank (see *Higgs' Case*, 2 Hem. & M. 657, and *Martin's Case*, ib. 669), the names of the other dissentients were removed without litigation.

On the 5th of May, 1866, a bill was filed by leave of the Lords Justices granted on a petition to wind up the Imperial Bank, in the first instance in the name of the Imperial Bank, and afterwards by amendment in the names also of two of the dissentient shareholders, praying that the pretended amalgamation might be set aside as invalid and *ultra vires*.

Between the filing of the bill and the hearing of the cause the Hindustan Bank was (21st of December, 1866) ordered to be wound up.

The cause came on to be heard on the 6th and 7th of May, 1868, and on the latter day Sir G. M. Giffard, V.C., pronounced judgment, declaring the amalgamation to be *ultra vires* and inoperative—

The Imperial Bank of China, India and Japan v. The Bank of Hindustan, China and Japan, Law Rep. 6 Eq. 91.

No decree in accordance with this judgment was drawn up, but a compromise having been effected with all the dissentient shareholders, an order was made staying all further proceedings in the suit; and the Hindustan Bank retained possession of the property and assets of the Imperial Bank which they had acquired under the agreement.

In December, 1866, the Hindustan Bank was ordered to be wound up under supervision.

ALISON'S CASE.

Mr. Alison held twenty-five shares in the Imperial Bank, and had paid 5*l.* per share on such shares.

In September, 1864, he applied for twenty-five shares in the Hindustan Bank under the amalgamation. These were allotted to him on the 22nd of September, 1864, and notice of the allotment was sent to and received by him.

After the allotment the sum of 5*l.* per share was credited to him on each of the twenty-five shares held by him in the Imperial Bank in accordance with the terms of the agreement of the 24th of August, 1864; and on the 5th of January, 1865, he paid the further sum of 150*l.*

cash, being 5*l.* per share deposit, and 1*l.* per share on account of premiums, making, with the 5*l.* per share already credited to him, 275*l.*

Mr. Alison having paid no calls in respect of the new shares in the Hindustan Bank, his shares were declared forfeited, and subsequently an action was brought against him for the calls; and it was decided by the Court of Common Pleas, and affirmed in the Exchequer Chamber, upon a special case, in which however it was erroneously stated that a decree had been made by Vice-Chancellor Giffard setting aside the amalgamation as *ultra vires*, that the directors of the Hindustan Bank had no power to issue the new shares, and that the defendant was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in the Hindustan Bank. See

The Bank of Hindustan, China and Japan (Limited) v. Alison, 40 Law J. Rep. (N.S.) C.P. 1; s. c. on app. 40 *ibid.* Ex. Ch. 117; s. c. Law Rep. 6 C.P. 54, 222.

Mr. Alison then took out a summons in the winding-up of the Hindustan Bank claiming to be allowed the sum of 275*l.*, and interest at 5*l.* per cent. against the estate, and to be paid out of the assets of the company.

Upon the summons coming on to be heard in Court, James, L.J., sitting for Wickens, V.C., considered himself bound by the judgment in the Exchequer Chamber. Mr. Alison had paid his money in order to get certain shares, which he never got, and he was therefore entitled to a return of the 150*l.* which he had paid for them, with interest at 5*l.* per cent. from the date of the summons. He could not, however, claim to be repaid the 125*l.* against the Hindustan Bank. His claim for this must be against the Imperial Bank.

CAMPBELL'S CASE.

Mr. Campbell held five original shares in the Imperial Bank. He received the circular, and filled up, signed and sent to the Hindustan Bank an application for five of the new shares in it, and paid the premium and deposit upon them. Those five new shares were allotted to him, and

he received the certificates for them. In March, June, and September, 1865, calls were made, all of which Mr. Campbell paid. He was placed on the list of contributories of the Hindustan Bank, and in January, 1871, he was served with a balance order for 50*l.* principal money, and 2*l.* 8*s.* 8*d.* interest. After some correspondence he, under protest, and with the express reservation of all his rights, both as to that and previous payments made by him, submitted to the order, and paid the balance and interest.

HIPPLESLEY'S CASE.

Mr. Hippleasley also held five original shares in the Imperial Bank, and exchanged them for five allotted shares in the Hindustan Bank. He had, since the amalgamation, paid a considerable sum in respect of these shares. In October, 1864, he purchased in the market forty shares in the Imperial Bank at a discount, but the transfers were of forty shares in the Hindustan Bank, and he never was a registered shareholder of the Imperial Bank in respect of those shares, but he paid in the aggregate as much as 1,763*l.* in respect of them.

In consequence of the decision of Lord Justice James in *Alison's Case* (*ubi supra*), Messrs. Campbell and Hippleasley, who had been placed on the list of contributories of the Hindustan Bank, took out summonses, which were adjourned into Court, to rectify the list by striking out their names and declaring them to be creditors of the Bank instead, and entitled to be paid their respective claims accordingly.

Vice-Chancellor Wickens held in *Campbell's Case* that he was not estopped by the payments made by him before the winding-up, or by allowing himself to be put on the list of contributories, those things having been done before the 7th of May, 1868, when Vice-Chancellor Giffard pronounced against the amalgamation. Hippleasley had paid calls in the liquidation after the Vice-Chancellor had pronounced his decree. But his Honour was of opinion that no such payment amounted to an estoppel before the judgment of the Court of Common Law declaring that Alison got no shares. In both cases he held that the applicants

were entitled to a return of the money paid, with interest from the date of the summons, as in *Alison's Case* (*ubi supra*).

The official liquidators now appealed from all these decisions.

Mr. Greene, Mr. Higgins and Mr. Graham Hastings appeared for the appellants. —As to the money paid by Campbell under the balance order, he paid it with full knowledge of the facts of the case, and cannot now recover it back on account of his ignorance of the law—

Bilbie v. Lumley, 2 East 469;

Marriot v. Hampton, 7 Term Rep. 269; s. c. 2 Smith's L. Cas. 356 (5th Ed.).

The fact of the amalgamation being void will not entitle either Campbell or Hippleasley to recover money paid for shares which they have received under an arrangement to which they were assenting parties—

Lawes v. Purser, 6 E. & B. 930; s. c. 26 Law J. Rep. (N.S.) Q.B. 25;

Lambert v. Heath, 15 Mee. & W. 486; s. c. 15 Law J. Rep. (N.S.) Exch. 297.

Everything required by the 12th, 50th and 51st sections of the Companies Act, 1862, to be done in order to make the issue of the new shares valid has been done. Messrs. Campbell and Hippleasley have had the benefit of those shares, and there can be no *restitutio in integrum*—

The Western Bank of Scotland v. Addie, Law Rep. 1 Sc. App. 145;

Richmond's Case, 4 Kay & J. 305;

Hitchcock's Case, 3 De Gex & S. 92;

Higgs' Case, 35 Law J. Rep. (N.S.) Chanc. 445; s. c. Law Rep. 1 Chanc. 339;

Los's Case, 34 Law J. Rep. (N.S.) Chanc. 609;

Lawrence's Case, 36 Law J. Rep. (N.S.) Chanc. 490; s. c. Law Rep. 2 Chanc. 412;

Hart v. The Frontino, &c., Mining Company, 39 Law J. Rep. (N.S.) Exch. 93; s. c. Law Rep. 5 Exch. 111.

Mr. Benjamin and Mr. A. G. Marten, for the executors of Mr. Sassoon, a deceased shareholder, who had leave to attend the proceedings, also supported the appeal—

Oakes v. Turquand, 36 Law J. Rep. (n.s.) Chanc. 949; s. c. Law Rep. 2 E. & I. App. 325;

Evans v. Smallcombe, 37 Law J. Rep. (n.s.) Chanc. 793; s. c. Law Rep. 2 E. & I. 249;

Re The British Provident Life and Fire Assurance Society (Lane's Case), 1 De Gex, J. & S. 504; s. c. 33 Law J. Rep. (n.s.) Chanc. 84;

The Phosphate of Lime Company v. Green, Law Rep. 7 C.P. 43.

Mr. Eddis and Mr. Jackson, for Mr. Campbell, and Mr. Dickinson and Mr. Rowcliffe, for Mr. Hippeley, supported the decision of the Vice-Chancellor.

Mr. Dickinson and Mr. Brooksbank, who appeared for Mr. Alison, were not called upon.

CAMPBELL'S CASE.

HIPPESLEY'S CASE.

THE LORD CHANCELLOR (on Nov. 18) delivered the following judgment.—The Vice-Chancellor, Sir J. Wickens, proceeding mainly on the authority of a decision of the Court of Common Pleas, affirmed by the Exchequer Chamber in *Alison's Case* (*ubi supra*), and of an order of this Court in the same case, consequential upon that decision, determined that these two gentlemen, Mr. Campbell and Mr. Hippeley, are now entitled to repudiate the position of shareholders and contributories in the Hindustan Bank, which they have, *de facto*, held from 1864 to the present year, and to have repaid to them out of the assets of that bank in the hands of the official liquidator all the sums paid by them for calls or otherwise before the winding-up order, and likewise further sums paid by them as contributories under a balance order made in 1869, since the winding-up, with interest thereon. There are some distinctions between the two cases, but in the view which we take of them it is not necessary to consider the effect of those distinctions.

The shares in question are some of a much larger number, which, in the autumn of 1864, were issued by the directors of the Hindustan Bank to, and accepted by, a large number of persons who had been shareholders in another banking company called the Imperial. They were issued under the authority of a

special resolution, passed and confirmed unanimously by extraordinary general meetings of the shareholders of the Hindustan Bank, for the purpose of giving effect to the terms of payment on which, according to an agreement confirmed by the same meetings, the directors of that bank had contracted to acquire and purchase the property and assets of the Imperial. The Imperial was a company which had a subscribed capital and assets of considerable value (it has been stated to us as 70,000*l.*), and, as it is also stated, no indebtedness. It had gone into liquidation under resolutions for a voluntary winding-up passed at the same time that this agreement was made, and all its business property and assets had been handed over to, and remained in the possession of the Hindustan Bank, which continued to carry on business as a going concern for more than two years afterwards. The great majority of the shareholders in the Imperial, including Mr. Campbell, Mr. Hippeley, and another gentleman, from whom, during the progress of the arrangements, Mr. Hippeley purchased shares, assented to this agreement, and to everything that was due upon the footing of it. An inconsiderable minority, which was stated in the Chancery suit to which I am about to refer not to exceed forty-three shareholders, dissented from it, and two of them filed a bill in this Court in the name of the Imperial Company (which they had obtained leave to use for that purpose), and also in their own names, praying, in effect, that certain resolutions which had been passed by the Imperial Company for the purpose of giving force to this agreement as against all their shareholders, under sec. 161 of the Companies Act, 1862, might be declared invalid, or that, at all events, the dissentient shareholders might be held not bound, and might be paid the full value of their shares out of the property and assets of the Imperial Company. To this bill the Hindustan Company was, of course, a defendant. It was brought to a hearing in May, 1868, and Vice-Chancellor Giffard, on grounds the correctness of which is not open to any dispute, then delivered judgment to the effect that no valid or binding amalgama-

tion, by virtue of the Imperial Company's articles of association, or of sec. 161 of the Companies Act, 1862, had been effected under the resolutions of the Imperial Company impeached by the bill; and that such resolutions were not binding on the dissentient Imperial shareholders; at the same time expressing his opinion that, consistently with this conclusion, and notwithstanding the right of those dissentient shareholders to receive out of the assets of the Imperial Company the full value of their shares, all the other shareholders in that company who had assented to the agreement, and who had accepted shares in the Hindustan Bank on the footing thereof, and their respective shares and interests in the assets of the Imperial, would be and continue bound by that assent and by that acceptance of shares. The dissentient shareholders having thus obtained the Vice-Chancellor's opinion that they were entitled to the relief which they sought for their own personal benefit, were satisfied with that advantage, and proceeded no further with their suit. No decree in it was ever drawn up, passed, or entered, and no attempt was made to recover from the Hindustan Bank any part of the property and assets of the Imperial of which they had obtained and retained possession under the agreement. On the contrary, the Vice-Chancellor's judgment having been pronounced in May, 1868, and the Hindustan Bank having itself already passed into liquidation in December, 1866, a compromise was effected under an order made in Chambers by the Judge to whose supervision the winding-up of the Hindustan Bank was subject, and a subsequent order in the suit itself, by which all further proceedings in that suit were finally stayed, and the title of the Hindustan Bank, as purchasers of the property and business of the Imperial was, in effect, confirmed by all the dissentient shareholders in that company upon the terms of the payment to them by the Hindustan Bank of 4,500*l.*, which seems by the evidence to have been less than the value of their shares. At the time when this arrangement was made, Mr. Campbell and Mr. Hipplesey

had been settled, and remained on the list of contributories of the Hindustan Bank, and one or both of them had taken part in the appointment of its liquidators. They had never down to that time made any attempt to disaffirm or avoid the contracts under which they took their shares, or to escape from the liabilities of their position of shareholders, and afterwards, in 1869, they paid without objection certain calls then made upon them under a balance order in the winding-up of the company.

In this state of circumstances, if there had been no question as to the power of the Hindustan Bank to create and issue the shares in question, it would seem obvious that these gentlemen could not have any possible claim to be removed from the list of contributories, or to have the money which they had paid returned to them. I think it, for my part, equally clear that they would have no such claim, even if there might originally, or at any subsequent period, have been some possible ground for disputing the validity of the creation and issue of those shares, unless it would have been open, under all the circumstances of this case, to the Bank of Hindustan itself, or to the official liquidators of that bank (supposing it to have been for their interest to do so), to exclude these gentlemen from the rights of shareholders. In other words, either if these shares were originally well created, or if the Bank of Hindustan was estopped from denying that they were so, these gentlemen having entered voluntarily into contracts of which they had the full benefit, and which, if not always binding upon the company, had become so before any act had been done on either side to rescind or avoid them, would have then no pretence whatever to be relieved therefrom. If authority had been needed for these propositions it would, I think, be sufficient to refer to the decisions of this Court in *Hare's Case* (1) and *Challis's Case* (2), in both of which shares in one company were taken by shareholders of

(1) Law Rep. 4 Chanc. 503.

(2) 40 Law J. Rep. (N.S.) Chanc. 431; s. c. Law Rep. 6 Chanc. 266.

another upon the faith of an amalgamation, the legal validity of which was not less disputed and disputable than in the present case.

I am further of opinion that upon the facts above stated a decision against Mr. Campbell and Mr. Hippley upon the present appeals is not inconsistent with the decision of the Court of Common Pleas in *Alison's Case* (*ubi supra*). The directors of the Hindustan Bank had, by their articles of association, power, upon such terms as they might think fit, to purchase or acquire the business and property of any company, partnership or persons carrying on any business included amongst the objects of this company as specified in the memorandum of association, and to pay for it in such manner as the Board might deem expedient. At the date of the agreement with the Imperial Company the Hindustan Bank had issued all the shares which it had, down to that time, power to create; but under sections 12 and 50 of the Companies Act 1862, it was enabled to increase its capital, provided a special resolution for that purpose was duly passed and confirmed by proper majorities at two extraordinary general meetings of shareholders. Two extraordinary general meetings specially convened for the purpose did on the 25th of August, 1864, unanimously pass, and on the 12th of September following, unanimously confirm a series of special resolutions, one of which was in the following words—"That the capital of the company be increased by the creation of 20,000 new shares of 100*l.* each, to be issued at 6*l.* per share premium to the persons and upon the terms stated in the before-mentioned agreement" (that is the agreement with the Imperial Company which was approved by another of the same resolutions), "and that the resolutions of the Board to the above effect be duly ratified and confirmed."

The Court of Common Pleas does not seem to have doubted that if the agreement with the Imperial Company had been carried into effect so as to vest in the Hindustan Bank, as purchasers, the property and business of the Imperial Company, these shares (which were, in fact, issued by the directors at six per

cent. premium to the persons, and upon the terms stated in that agreement) would have been well created. But that Court had to pronounce its decision upon a special case, and upon such inferences as it might properly draw from the facts therein stated. In that special case it was stated as a fact (though contrary to the actual truth) that on the hearing of the Chancery suit before Vice-Chancellor Giffard, in May, 1868, "a decree was made setting aside the amalgamation as *ultra vires* and inoperative," and no mention at all was made of the subsequent compromise of that suit, or of the arrangement by which the opposition of the dissentient Imperial shareholders was bought off, and the title of the Hindustan Bank, as purchasers, to the business and property of the Imperial Company confirmed and made absolute. Upon this statement, partly incorrect and partly imperfect in these important particulars, the Court of Common Pleas held that the power given to the directors of the Hindustan Bank by the resolutions of August and September, 1864, to issue the shares in question, was for a special purpose which had wholly failed, and upon special conditions which had not been fulfilled, and therefore that those shares had not been validly issued. It appears, however, to us, upon the evidence as it now stands, that, as a matter of fact, the Hindustan Bank did really and *bona fide* acquire and purchase, by a title which, though originally defective as against some Imperial shareholders, was in the end confirmed so as to become unimpeachable, the business and property of the Imperial Company; that the shares in question were *bona fide* issued for the purpose, and upon the terms which were authorised by the resolutions of August and September, 1864; that the Hindustan Bank could never have repudiated those shares; and that Mr. Campbell and Mr. Hippley and the other shareholders in the same position have actually got all that they contracted to get. The purpose, therefore, for which the authority was given did not wholly fail, and the conditions on which the issue was authorised were fulfilled. Nor does it appear to us to be for the purpose of the present decision at all

material that the infirmity of the title of the Hindustan Bank as purchasers to the business and property of the Imperial, as against the dissentient shareholders of the latter company, was not effectually cured until after the winding-up of the Hindustan Bank, and was then cured only for a valuable pecuniary consideration; the facts being that there never was a time after the issue of those shares at which the Hindustan Bank were not in the actual undisturbed possession of the fruits of their purchase, and that the terms of compromise with the dissentient shareholders of the Imperial, when sanctioned by the authority of this Court in the winding up, became binding on the Hindustan Bank itself and on all the contributors thereto, including in our opinion Mr. Campbell and Mr. Hipplesey.

There remains, however, another objection to the validity of the creation and issue of these shares which appears to have been urged for the first time in the Court of Exchequer Chamber, and to have been then adopted by the Lord Chief Baron apparently without dissent on the part of any other member of that Court. It was urged by counsel that having already exhausted the power of increasing their capital the directors of the Hindustan Bank could not lawfully create the additional shares they affected to create without having first altered their articles of association in the manner directed by sections 12, 50 and 51 of the Companies Act, 1862, and to shew that they had not done this in a lawful manner, a case of *Re The West India and Pacific Steam Shipping Company* (3) was referred to which has been again much relied on before us for the same purpose by Mr. Jackson. The Lord Chief Baron, after expressing his concurrence with the Court of Common Pleas on the ground on which it had been rested by the judges of that Court, proceeded thus—"I do not refer to the ground upon which the agreement of amalgamation was declared to be void. It was set aside. I feel bound to observe, in addition to the ground taken by Vice-Chancellor Giffard, that these

20,000 new shares were never lawfully created at all;" the reason given by his Lordship for that opinion being "that it was not competent to the Hindustan Bank under the 12th, 50th and 51st sections of the Companies Act, 1862, by means of a single resolution passed at one meeting and confirmed at a subsequent meeting to alter the articles of association and to authorise the creation of additional capital by the issue of new and additional shares."

We are sensible of the very great weight due to the authority of the distinguished Judge who delivered that opinion, which (whether the words in which it is expressed accurately convey his Lordship's meaning or not) might well be regarded by the Vice-Chancellor as binding upon him; and it has been the chief cause of such difficulty as we ourselves have felt in dealing with these cases. That opinion, however, was not necessary for, and it cannot be said to have been the foundation of the judgment of affirmance; the actual grounds of which (being the same in effect with the reasons of the Court below) were thus stated by the Lord Chief Baron immediately before the expression of their concurrence by the other four Judges present—"It appears to us, therefore, that the agreement for amalgamation, which was the whole foundation of the transaction, having failed, the transaction itself wholly failed, and the defendant never became a shareholder in the Bank of Hindustan." Under these circumstances, the question being one of which the importance may possibly extend much beyond these particular cases and this particular company, my learned brothers and myself have not considered that we are either bound or entitled to treat the judgment of the Court of Exchequer Chamber as conclusive in favour of the objection thus taken to the resolutions of August and September, 1864, which (in the view we take of the facts) is now for the first time presented as a dry, legal and technical objection to the validity of shares, issued and accepted *bona fide* for a valuable consideration which has not failed, and acted upon, both by the bank and by all its shareholders of every class, to whom the

(3) Law Rep. Weekly Notes, 1868, p. 112 (V.C. Giffard).

whole facts were made known in every possible way during the period of more than two years which preceded the winding up order, and never in any one instance called in question or impeached, either by the bank in its corporate capacity, or, until the present moment, by any shareholder therein.

The Chancery suit, it must be remembered, was instituted by Imperial and not by Hindustan shareholders. The Hindustan Bank, as a defendant in that suit, affirmed and maintained to the utmost of its power the validity of what had been done; and so far as regards the position of those who had taken shares in that bank under the same circumstances with Mr. Campbell and Mr. Hippeley, they maintained it (in the opinion of the Vice-Chancellor Giffard) with success. I forbear to enquire whether under all these circumstances, a decision that it would have been open to the Hindustan Bank on the ground suggested to deny the rights of shareholders to Mr. Campbell and Mr. Hippeley could have been reconciled with equitable principles, or with the decision of Wood, V.C., in *Richmond's Case* (*ubi supra*) and of Wickens, V.C., in *Oroome's Case* (4), and with the case at law of *The Royal British Bank v. Turquand* (5); and with the principles as to ratification and estoppel acknowledged as correct by the learned Judges in *Alison's Case* (*ubi supra*). I forbear to do so because I am for my own part unable to see in what respect the necessary and substantial conditions of sections 12, 50 and 51 of the Companies Act, 1862, were really departed from by the resolutions of August and September, 1864. There can be no doubt that those resolutions were passed unanimously at two extraordinary general meetings in the manner required by sections 50 and 51 of the Act, and that they were duly registered. The objection depends wholly upon the language of section 12, which enabled this company so far to modify the conditions contained in its memorandum of association, if authorised so to do

by its regulations as originally framed or as altered by special resolution "in manner hereinafter mentioned" (referring to sections 50 and 51) as to increase its capital by the issue of new shares of such amount as it might think expedient. The statute does not prescribe any particular form in which this is to be done; and I apprehend it is consistent with sound general principles, as well as with the express provisions of sections 50-53, to hold that the powers given by section 12 might be well exercised whenever the things authorised were in substance done by those who were made by the statute competent to do them. Nor is there anything in the judgment of the Lord Chief Baron from which I can with any certainty infer that his Lordship thought that the resolutions of August and September, 1864, would have been bad in form, if they were not bad in substance. If the effect of those resolutions was necessarily to alter the regulations of the company—that is, the articles of association as originally framed—by authorising an increase of the capital by the issue of new shares which those articles did not authorise, then I think they were sufficient to enable the company to modify, by an actual issue of new shares, pursuant to that authority, the conditions as to the amount of the capital of the company contained in the memorandum of association. And it appears to me that such was the necessary effect of these resolutions, although neither the memorandum of association nor the articles of association were in so many words mentioned therein. All the shareholders of the company must have imputed to them knowledge of the Act of Parliament, and also of their own memorandum and articles of association, and of the fact that the articles did not (as they stood before those resolutions were passed) authorise the proposed increase of capital; and from the notices which convened the two extraordinary meetings it must have been clearly understood that, without the sanction of those meetings, the proposed increase of capital could not be made. I entertain no doubt (nor does it seem to me that doubt was entertained on this point by any of the Judges in the Exchequer Chamber) that

(4) 42 Law J. Rep. (N.S.) Chanc. 771; s. c. 16 Law Rep. Eq. 417.

(5) 6 E. & B. 327; s. c. 25 Law J. Rep. (N.S.) Q.B. 317; affirming the judgment below, 5 E. & B. 248; s. c. 24 Law J. Rep. (N.S.) Q.B. 327.

NEW SERIES, 43.—CHANC.

it was competent for two meetings to authorise an increase of capital conditionally as much as absolutely, for a special purpose as much as for general purposes, and thereby to carry into effect an agreement the terms of which had previously been arranged, as much as to provide contingently for an agreement of any particular kind, if made at a future time. If I rightly understand the view of the Lord Chief Baron, it seems to have been that these resolutions were bad, as attempting to combine, *uno flatu*, two operations—namely, the authorisation of the increase of capital by the issue of new shares, and the actual increase of such capital by the creation of such new shares—which by section 12 of the statute are contemplated as distinct, and the first of which under that section was a condition precedent to the second. But if this is the true interpretation of the judgment, I am obliged to say, with very sincere deference, that this view appears to me *hærerere in cortice*, and to lose sight of the substance. According to the terms of the Act of 1862 and the constitution of this company, it was not necessary that the second of these two operations should be performed by special or indeed by any resolution of shareholders at extraordinary general meetings. The authority to make the issue was indeed required to be given by a special resolution; but the power of issue when that authority was once given was capable of being exercised by the board of directors. The authority in this case being only for a special purpose, the capital was not really increased till the shares were issued and accepted pursuant to that authority. The words, therefore, of the resolution, that the capital of the company be increased by the creation of 20,000 new shares, seem to me to be in truth nothing more or less than an authority for such increase by the board of directors, who proceeded on the faith of that resolution actually to issue the shares. Whatever would have been sufficient authority if contained in the articles as originally framed, must also, I think, be sufficient, if expressed in similar terms, in any resolution by which the articles might, in effect, be altered. There would have been in my opinion no doubt of the

sufficiency of the authority if the articles as originally framed had contained in addition to what now appears in them any such words as the following—"In the event of the directors succeeding in making an agreement for the purchase of the business and property of the Imperial Bank after shares to the full amount of 2,000,000*l.* have been issued, upon the terms of paying for such business and property by shares of the company at 6*l.* premium to be issued to such shareholders in the Imperial Bank as may be willing to accept the same, the capital of this company shall be increased beyond the 2,000,000*l.* by the creation of such a number of new shares not exceeding 20,000 of 100*l.* each as may be necessary for the performance of such agreement; such shares to be issued to the persons, and on the terms stated in such agreement." I cannot discover any ground for doubting that such a provision in the original articles would have been sufficient authority under the 12th section of the Act for the issue of new shares for the purposes of the supposed agreement whenever made; and if so, it seems to me that the equivalent words in the special resolution in the present case, though applicable to the fulfilment of an agreement already provisionally made, and not to a future and contingent agreement, are equally sufficient. The case of *The West India and Pacific Steamship Company* (*ubi supra*) which I think was correctly decided, was substantially different. There the question was whether the Court of Chancery could confirm a resolution, which, to be effective, must have been passed under the powers of the Companies Act, 1867, s. 9, for the reduction of the capital of the company. Such a reduction under the 9th section of the Act could only be effective by special resolutions, that is by a resolution adopted and confirmed at two extraordinary general meetings, which was not to come into operation until an order of the Court confirming it after full proof of certain notices to and consents of creditors should have been registered by the registrar of Joint Stock Companies; and no such resolution could be passed unless in language so far similar to that of the 12th section of the Com-

panies Act, 1862, that it was authorised by the regulations of the company as originally framed or as altered by special resolution. In that case the regulations of the company as originally framed did not authorise any reduction of the capital, and no resolution had been passed to the effect of altering them other than that for the actual reduction of the capital to which the assent of the Court was then asked. But this resolution, until some order of the Court confirming it should be registered, was wholly inoperative under the statute; and being inoperative it could not authorise what it purported to do or supply the want of that alteration of the articles which was a condition precedent under the statute independently of any order of the Court.

Upon the whole case I am of opinion that these appeals must prevail, and that the Vice-Chancellor's order must be discharged.

JAMES, L.J.—I desire only to add that we are of opinion that it is in the highest degree important for the safety of that large portion of mankind which has dealings in shares, and to the true interests of all shareholders, that the principle of the decision in *The Royal British Bank v. Turquand* (*ubi supra*) should be adhered to and acted upon.

MELLISH, L.J., concurred.

ALISON'S CASE.

THE LORD CHANCELLOR.—The facts of Alison's case seem to have been sufficiently stated in the preceding judgment.

The appeal is from an order of Lord Justice James, sitting for the late Vice-Chancellor Wickens, by which he directed sums which Mr. Alison paid to the Hindustan Bank when he took his shares to be repaid with interest, out of the funds of that bank. Alison has paid part, but not the whole, of the premium payable according to the terms on which the shares were issued. He had never paid any calls, and in March, 1866, his shares had been declared forfeited for non-payment of calls; so that his connection with the Hindustan Bank, if a shareholder, was finally dissolved nine months before the order to wind up that bank, in which he never was a contributory. An action

at law was brought against him in the name of the company by the official liquidator to recover the unpaid premiums and calls, and the judgment in that action was in Mr. Alison's favour, upon the ground that he never was a shareholder. The Lord Justice sitting for the Vice-Chancellor was of opinion that this judgment was binding as between Alison and the company, that it was conclusive in his favour upon the question raised by him in the winding up whether the consideration for the payments made by him to the company had not wholly failed, and whether he was not therefore entitled to recover back those payments. In that opinion we agree. We cannot relieve the official liquidator against the estoppel created by that judgment, on the ground that if evidence had been given in the action, which was not given, if the special case had been stated otherwise than it was stated, the result might have been different. A company in liquidation, like any other litigant, must be bound by the manner in which it conducts its own case. The appeal, therefore, in this case must be dismissed with costs.

MELLISH, L.J.—I am of the same opinion. It is clear, I apprehend, that the judgment is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered.

The only sort of difficulty that there really is in this case arises from the judgment not in form stating on which plea the defendant should succeed, but only deciding that the company were not entitled to recover any portion of the sums they sought to recover in the action; and if the special case had left it open to the Court to decide in favour of the defendant on several grounds, I doubt whether, technically, we could have looked at what was said by the judges, for the purpose of discovering what were the real grounds of their decision; but upon reading the special case it appears to me to be perfectly clear that only one single question was raised by it for the opinion of the Court, namely, the

question whether Mr. Alison ever became a shareholder in the Hindustan Bank, and that therefore the judgment that the company were not entitled to recover all or any of the sums which they sought to recover in the action, is necessarily a decision also that Mr. Alison never had become a shareholder in the bank. Therefore, upon that ground there is conclusive evidence in this case that he never became a shareholder in the bank. If he never became a shareholder in the bank, it appears to me he is clearly entitled to recover back the sums which he paid for the purpose of becoming a shareholder, upon the ground that they were moneys paid upon a consideration which has wholly failed.

Solicitors—Messrs. Ashurst, Morris & Co., for appellant; Messrs. Thomas & Hollams, for Mr. Sassoon's executors; Messrs. Flux & Co., for Mr. Campbell; Messrs. Gregory, Rowcliffes & Rawle, for Mr. Hippealey; Mr. A. Pulbrook, for Mr. Alison.

JESSEL, M.R. }
1873. } BOATWRIGHT v. BOAT-
Nov. 5, 12. } WRIGHT.

Statute of Limitations—Executor—Probate—Delay of Defendant—Accruer of Right of Action—Costs.

A testator died owing a debt of 100l. His widow, who was tenant for life under his will of both his real and personal estate, took possession accordingly, and paid interest on the debt for some years, and then ceased to pay any interest. After an interval of rather more than six years from the last payment of interest the testator's will was proved in consequence of proceedings taken by the creditor; and shortly after the grant of probate the creditor filed a bill for administration of the real and personal estate of the testator:—Held, that his debt was barred by the Statute of Limitations, and the bill must be dismissed with costs.

The bill in this suit was filed by T. Boatwright on behalf of himself and all other the simple contract creditors of

John Boatwright, deceased, against Eliza Boatwright his executrix, Elizabeth Boatwright his widow and John Boatwright his heir-at-law.

The plaintiff held a promissory note of the testator's for 100l. on which the testator had paid interest regularly while he lived.

The testator, by his will, devised all his real estate to his wife during widowhood, and after her death or marriage he directed his executrix to sell his real estate, and he bequeathed all his personal estate to his wife for life, subject to the payment of his debts and funeral and testamentary expenses, and after her death he directed his executrix to convert his personal estate into money and stand possessed of it and also the proceeds of his real estate on certain trusts for the benefit of his son and daughters.

The testator died on the 13th of January, 1857, and thereupon his widow took possession of his personal estate, which consisted of a few articles of furniture of the value of about 5l., and entered into receipt of the rents of his real estate which produced 24l. a year. She also for some time paid the plaintiff interest on his promissory note, the last payment being made by her on the 1st of February, 1864.

It appeared that the testator had told his wife not to part with his will as long as she lived, and she endeavoured to act on this precept accordingly; and the will was not proved till the 27th of September, 1870, when probate was compelled by proceedings taken by the plaintiff, in the course of which Mrs. Boatwright was committed to prison for a contempt of Court in not obeying an order of the Court of Probate to leave the will at that Court to be proved.

The bill was filed on the 1st of December, 1870. It prayed for administration of the real and personal estate of the testator.

The defence was the Statute of Limitations.

Mr. Southgate and Mr. Freeman, for the plaintiff.—We contend that when the Statute of Limitations does not begin to run till after a testator's death it does not begin to run until a personal representative is constituted. And it cannot

be said in this case that it began to run against anybody on the last payment of interest in the testator's lifetime, for the subsequent payments of interest by the widow ensured for the benefit of both the real and personal representatives, and so kept the statute from running in their favour. In

Roddam v. Morley, 25 Law J. Rep. (N.S.) Chanc. 438; s. c. 2 Kay & J. 336; s. c. 1 De Gex & J. 1; s. c. 26 Law J. Rep. (N.S.) Chanc. 438 (1858),

a testator died indebted on a bond in which the heirs were bound, and having devised his real estates in strict settlement, and the devisee for life paid interest on the bond for twenty years and then died, and it was held that under the 3 & 4 Will. 4. c. 42. s. 5, the payment of interest by the tenant for life prevented the Statute of Limitations from barring the action against the remaindermen.

And though that case was doubted by Lord Chelmsford, it has been recently re-affirmed by V.C. Bacon.

[The cases here referred to appear to be *Coope v. Cresswell*, 35 Law J. Rep. (N.S.) Chanc. 496; s. c. *ibid.* 114; s. c. Law Rep. 2 Chanc. 112, see p. 124 (Lord Chelmsford, 1866);

and

Pears v. Laing, 40 Law J. Rep. (N.S.) Chanc. 225; s. c. Law Rep. 12 Eq. 41 (V.C. Bacon, 1871.)]

In this case the retention of the will prevented us from suing the devisees, and we could not sue the heir as he was not in possession. It is true that if the statute begins to run in the lifetime of the deceased, it will continue to run although no personal representative is appointed—

Rhodes v. Smethurst, 4 Mee. & W. 42; s. c. 7 Law J. Rep. (N.S.) Exch. 273 (1838),

but when, as in this case, it has not begun to run in the lifetime of the deceased, the case is different. The law is summed up in

Williams on Executors, 6th ed. pp. 1735 *et seq.*

In

Burdick v. Garrick, 39 Law J. Rep. (N.S.) Chanc. 369; s. c. Law Rep. 5 Chanc. 233 (1870),

a defence of the Statute of Limitations failed, there being a fiduciary relation between the parties. But Lord Hatherley and Lord Justice Giffard expressed an opinion that it would also have failed if no such relation had existed, for that inasmuch as the agency lasted till the death of the principal the statute would not have begun to run till administration was taken out.

[THE MASTER OF THE ROLLS pointed out that that was a suit by an administrator, while the present case was against an executor.]

In

Douglas v. Forrest, 4 Bing. 686 (1827),

a plea of the Statute of Limitations failed, since the testator died in foreign parts and the action was brought against his executor within six years after probate.

Mr. Fry and *Mr. Bury*, for the defendants.—The question whether the will was proved or not cannot affect the real estate. As to the personal estate the plaintiff might at any time have sued the person having possession of the testator's assets, as executor *de son tort*, or executor as the case might be. The statute 43 Eliz. c. 8, shews that complete relief may be obtained against an executor *de son tort*. The law is summed up in

Williams on Executors, 6th edit. 255.

The present case is on all fours with

Webster v. Webster, 10 Ves. 93 (1804), where a plea of the Statute of Limitations by an executor, the testator having died in 1796, and probate being taken out in 1802, was allowed; the allegation in the bill upon a fair construction being, that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort*.

If the possession of the beneficiary in this case was with the consent of the executrix, she was liable; but if it was without her consent, the beneficiary was liable as executor *de son tort*. Even if no one was liable as executor or executor *de son tort*, the plaintiff might have taken in 1864 the proceedings he eventually took to compel probate of the will or he might have applied for administration himself. We contend, however, that an executor *de son tort* is liable to a creditor.

There are some recent cases in equity on the point, namely—

Rayner v. Koehler, 41 Law J. Rep. (N.S.) Chanc. 697; s. c. Law Rep. 14 Eq. 262 (V.C. Malins, July 10, 1872);

Cary v. Hills, 42 Law J. Rep. (N.S.) Chanc. 100; s. c. Law Rep. 15 Eq. 79 (Lord Romilly, M.R., Dec. 11, 1872);

Coots v. Whittington, Law Journal, Notes of Cases, 1873, p. 137; s. c. 21 W.R. 837 (V.C. Malins, July 7, 1873); s. c. 42 Law J. Rep. (N.S.) Chanc. 846.

[At the rising of the Court the Master of the Rolls suggested that the case should stand over for a few days, and on its coming on again, his Honour called on the plaintiff's counsel to reply.]

Mr. Freeman replied.

THE MASTER OF THE ROLLS.—This bill is filed by a simple contract creditor who had a promissory note of the testator who died on the 13th of January, 1857, for the sum of 100*l*. Though the promissory note was an old one interest had been regularly paid till some time before the testator's death. When the testator died it appears his widow took possession of what little property there was in the shape of furniture and such things, but no one proved the will. And it was not proved till the 27th of September, 1870, when it was proved by the executrix, *Eliza Boatwright*. It appears the will was not proved from some misapprehension on the part of the widow who understood her husband to tell her to keep it secret. The defence is the Statute of Limitations, which arises in this way—*Elizabeth Boatwright*, who was tenant for life of certain real estate belonging to the testator, paid interest up to some day in February 1864, and the bill was not filed till the 1st of December, 1870. It is attempted to get rid of the statute by certain ingenious arguments, and I must say that where the debt is clearly admitted and the statute is used, as in this case, not for protecting persons from a claim on which there is doubt, but to defeat an honest claim not brought within six years, the Court is anxious to

bring the case of the creditor within some or one of the exceptions which have been established. And for that reason, and not because I entertained any doubt as to the statute running, I not only heard *Mr. Fry's* argument, but had the cause adjourned in order to look into the authorities and see if I could discover any ground for giving the plaintiff relief.

The cause of action accrued in the testator's lifetime, and therefore, whether the will was proved or not is immaterial. Then if payment by the tenant for life of the real estate prevented the statute from running against the personal estate, it would run against the real estate from the date of the last payment, and, therefore, against the personal estate also. And time being thus a bar, the mere fact that you could make the legal personal representative a party to a suit against the real estate cannot be material. If the suit cannot proceed in the absence of a personal representative, the result would be that having lost the remedy against the personal estate, that against the real estate would be gone also, and if the remedy against the real estate is to be kept alive, the remedy against the personal estate must be kept alive also. But it does not appear to me that that point calls for decision now, for in this case I am of opinion that the executrix assented to these payments and so prevented the statute from running against the personal estate up to the date of the last of them. But then the statute is equally a bar to the suit.

Therefore I regret to say I must give effect to the defence. And though I do not approve of the defendant's conduct in raising it, still as the statute says that if a person neglects and sleeps upon his rights for six years he shall not enforce them, I am not at liberty to say that the statute is not a complete defence, and I cannot deprive the defendants of their right to costs. I must, therefore, dismiss the bill with costs.

Solicitors—Messrs. Barton & Pearman, for plaintiff; *Mr. William Norris*, for defendants.

JESSEL, M.R. }
 1873. }
 Nov. 11. } SIDNEY v. SIDNEY.

Ademption—Legacy of Debt—Payment—New Debt—Codicil—Confirmation—Revival—Republication—7 Will. 4 & 1 Vict. c. 26. ss. 24, 34.

A testator by his will said, "Whereas there is due to me from my son 1,440l. or thereabouts, secured by bills or notes or otherwise, I release my said son from the payment of any interest up to the time of my death, and I direct that he shall have time for payment of the said sum by paying one-sixth in every year next after my death." He afterwards made a codicil, whereby he confirmed his will. The son paid the debts due at the date of the will, amounting to about 1,440l., and afterwards incurred fresh debts to the amount of about 1,300l., which were due at the date of the codicil and at the death of the testator:—Held, that the legacy was specific, that it was adeemed by payment of the debt, and that the confirmation of the will by the codicil did not give the son any benefit in respect of the debts then due.

The bill in this suit was filed by Henry Sidney, the eldest son of W. H. M. Sidney, sen., deceased, against the executors and trustees of his will, namely, W. H. M. Sidney, jun., and J. Lynch.

The will was dated the 24th of February, 1860, and contained the following clause—

"Whereas there is due to me from my eldest son the sum of 1,130l. or thereabouts secured by mortgage upon property at Middlesborough-on-Tees, with respect to which I hereby release my said eldest son from the payment of any interest for the same up to the time of my death, it being my desire that the said sum of 1,130l. or thereabouts shall be paid by him without interest as aforesaid. And whereas there is also due to me from my said eldest son the aggregate sum of 1,440l. or thereabouts secured to me by bills or notes or otherwise, I do hereby release my said son from the payment of any interest up to the time of my death; and I direct that he shall have time for payment of the said sum of 1,440l. or thereabouts by paying one-sixth thereof in

every year next after my death, so that the same will be payable over a period of six years by equal yearly payments."

The testator made a codicil on the 28th of February, 1870, containing some directions not material to this case, and concluding with the words—"And I hereby confirm my said will in all other respects." And on the 14th of May, 1870, he made another codicil appointing the defendant, J. Lynch, an executor, and concluding, "And in all other respects I confirm my said will, except as altered or varied by the said codicil of the 28th of February, 1870."

The bill contained the following paragraphs, which, though contested on some minor points by the defendant's answer, were assumed for the sake of argument to be correct—

"6. The said property at Middlesborough-on-Tees, on which the sum of 1,130l. was secured as mentioned in the said will, was sold during the said testator's lifetime, and the said mortgage debt was paid off out of the proceeds of such sale.

"7. The plaintiff was formerly in business in the iron trade at Middlesborough aforesaid, but he was unsuccessful therein; and some years ago he gave up such business, and, save as to such business, the plaintiff had, during the lifetime of his father, no independent or other income of his own, and his father was in the habit of advancing to him from time to time sums of money for his maintenance, and for some of these sums the testator took the plaintiff's promissory notes, and for others no security but treated them as loans.

"8. At the date of the said testator's will, divers sums were owing by the plaintiff to his father on notes and otherwise exclusive of the mortgage in the said will mentioned, but the said sums were afterwards from time to time paid by the plaintiff to his father during his lifetime, and divers other sums in lieu thereof were from time to time advanced to the plaintiff by his father, and at the death of the plaintiff's father there was owing from the plaintiff to his father sums amounting altogether, as the defendants allege, to 1,291l., whereof the sum of

930*l.* was secured by the plaintiff's promissory notes, and the balance, or alleged balance (361*l.*), was wholly unsecured. The particulars of the said notes were as follows—First, a note dated the 15th of September, 1865, for 390*l.*, payable with interest thereon at the rate of 5*l.* per cent. per annum on demand after the 31st of March, 1866; second, a note dated the 11th of June, 1867, for 180*l.*, payable with interest at 5*l.* per cent. per annum on demand; third, a note dated the 15th of February, 1868, payable, with interest thereon, at the rate of 5*l.* per cent. per annum six months after demand; and, fourth, a note dated the 13th of June, 1868, for 50*l.*, payable with interest at the rate aforesaid six months after demand. The sums secured by the said notes were all advanced at or about the dates of the said notes respectively, and before the execution of the said codicil of the 28th of February, 1870. The said balance, or alleged balance, of 361*l.* was composed of advances made between the 14th of July, 1868, and the 3rd of January, 1870."

The defendants had brought actions against the plaintiff to recover the debts due from him to the testator, and on the bill being filed they undertook not to prosecute them till the hearing. In the course of the arguments reference was made to the 24th and 34th sections of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, which are in the following words—Section 24, "That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Section 34, "That this Act shall not extend to any will made before the 1st day of January, 1838, and that every will re-executed or re-published or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published or revived, and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the 1st day of January, 1838."

Mr. Southgate and *Mr. Chitty*, for the plaintiff.—We contend that the plaintiff

is entitled to have six years to pay the sums due from him at the date of the codicil, and to be released from all interest due during the testator's life. In

Winter v. Winter, 5 Hare 306; s. c. 16 Law J. Rep. (N.S.) Chanc. 111 (1846),

it was laid down that, under section 34 of the Wills Act (7 Will. 4 & 1 Vict. c. 28), the effect of the re-publication of a will by a codicil was the same as if the testator, at the date of the codicil, had made a will in the words of the former will, and the same principle is shewn by—

In the goods of Lady Truro, 35 Law J. Rep. (N.S.) Prob. & M. 89; s. c.

Law Rep. 1 P. & D. 201 (1866), the head-note of which is—"The re-publication of a will by the execution of a codicil, will not of itself entitle an unexecuted paper, written or signed between the date of the will and the date of the codicil, to probate. But where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil."

In accordance with the same principle, *Bacon, V.C.*, recently decided in

Anderson v. Anderson, 41 Law J. Rep. (N.S.) Chanc. 247; s. c. Law Rep. 13 Eq. 381 (1872),

that where a legatee under a will was an attesting witness so that the legacy was void, but there was a codicil executed by disinterested witnesses confirming the will, the legacy was made valid. And in

Doe d. York v. Walker, 12 Mee. & W. 591; s. c. 13 Law J. Rep. (N.S.) Exch. 153 (1844),

there was a will devising all lands at B. before the Act, a codicil appointing an additional trustee after the Act; and after the codicil the testator purchased other lands at B., and they were held to pass by the will.

In any case, we submit that the plaintiff is released from all interest due during the testator's life. The words respecting the interest are quite general.

Sir R. Baggailey and *Mr O. Browne*, for the defendants.—The object of sec-

tion 24 of the Wills Act was to give the same effect to a residuary gift of realty that had formerly attached to one of personality. The law as to personality was the same before the Act as it is now. And section 34 only enacts that when a will made before the Act is revived by a codicil made after it, it shall be construed according to the new law. We contend that this was a specific legacy, and that it was adeemed by payment of the debt; and that being so, the confirmation of the will by the codicil does not raise a new legacy, but merely expresses the testator's intention that his will shall continue operative, except so far as altered by the codicil. In

In re Gibson; Mathews v. Foulsham, 35 Law J. Rep. (N.S.) Chanc. 596; s. c. Law Rep. 2 Eq. 669 (1866), a testator bequeathed "my one thousand N. B. Railway preference shares." He had such shares, sold them and bought other shares exceeding 1,000*l.* in amount, and the legacy was held to be adeemed.

Again in

Douglas v. Douglas, Kay 400; s. c. 23 Law J. Rep. (N.S.) Chanc. 732 (1854), a testator released his sister "from all claims in respect of money laid out by me in improvements of the estates in Scotland, and which money has, according to the laws of Scotland, been charged thereon." Some moneys had been laid out and charged at the date of the will, some were then laid out and charged afterwards, and some were both laid out and charged afterwards; and it was held that the exoneration applied only to moneys laid out and charged at the date of the will.

[THE MASTER OF THE ROLLS referred to—

Smallman v. Goolden, 1 Cox 329 (1787),

where a testator gave to his son "all sum and sums of money due to me from him on bond or bonds or any other security." The son was indebted to the testator by bond at the date of the will, and afterwards became indebted to him by another bond, and it was held that the bequest did not include the subsequent bond.]

Mr. C. Browne proceeded to cite—

NEW SERIES, 43.—CHANC.

Du Hourmelin v. Sheldon, 19 Beav. 389 (1854),

where a married woman by will appointed and devised all hereditaments which she had any power to appoint and devise; and afterwards when a widow by codicil confirmed the will, and it was held that the will as confirmed only passed such hereditaments as were subject to her power. And—

Montague v. Montague, 15 Beav. 565 (1852),

where the principle is clearly laid down that "the confirmation of a will by a codicil does not revive a legacy adeemed in the interval between the will and the codicil."

Also a dictum of Malins, V.C., in

Castle v. Fox, 40 Law J. Rep. (N.S.) Chanc. 302; s. c. Law Rep. 11 Eq. 542, see p. 551, line 30 (1871).

Mr. Southgate, in reply, cited—

Wagstaffe v. Wagstaffe, 38 Law J. Rep. (N.S.) Chanc. 528; s. c. Law Rep. 8 Eq. 229 (1869),

where after-acquired property was held to pass under a gift of "any other property I may now possess;" and—

Trinder v. Trinder, Law Rep. 1 Eq. 695 (1866),

where after-acquired shares were held to pass under a gift of "my shares in the G. W. Railway."

THE MASTER OF THE ROLLS.—This is a bill which raises a question which has been very often raised since the passing of the Wills Act, and which I am afraid will continue to be raised very often, and that question is, how far the provisions of the 24th section of the Wills Act apply to gifts of legacies as distinguished from gifts of residue?

Now the first point to be considered is, what does the instrument mean? The will in this case deals with property described in rather dubious language. If I ascertain that the will meant a specific sum then existing, it is conceded by the plaintiff that the mere fact of a codicil being made confirming the will will not alter the nature of the gift. If, on the other hand, I come to the conclusion that the will does not deal with a specific sum, but with what is sometimes called a class

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gift, that is to say, a gift of a class of subjects, subject in its nature to increase or diminution, then it is contended that confirmation by a codicil, coupled with the 24th section of the Wills Act, will extend the class to after-acquired subjects.

Now the circumstances of this case are fortunately without any possibility of doubt, because the defendants are willing to take the statements in the bill as true, and the plaintiff is not at liberty to depart from those statements. The curious thing is that that is the most favourable case for the defendants, for the defendants have put in an answer which has improved the plaintiff's case.

Now the words of the will are. [His Honour here read the passage above set out.] And it is only necessary to read two other paragraphs. The 6th is as follows. [His Honour here read it, and also the 7th and the beginning of the 8th.] So we have an admission in the bill that there were at the date of the will existing securities properly described as for 1,440*l.* or thereabouts, and that these were the sums intended to be referred to by the testator. Then many years afterwards, as we find by the 8th paragraph—that is after the date of the will, which was the 24th of February, 1860—the whole 1,440*l.* was paid off, and at the death of the testator there were other sums due. [His Honour then read the rest of the 8th paragraph.]

Well now, the codicil in question was made on the 14th of May, 1870, shortly before the testator's death, which took place on the 25th of November, 1870. It is sufficient to say that the codicil confirmed the will so far as not altered by codicil, and that does not affect the question.

The first contention urged upon me was that the gift of 1,440*l.* was not, under the circumstances and in spite of the admission in the bill that there were really such sums, a gift of a specific subject; but that the testator intended to refer to any sums which might be owing to him from his son generally, and not to these particular sums. It appears to me, however, to be very clear and plain that these are the sums which were referred to in the will. That is, that when the testator was

describing the sum by this amount, it was such an amount. It was really secured by promissory notes and bills, and he describes it so. It was owing by his son, and he so describes it. And how can it be said that that is a general description? It seems to me to be very specific indeed. But if I had any doubt, there is an old case which is much stronger—*Smallman v. Goolden* (*ubi supra*). It is much stronger because in it the sum is not mentioned. But with that exception it is the same as this case. In one case the debt is secured by bills, in the other by bond. And it was held that the bond having been paid off and another sum advanced on bond, the gift was gone. Therefore in both respects the case was stronger than this is.

The only question remaining is, what effect had the codicil? It confirmed the will, except as altered or varied by the other codicil. But if the legacy was adeemed by the payment of the sum by the son, it could not be argued that the codicil gave a new sum, nor was it so argued.

I have now disposed of the substance of the argument, that this was a general gift. I hold it a specific legacy, and hold that the son is not entitled to anything under the will. But there was one point argued by Mr. Chitty, a very ingenious point; and though I think that if the father were asked he would not approve of my decision, I must decide against it. It is true that the will does not say any interest on the sum last mentioned; but, looking at the context and considering that the sum spoken of was the same previously mentioned, I think that the interest spoken of in the same sentence means the interest on that particular sum, and not generally on any sum owing at his death. I am afraid, therefore, that I cannot give any effect to the clause in favour of the son. I dismiss the bill without costs, and the undertaking not to go on with the action is of course thereby discharged.

Solicitors—Messrs. Shum & Crossman, agents for Messrs. G. & F. Brumell, for the plaintiff; Messrs. E. Flux & Leadbitter, for the defendants.

[IN THE HOUSE OF LORDS.]

1873.

June 19, 20,
24, 26, 27,
July 3, 31.

PEEK v. GURNEY.

Company—Prospectus—Suggestio falsi—Suppressio veri—Liability of Directors—Liability of Estate of Deceased Director—Suit for Indemnity by Transferees of Shares—Decree appealed from affirmed on different Grounds—Costs—Delay in instituting Proceedings.

In proceedings in equity for damages, by one who has been deceived to his own injury by the misrepresentations of another made in a prospectus, the only amount of delay which is a bar to relief is that fixed by the Statute of Limitations as to actions for deceit at law.

Non-disclosure of material facts, though a ground for setting aside an allotment or purchase of shares, is not a ground for an action for deceit or for proceedings in equity in the nature of such an action.

The office of a prospectus is to invite persons to become allottees, and, the allotment having been completed, such office is exhausted and the liability to allottees does not follow the shares into the hands of subsequent transferees—*Bedford v. Bagshaw* (4 Hurl. & N. 538; s. c. 29 Law J. Rep. (N.S.) Exch. 59), and *Bagshaw v. Seymour* (18 Com. B. Rep. 903; s. c. 29 Law J. Rep. (N.S.) Exch. 60), note, disapproved; *Scott v. Dixon* (29 Law J. Rep. (N.S.) Exch. 62), note, and *Gerhard v. Bates* (2 E. & B. 476; s. c. 22 Law J. Rep. (N.S.) Q.B. 364, distinguished.

A company was formed for taking to a bill broking business of long standing and high credit. The prospectus stated that the good-will of the old firm had been purchased for 500,000*l.*, half to be paid in cash, half in shares with 15*l.* per share credited; and that the vendors guaranteed the company against loss on the assets or liabilities transferred. The liabilities of the old firm exceeded its bona fide assets by upwards of 4,000,000*l.*, or, including the value of the private estates of the members of the old firm, by upwards of 2,000,000*l.* Upwards of 4,000,000*l.* of almost hopelessly bad debts were entered in the balance-sheet prepared by the old firm with a view to

the transfer as assets worth 20*s.* in the *l.* By a deed executed between the company and the old firm, referred to in the prospectus, power was given to the directors of the company to reserve such accounts as they should think fit, to be wound up by the old firm. And by a second deed which was executed soon after the prospectus was issued, these bad or suspicious accounts were excepted and were left for collection in the hands of the old firm during three years and a half, at the end of which time, if these accounts should have realised more than the 4,000,000*l.*, the old firm was to have the benefit of the excess, and if they realised less than the 4,000,000*l.* the old firm was to make good the deficiency. In the meantime the 250,000*l.* cash, and the whole of the shares allotted to the members of the old firm as the price of the goodwill of their business, were to be held in suspense:—

Held, that this prospectus not only intentionally concealed material facts, but also contained statements amounting to an active misrepresentation, for which the promoters who signed it would be personally liable either at law or in equity to one who, on the faith of the prospectus, had applied for and obtained an allotment of shares in the company. But Held, that one who purchased shares in the open market had no remedy against the promoters, though he bought on the faith of the representations contained in the prospectus.

One who took no part in the preparation or issuing of the prospectus, but, with full knowledge of all the facts, consented to be a director and allowed his name to remain unchallenged at the foot of the prospectus, and signed the memorandum and articles of association which referred to the prospectus was held as liable as the other directors who prepared and issued the prospectus.

One of the directors having died before the suit was instituted:—Held, that as the suit was, not to recover profits derived by their testator or by his estate, but to recover damages for the wrong done by him, the suit could not be sustained against the executors of such deceased director, either in a Court of Equity or in a Court of Law, on the principle *actio personalis moritur cum persona*.

Directors may not be liable to a criminal prosecution under 24 & 25 Vict. c. 96. s. 84, and yet may be liable in a Court of Equity to indemnify persons taking shares on the faith of representations made by them in a prospectus.

This was an appeal from a decree of the Master of the Rolls, by which his Lordship had dismissed the appellant's bill without costs. The respondents, who were defendants in the Court below, were the directors of Overend, Gurney & Co. (Limited), and the executors of a deceased director, and the bill prayed for a declaration that the directors, in pursuance of a scheme for the formation of that company, had fraudulently issued a prospectus which concealed many important facts and misrepresented others, and was intended to deceive the public and the plaintiff as one of the public; in particular that it had represented the goodwill of Overend, Gurney & Co., for the purchase of which business the company was formed, as worth 500,000*l.*, and likely to yield a large profit if bought at that price, whereas in fact the old firm was hopelessly insolvent; that the plaintiff was misled by these omissions and misrepresentations into purchasing 2,000 shares in the company, and had suffered great loss and injury in consequence; and that he was entitled to have his contract rescinded, and also to be indemnified by the defendants against the loss he had sustained in consequence of their fraud and misrepresentation. The case is very fully reported from the Court below in 41 Law J. Rep. (N.S.) Chanc. 436, and it is only necessary here to mention the following facts. The firm of Overend, Gurney & Co. for many years prior to 1857 had been one of the largest and most successful firms of bill brokers and money dealers in London. In the year 1857 no profits were divided, in 1859 and 1860 there was a division, but subsequently to 1860 no profits were ever ascertained or divided. This was due mainly to the circumstance that improvident advances had been made to insolvent firms and persons to a very large extent. But besides this there was an average loss on the legitimate business of the firm during the years 1861, 1862,

1863 and 1864 of upwards of 32,000*l.* per annum. In 1865 the amount of capital hopelessly lost in advances to insolvent people and firms was found to exceed 3,000,000*l.* It had since been ascertained that the liabilities of the firm at that time, which had since ripened into actual losses, exceeded the total capital of the firm, including the value of their private estates, by nearly 2,000,000*l.*

The appellant in his bill alleged that "the prudent and honest course for the plaintiffs to have taken in 1865 would have been to have closed their business, and applied such assets as they possessed towards payment of their liabilities." But on the other side it was urged that the partners had strong hopes that by care, and the introduction of fresh capital, the business might be brought round; that for many years the profits of the business had averaged 188,000*l.* a year; the amount of bills discounted had averaged upwards of 32,500,000*l.* a year; the total amount of money turned over in the years 1859, 1860, 1861, 1862, 1863, 1864 and the first half of 1865 was 1,115,862,272*l.*, giving an average for each year of 171,671,118*l.*; the firm was still in high repute with the public; and the partners had sanguine hopes that if they appealed to the public for capital they would be enabled to bring the business through its difficulties. For this purpose, however, it was of course necessary that the true position of the firm should be kept secret. The bill accordingly alleged that "a scheme was therefore devised by the partners, together with other persons, for the formation of a joint stock company, whereby the goodwill of the firm of Overend, Gurney & Co. was to be put forward as worth 500,000*l.*, while its business was to be stated to be of such a nature as to yield a highly remunerative return, even on such an outlay." The bill went on to allege that the persons associated with the partners in this scheme were Mr. Henry Ford Barclay, a connection by marriage of the Gurney family, Mr. William Rennie, a member of the firm of Cavan, Lubbock & Co., which was at that time indebted to Overend, Gurney & Co. in the sum of 691,574*l.*, Mr. H. G.

Gordon, all of whom were made defendants to the bill, and Mr. H. S. A. Gibb, whose executors were also joined as defendants. To substantiate the charges of fraud, the bill alleged, as indeed was the fact, that no estimates or valuations of the business, of its assets or of its liabilities, were made by any independent accountant or valuer called in for that purpose, and that the statements of the affairs of the firm, which were submitted by the partners to Messrs. Rennie, Gordon and Gibb, shewed that the firm was then insolvent, and that these gentlemen must in consequence have been fully aware that it was so. With the same view the bill alleged that a statement of the affairs of the firm, which was entered on the books both of the old firm and of the company, was imperfect and delusive, and made in order that an appearance of solvency might be produced. This statement was as follows:—

1865.	ASSETS.	£	s.	d.
July 31.	Cash Securities ...	8,507,061	3	4
"	Advances ...	1,070,573	0	9
"	Country Banks ...	5,658	5	11
"	G. L. ...	13,303	10	0
"	Bills ...	1,345,135	4	5
"	Cash ...	120,394	7	2
"	Suspense and Guarantee	4,213,896	16	4
"	D. L. ...	1,969	19	2
"	S. D. ...	3,648	17	9
		<u>£15,281,641</u>	<u>17</u>	<u>10</u>

1865.	LIABILITIES.	£	s.	d.
July 31.	Cash Loans ...	9,006,422	0	7
"	" Country Banks	1,909,458	9	2
"	" D. L. ...	25,628	4	1
"	" Advances ...	64,075	16	0
"	" G. L. ...	435,380	5	9
"	" Rebate on Bills	72,610	6	4
"	" B. P. ...	38,772	3	6
"	" (P. L.) Private Ledger ...	1,053,715	1	9
"	" (S. D.) Single Deposits ...	2,675,579	10	8
		<u>£15,281,641</u>	<u>17</u>	<u>10</u>

With regard to this statement, the appellant alleged that there was wholly excluded from it all reference to a sum of 7,177,280*l.*, for which the firm was liable on guarantees on rediscounted bills, a large portion of which subsequently ripened into claims; or of a sum of

965,500*l.*, for which the firm was liable upon general guarantees, which had also matured into claims; or of a sum of 655,919*l.* 8*s.* 3*d.*, payable on credits granted; and that these three liabilities, amounting together to 8,808,699*l.* 8*s.* 8*d.*, might have been expected to and did ripen into very heavy losses, without producing any profit.

The bill also alleged, that not only was this large sum of liabilities excluded from the statement, but that the item of 4,213,896*l.* 16*s.* 4*d.*, which was entered in the statement under the head of "suspense and guarantee" as an asset worth the full amount, was only so entered in order to produce a semblance of solvency for the firm; that in the private account of the partners it was reckoned as likely to produce only about one-fourth of the full amount; and that it was composed of accounts of large amounts, standing in the books of the firm under the names of various parties with balances to the debit of such accounts, but instead of representing good debts owing to the firm, or being in fact assets of the firm, as in the above-mentioned statement of accounts they were represented to be, these accounts were for the most part, if debts at all, debts due from insolvent persons and failed firms, and ought to have been written off and treated as bad debts, or as only good to the extent of the dividends or sums likely to be received upon them in liquidation; and, moreover, that some of these debts were due from undertakings in which the majority of the shares were held by the firm, either themselves or by their nominees, and instead of the firm being likely to receive anything from those undertakings, the firm was, in respect of the shares they held in them, subject to liabilities to an enormous amount.

The bill further alleged, that although the said statement of the affairs of the firm, by representing this total of 4,213,896*l.* 16*s.* 4*d.* as an asset worth 20*s.* in the pound, made it appear that the firm was not only solvent, but that the partners had an actual capital in the firm of 1,053,715*l.* 1*s.* 9*d.*, the partners themselves at this time actually estimated the accounts forming this total to be worth,

and likely to produce on realization, only the sum of 1,082,000*l.*; and that they knew that the whole of the capital of the firm was lost, and that the firm was insolvent to the extent of upwards of 3,000,000*l.* as before mentioned; also, that in the events which happened, it was proved that even the estimate of the sum of 1,082,000*l.* was wholly delusive, that in fact that sum never was realized, and that at the date of the stoppage of the Limited Company the accounts in the suspense and guarantee account had not only not produced anything but had entailed a further loss of 615,000*l.*, because in the case of many of the accounts which went to make up the total of 4,213,896*l.* 16*s.* 4*d.* nothing was ever recovered; upon some others very trifling sums had been received, and some of them, and notably the accounts of the Millwall Iron Works, the Atlantic Royal Mail Steam Packet Company, L. Brusewitz & Sichel, Alexander & Co., so far from producing the assets for which the firm had taken credit, had ultimately resulted in the actual additional loss of large sums. Moreover, the mode in which these accounts were dealt with, was made by the bill a special instance of the fraudulent design of the whole scheme. For, in order to conceal from the public the names of the firms and persons whose debts were thus reckoned as assets, but which were well known to be hopelessly insolvent, a deed was executed before or on the day of the issuing of the prospectus, and was the only deed referred to in the prospectus, by which deed it was contrived that no reference should be made to the highly suspicious accounts by name. For instead of this a power was thereby given for the directors of the company to reserve such accounts as they should think fit to be wound up by the old firm; and by another deed, which bore even date with, but was in fact executed some time after the prospectus, and which the bill alleged was kept secret, these particular debts were reserved, and were handed over to the old firm for collection. By this second deed it was arranged that the whole of these so-called assets should be locked up at bank interest for three years and a half, during which time the old firm were to

collect the debts so left in their hands, and at the end of that time if the debts should have realized more than the 4,213,896*l.* 16*s.* 4*d.* the surplus was to belong to the partners in the old firm, and if they realized less than that sum the partners in the old firm were to make good the deficiency; and in the meantime the price of the goodwill, whether cash or shares, was to be practically held in suspense and remain unpaid. But it was alleged that the total value of the private estates of the partners as ascertained by valuation previous to the transfer of their business, even when the 500,000*l.*, the price of that business, and 45,000*l.*, the price of their offices, were added thereto, and even when the estimate was included which they had themselves made of the amount which these excepted accounts would probably produce on realization, and which estimate, as above mentioned, proved wholly delusive—the total value of all these fell far short of the sum of 4,213,896*l.* 16*s.* 4*d.*, for which, in the statement of accounts, entered in the books of the new company and of the old firm, the old firm took credit, and which sum was required to balance the undeniable liabilities of the firm, which liabilities were again, as above mentioned, themselves understated by an amount of upwards of 800,000*l.*, which had ripened into an actual loss of a very large amount.

It was in evidence that most of the excepted accounts had been well considered by the partners and found to be valueless so long ago as 1859, when their existence had been the occasion of a change in the management of the London business, and that by a letter dated the 5th of July, 1865, addressed by the old firm to Mr. Gibb for the use and information of himself, Mr. Rennie, and Mr. Gordon, those gentlemen were sufficiently apprised of the true state of the firm's affairs. The plaintiff having put forward the non-disclosure of this deed as an instance of the fraud it should be mentioned that on the other hand it was given in evidence by the defendants that the deed was not settled by counsel till a week or two after the issuing of the prospectus; that no instructions had been given by the partners or their solicitor for its prepara-

tion, and that it originated entirely with the counsel to whom the preparation of the deeds or deed required to effect the transfer of the business had been entrusted. The plaintiff in his bill stated that he purchased the shares solely on the faith of the statements contained in the prospectus, and in the belief that such statements were true, and that the business sold to the company was solvent and remunerative. This second deed was not only mentioned as an instance of fraud: it was also argued, as will be seen by his counsel, that the omission of all allusion in the prospectus to so important a matter as this second deed amounted to a misrepresentation on which he was entitled to relief. It is also proper to mention that the bill alleged that a fraud had been committed by the defendants in obtaining a settling day and an official quotation without producing this second deed; but, as the bill did not allege that the plaintiff had been deceived by this, it is not necessary to dwell farther on this part of the case.

The prayer of the plaintiff's bill is printed at p. 442, and the prospectus of the company at p. 438 of 41 Law J. Rep. (N.S.) Chanc. The prospectus was prepared and issued in the absence on the Continent of Mr. H. F. Barclay. But he on his return signed the articles of association which referred to the prospectus. The company was incorporated on the 1st of August, 1865, on which day all the shares in the company were allotted. The appellant purchased his shares in October and December—the transfer of 1,000 of such shares, bought at 7l. 10s. premium, being dated the 2nd of November, 1865; the transfer of other 1,000 shares, bought at 6l. 10s. premium, being dated the 3rd of January, 1866. On the 10th of May the company stopped payment, on the 11th of June a resolution was passed for voluntarily winding it up subject to the supervision of the Court, and on the 22nd of June, Kindersley, V.C., made an order that the winding-up should be continued under the supervision of the Court. Mr. Gibb died on the 15th of November, 1866. The plaintiff's original bill was filed on the 19th of March, 1868, and his amended bill

on the 1st of April, 1869. The defendants—namely, the partners in the old firm who were the directors and who signed the prospectus of the new company, Mr. Barclay, Mr. Rennie, Mr. Gordon, and the executors of Mr. Gibb, severed in their defence, and appeared separately on this appeal, the partners in the old firm appearing by themselves, Mr. Gibb's executors by themselves, and each of the three other defendants by himself. The partners in the old firm who were not directors of the company were not joined, they being, as the bill stated, insolvent and not necessary parties.

In the winding-up the appellant unsuccessfully endeavoured to have his name removed from the list of contributories. This House finally decided against that claim on the 15th of August, 1867. That case is reported *sub nom.*

Peek v. Turquand, 36 Law J. Rep. (N.S.) Chanc. 949.

The present bill was therefore filed a little more than six months after that decision.

In the meantime hostile proceedings had been taken against these directors in a suit brought in the name of the company, for negligence in completing the purchase. The final decision in that suit, given by this House, is reported in 42 Law J. Rep. (N.S.) Chanc. 67.

Criminal proceedings were also taken against them under 24 & 25 Vict. c. 96. s. 84, but these, under the direction of Cockburn, C.J., resulted in an acquittal.

In the present case Lord Romilly, M.R., had dismissed the plaintiff's bill on the ground of his delay in instituting the proceedings, but he dismissed it without costs because in his opinion the directors had been guilty of gross misconduct in concealing the insolvency of the old firm of Overend, Gurney & Co.

From this decision Mr. Peek now appealed.

Mr. Kay, Mr. Swanston and Mr. Jolliffe, for the appellant.—It may be true that some of the directors who issued this prospectus believed that the company might become a paying concern, but it cannot be denied that, with whatever intentions, they kept back from the public material facts which, if they had been

disclosed, would have prevented the formation of the company. The Master of the Rolls was of opinion that the statements in the prospectus were calculated to mislead, and he decided against our claim on the ground of delay, and incidentally his Lordship mentioned a difficulty, which occurred to his mind, arising from the fact that Mr. Peek had bought the shares in the market. But if he purchased them on the faith of the misrepresentations of these directors, they are responsible to him for the injury he has sustained through their deceit.

The liability of directors for issuing a false prospectus is well laid down by Kindersley, V.C., in—

The New Brunswick and Canada Railway Company v. Muggeridge,
1 Dr. & S. 363; s. c. 30 Law J. Rep. (N.S.) Chanc. 242 :

“Those who issue a prospectus inviting the public to take shares on the faith of the representations therein contained are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not fact, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares;” and his Honour gave judgment in favour of Mr. Muggeridge, although, as he said in his judgment, it did not appear to him that there had been in that case intentional fraudulent misrepresentation. That judgment was approved by this House, and especially by the Lord Chancellor Chelmsford in—

The Directors, &c., of the Central Railway Company of Venezuela v. Kisch,
36 Law J. Rep. (N.S.) Chanc. 849;
s. c. Law Rep. 2 H. L. 99,

and by Lord Hatherley, when Vice-Chancellor, in—

Henderson v. Lacon, Law Rep. 5 Eq. 249,

wherein he speaks of this passage in the judgment of Kindersley, V.C., as “The golden legacy which has been left to us by Sir Richard Kindersley.”

Now the deceptive and fraudulent nature of this prospectus was recognised

by Lords Chelmsford, Cranworth and Colonsay in—

Oakes v. Turquand, 36 Law J. Rep. (N.S.) Chanc. 949; s. c. Law Rep. 2 E. & I. App. 325,

and by the Master of the Rolls in his judgment, from which this appeal is brought, in that part of his judgment in which his Lordship is considering the question which will be raised by the respondents as to the right of proceeding in a Court of Equity rather than at law against individuals for deceit. And on this question we would adopt the argument of his Lordship, who after referring to

Burnes v. Pennell, 2 H. L. Cas. 497, shewed that a Court of Equity will entertain a personal claim for damages by one who has acted, to his own injury, on the representations of another, where there is fraud or deceit or misrepresentation with knowledge, and will order the latter to make good his representations, or to indemnify the plaintiff from the consequences of his so acting, and this, although the person making the misrepresentation has no interest, as was the case in—

Pasley v. Freeman, 3 Term Rep. 51. And in—

Evans v. Bicknell, 6 Ves. 173, Lord Eldon said that was a more fit case for a Court of Equity than a Court of law. So also in—

Burrows v. Lock, 10 Ves. 470, Sir William Grant held that as there was no difficulty in assessing the damages, it was a proper case for a Court of Equity. There the trustee had no interest, but he was held responsible for his misrepresentation with knowledge, though it had escaped his recollection; and this, too, although as held in

Kennedy v. Green, 6 Sim. 6, a trustee is not bound to answer to a stranger. In

Slim v. Croucher, 1 De Gex, F. & J. 518; s. c. 29 Law J. Rep. (N.S.) Chanc. 273,

which was not a case of a trustee but of a landlord, who also had no interest, the result was similar.

It has also been held that where there are several persons implicated in the misrepresentation, a proceeding against them collectively in a Court of Equity is

a fitter proceeding than several actions at law. This was so held in

Colt v. Woollaston, 2 P. Wms. 154;

Green v. Barrett, 1 Sim. 45;

Barry v. Groskey, 2 Jo. & H. 1;

Cridland v. Lord De Mauley, 1 De

Gex & S. 459; s. c. 17 Law J.

Rep. (N.S.) Chanc. 190;

Ramshire v. Bolton, 38 Law J. Rep.

(N.S.) Chanc. 594; s. c. Law Rep.

8 Eq. 294;

Hill v. Lane, 40 Law J. Rep. (N.S.)

Chanc. 41; s. c. Law Rep. 11 Eq.

215.

In these last cases demurrers filed to the bills were overruled, so that the question has been decided over and over again, and the Court of Equity has this jurisdiction. As for the case of

Ogilvie v. Currie, 37 Law J. Rep.

(N.S.) Chanc. 541,

in which a demurrer was allowed to a bill against directors, the reason of that was that the bill was for rescission of the contract; that failed against the company, and it was considered not equitable to grant collateral relief against the directors when the claim for the principal relief had failed. The claim then became one for unliquidated damages. Even at common law an action under such circumstances would fail, as in

Clarke v. Dickson, E. B. & E. 148; s. c.

27 Law J. Rep. (N.S.) Q.B. 222.

The principle was also recognised in

Rawlins v. Wickham, 3 De Gex & J.

304; s. c. 28 Law J. Rep. (N.S.)

Chanc. 188,

where too an action, founded on the same grounds as the present, was stopped by the death of a defendant, but the remedy in Equity was not thereby affected, and

Rashdall v. Ford, 35 Law J. Rep.

(N.S.) Chanc. 769; s. c. Law Rep.

2 Eq. 750.

The law being so as to direct misrepresentations or *allegatio falsi* or *suggestio falsi*, it is the same also as to *suppressio veri*. For at law "actions for deceit are not confined to representations which are literally false"—

Tapp v. Lee, 3 Bos. & P. 367,

in which case the dicta of all the Judges in

Haycroft v. Creasey, 2 East 92,

NEW SERIES, 43.—CHANC.

that fraud on which an action for deceit may be founded may consist, as well in the suppression of what is true as in the representation of what is false (although in that case the majority of the Judges decided that there was no fraud, because no intention was proved), was approved; and

Tapp v. Lee (*ubi supra*)

was emphatically approved in

Foster v. Charles, 4 Mo. & P. 61; 6

Bing. 296; s. c. 8 Law J. Rep.

(O.S.) C. P. 118,

and this is stated to be the law in

Smith's Leading Cases, 3rd Ed. vol.

1, pp. 77, 78, in the notes to

Chandelor v. Lopus, 2 Cro. 2,

where

Taylor v. Ashton, 11 Mee. & W. 401;

s. c. 12 Law J. Rep. (N.S.) Exch.

363, and other cases are cited.

Therefore we have these propositions established, that the intentional concealment of a material fact from a motive which may not be a dishonest one amounts to a misrepresentation, and that the Court of Equity has jurisdiction to compel one who has made such a misrepresentation to indemnify one who has acted on the faith of it to his own injury. But it is objected, as by Lord Romilly in his judgment, that though this equity may be asserted on behalf of one who is an allottee of shares, still a mere purchaser in the open market may not be entitled to relief. In reply to this objection, we contend that generally, until something has happened to limit the publicity or authority of a prospectus addressed to the public, all persons purchasing on the faith of the representations contained in it are entitled to relief. At all events, this must be the case so long as no other report or document exists with regard to the company. So long as no general meeting has been held, nor any report issued, all persons joining the company, whether as allottees or transferees, must be held, in the absence of anything to the contrary, to have done so on the faith of the prospectus. How can it be equitable for those who have issued the prospectus to say to one who has been deceived by it into becoming a transferee, "I only intended to deceive you into becoming an allottee;

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that you have been deceived into becoming a transferee was not quite the kind of deception I intended; so though you have been injured you have no remedy against me!" Besides, in this case, the object of these directors was not only to get the shares allotted: they had 16,666 shares allotted among themselves, and they had, as an object, to get rid, by sale and transfer of these shares, and the misrepresentations in this prospectus enabled them to do this, and at a premium. Therefore, the prospectus was intended to influence the public to become purchasers as well as allottees. It is not necessary to shew any further connection between the misrepresentations made by the directors and Mr. Peek, who, as a member of the public, was deceived by them to his great loss and injury. In *Bedford v. Bagshaw*, 4 Hurl. & N. 538; s. c. 29 Law J. Rep. (N.S.) Exch. 59,

the directors obtained a settling day on the Stock Exchange by means of false representations to the committee of the Stock Exchange, and one who purchased shares in consequence of his knowing that a settling day had been granted, was allowed to maintain an action against the directors, though the misrepresentation in that case had been made, not to the public or to him as a member of the public, but to a committee. It is said that—

Bedford v. Bagshaw (*ubi supra*), was decided on the strength of *Bagshaw v. Seymour*, 18 Com. B. Rep. (O.S.) 903; s. c. 29 Law J. Rep. (N.S.) Exch. 60, note,

in the House of Lords, and that in that case judgment was taken by consent, in the first instance, for the purpose of going to this House, and when here without argument. But Bramwell, B., in

Bedford v. Bagshaw (*ubi supra*), expressly mentions in his judgment that

Bagshaw v. Seymour (*ubi supra*) did not pass *sub silentio*, but was carefully considered. To the same effect are

Cullen v. Thompson, 4 Macq. H. L. 424;

Duranty's Case, 26 Beav. 269; s. c. 28 Law J. Rep. (N.S.) Chanc. 37;

Gerhard v. Bates, 2 E. & B. 476;

s. c. 22 Law J. Rep. (N.S.) Q.B. 364;

and

Scott v. Dickson, 29 Law J. Rep. (N.S.) Exch. 62, note 3.

In the judgment of Lord Campbell in

Gerhard v. Bates (*ubi supra*), occurs this passage—"It was strongly urged that no privity was shewn to exist between the parties, and that such privity was necessary as the action did not arise from any public wrong or the neglect of any public duty. But in

"*Levy v. Langridge*, 4 Mee. & W. 337; s. c. 7 Law J. Rep. (N.S.) Exch. 387;

and

"*Winterbottom v. Wright*, 10 Mee. & W. 109; s. c. 11 Law J. Rep. (N.S.) Exch. 415,

and the other cases referred to on this head, the alleged cause of action arose in respect of contracts, or from negligence imputed to the defendant, whereby the plaintiff was damaged; and the doctrine there laid down cannot apply to an action founded, irrespectively of contract, upon a false representation fraudulently made by the defendant to the plaintiff for the purpose of inducing the latter to act upon it, the plaintiff also shewing that by so acting upon it he had suffered damage." As to the case, on which the respondents rely, of

Blain v. Agar, 2 Sim. 289, the first demurrer in that case succeeded, because it was filed on behalf of himself and of all others; the second, because by the frame of the bill it was treated as a bill against the company for money had and received; and that case will be readily understood by considering that of

The Western Bank of Scotland v. Addie, Law Rep. 1 Sc. App. 145, in which Lord Chelmsford, after referring to the opinion of Lord Cranworth in the case of

The National Exchange Company v. Drew, 2 Macq. H. L. 103, and to proceedings brought by people against a company for the acts of their directors, says—"But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers

to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally."

With regard to the liability of Mr. Gibb's executors, although at law no action could be maintained against them upon the rule *actio personalis moritur cum persona*, we cannot find a single case in which that rule has been adopted in Equity; and in

Ingram v. Thorp, 7 Hare 67;

Rawlins v. Wickham (*ubi supra*);

Walsham v. Stainton, 1 Hem. & M.

322; and 1 De Gex, J. & S. 678;

s. c. 32 Law J. Rep. (N.S.) Chanc.

557; and 33 *Ibid.* 68,

the decisions went on a contrary supposition of law; and in

Davidson v. Tulloch, 3 Macq. H.L. 783,

the application of the rule in such a case was distinctly disapproved.

The result is that these directors by this prospectus and by their other acts, particularly by their obtaining a settling day on the Stock Exchange, which they did by withholding the second and most important deed of arrangement between the old firm and the company, deceived the public by misrepresentations; they had a direct interest in thus deceiving the public. Mr. Peek, reading the statements contained in the prospectus, and seeing that they had obtained a settling day on the Exchange, was deceived, as the plaintiff was in

Scott v. Dickson (*ubi supra*), into purchasing these shares, 1,695 of which he bought of Mr. Samuel Gurney or his nominee; the circumstances of the case are exactly such as were mentioned by the Vice-Chancellor in

Barry v. Croskey (*ubi supra*), as proper to be heard in a Court of Equity, while those circumstances are not found here which in

Ingram v. Thorp (*ubi supra*), and such cases are mentioned as rendering it more convenient for adjudication in a Court of law than in Equity, cases namely, where the damages cannot with ease and certainty be assessed. We contend that the decree appealed from ought to be reversed.

The Solicitor-General (Sir George Jessel), who, with Mr. Macnaghten and Mr. Medd, appeared for the respondent, Mr. William Rennie, and Mr. Roxburgh, who with Mr. Lindley and Mr. Graham Hastings, appeared for those of the respondents who had been members of the old firm, namely, Mr. John Henry Gurney, Mr. Henry Edmund Gurney and Mr. Robert Birkbeck.—The evidence now brought to light in this suit shews that there was no fraud in this prospectus, but at most an error in judgment, and for a mere error in judgment directors are not personally responsible at law or in equity—

Overend, Gurney & Co. v. Gibb, 42

Law J. Rep. (N.S.) Chanc. 67;

s. c. Law Rep. 5 E. & I. App. 481.

But whether there was misrepresentation in the prospectus or not, there was none to the appellant, who bought his shares in the open market. The prospectus was only addressed to the public to become allottees, and when the shares were all allotted it was *functus officio*. The learned counsel for the appellant have not attempted to rest their case on actual fraud, but where there is not actual fraud the Court of Chancery will not give relief in the nature of damages, although reprehensible representations may have been made. All that a Court of Equity can do where a man has been deceived into making a contract by the false representations of another who was not a party to the contract, is to compel the other party to make good his assertion as far as possible—

Kerr on Frauds, p. 274.

The Court will not decree damages even in that case, though perhaps what it has done sometimes may look very like it. All the cases cited on the other side, as

Ingram v. Thorp (*ubi supra*),

and

Slim v. Croucher (*ubi supra*),

are cases where there had been direct and positive misrepresentations, which the persons who made them were compelled to make good. In fact to ground an action for deceit or the analogous proceeding in equity there must be "positive aggressive deceit"—

Keats v. Cadogan, 10 Com. B. Rep.

591 ; s. c. 20 Law J. Rep. (N.S.)
C.P. 76.

That is, there must be positive misrepresentation fraudulently or recklessly made to the person complaining and in the course of the transaction. But in the first place in this present case these directors are sued for having omitted to make statements ; and where there are no statements on the one side and no enquiry on the other, how can any Court grant any relief? Secondly, the statements complained of were not made to the plaintiff at all but to allottees, and they were made not with reference to the transaction in which he has been engaged, namely, a purchase in the open market, but with reference to a totally different transaction, namely, the original allotment of the shares. Thirdly, the plaintiffs' bill asks, not for compensation for misrepresentation, but for a rescission of his contract and for damages as incident to that rescission. But he has no right to a rescission of the contract. Even if the original vendor had a right to rescind (and it is certain that Mr. Samuel Gurney, who was the original vendor of 1,690 of these shares, could have had no such right), the original vendor could not have sold that right with the shares ; he parted with the right when he parted with the shares ; and even if he had a right and was able to sell it, there are the intermediate purchasers and vendors, these have all got their premium ; the 7l. 10s. and the 6l. 10s. premium paid by Mr. Peek has been filtered through the hands of all of them ; they are not before the Court, and it is highly improbable that they should wish to rescind. With regard to the facts, we have evidence in this suit which was not before the Court in the former trials of

Peek v. Turquand (ubi supra),
and
Overend, Gurney & Co. v. Gibb (ubi supra).

The observations therefore of noble and learned lords made on those trials are not applicable to this case. Mr. Turquand and Mr. Harding in their affidavits state that after investigating the accounts they have come to the opinion that 500,000l. was not an excessive sum to be paid for the

goodwill of the old firm, and that the old firm was in fact solvent at the time of the transfer of its business. Mr. Rennie and Mr. Gordon, men of business also, after investigating the position of the old firm, entertained so genuine a belief in the favourable result of the purchase that they took shares in the company and kept them. It is easy to say after the events that have happened that they were egregiously mistaken. But it cannot be said that in stating their belief that the business would yield a large return on the price paid for it, they stated fraudulently what they did not believe, or recklessly that which in their judgment they had no good grounds for believing. The fact is that the new company was broken by a panic, and it is well known that every banker would have to stop if all his customers called for their money at once. The charge therefore of a fraudulent concealment of an insolvency of the old firm or of a fraudulent overstatement of the value of its business falls to the ground. As to the charge that one of the deeds was kept back, Mr. Jones, the solicitor for the old firm, has shewn that it was from no instructions emanating from him or the members of the old firm that there were two deeds, the second deed was due solely to the suggestion of the counsel instructed to draw the necessary conveyance, and to whom the machinery by which the assignment and arrangement were to be carried out was entrusted. Therefore the allegations of fraud are disproved and without actual fraud, that is to say, unless there be *mens dolosa* an action for deceit will not lie ; as was stated by Parke, B., in

Taylor v. Ashton (ubi supra),
mere negligence (though here there was not even negligence) is not sufficient—

Moore v. Burke, 4 Fost. & F. 258,
which was tried before Cockburn, C.J. With regard to the cases cited on the other side of

Burrowes v. Lock (ubi supra)
and

Slim v. Croucher (ubi supra),
there was a special enquiry upon a material fact. But in this case no such enquiry was made. In

Barry v. Croskey (ubi supra),

there was a representation made with a view to the particular transaction. But in this case the representation was made with a view to a transaction in which Mr. Peek was not concerned, namely, the allotment of the shares. The case of

Bedford v. Bagshaw (*ubi supra*), was not argued, and cannot be considered as an authority. The case of

Levy v. Langridge (*ubi supra*), was a curious case, and was not approved of by the Vice-Chancellor in

Barry v. Croskey (*ubi supra*), in which case his Honour said that to bring it within the principle the injury must be the immediate and not the remote consequence of the representation. The case of

Ogilvie v. Currie (*ubi supra*), is a case precisely in point now, and Lord Cairns in his judgment, after pointing out that the plaintiff there having no relief by reason of his own laches against the company, was virtually asking that the directors might be ordered to pay him something in the shape of damages, says, "It seems to me that this is a kind of relief that was never heard of in this Court, and none of the cases cited in any way approach it." The case of

Scott v. Dickson (*ubi supra*), was one of fraudulent accounts; and the dictum in

Duranty's Case (*ubi supra*) only went to this extent that the complainant had no remedy against the company; his remedy if any was against the persons who had deceived him. In

Gerhard v. Bates (*ubi supra*), it was held on one of the counts which shewed the same sort of connection as is attempted to be shewn by this bill between the act of the plaintiff and the act of the defendant that that was not sufficient, and though the plaintiff succeeded on another count he failed on that.

Mr. Fry (who appeared with *Mr. Jackson* and *Mr. Sayer*, for the respondent, *Henry Ford Barclay*, the director who was abroad when the prospectus was issued; *Mr. Fooks* and *Mr. W. Fooks*, appearing for the respondent, *Henry George Gordon*).—*Mr. Barclay* had not seen the prospectus before it was issued,

being abroad at the time, and "for the purpose of relief it must be established that there was by the prospectus a misrepresentation made by the persons sought to be made answerable—knowingly false, and also that it was made by them with a view to, and that it did, deceive the plaintiff," *per Lord Romilly* in

Ship v. Crosskill, 39 Law J. Rep. (N.S.) Chanc. 550; s. c. Law Rep. 10 Eq. 73.

To the same effect is the judgment of *Wood, V.C.*, in

Henderson v. Lacon (*ubi supra*), and of *Lord Hatherley* in

The Land Credit Company of Ireland v. Lord Fermoy, Law Rep. 5 Chanc. 763; s. c. before the Master of the Rolls, Law Rep. 8 Eq. 7.

In that case, although the Lord Chancellor reversed the decree of the Master of the Rolls, and held that the directors were liable in respect of the particular conduct complained of, his Lordship held that the liability did not extend to one of them who had no knowledge of the transaction at the time, but who took no steps towards repudiating it afterwards. The maxim *omnis rati habitio retrotrahitur et mandato priori æquiparatur* applies only to matters of contract not to matters of tort. So too in

The Joint Stock Discount Company v. Brown, Law Rep. 8 Eq. 376,

directors present at a meeting where a breach of trust had been agreed upon were held liable, but the bill was dismissed against one who had not been present at the meeting referred to.

Sir Richard Baggallay (with him *Mr. Macnaghten* and *Mr. Maclean*, for the respondents, the executors of the deceased director, *Mr. Gibb*) contended that even if *Mr. Gibb* would, if alive, be liable, the rule *actio personalis moritur cum persona* applied in equity as well as at law, and that his estate and his executors could not be sued. They cited

Lansdowne v. Lansdowne, 1 Madd. 116;

Hamblay v. Trott, Cowp. 375;

Bishop of Winchester v. Knight, 1 P. Wms. 407;

Powell v. Aiken, 4 Kay & J. 343;

Walsham v. Stainton (*ubi supra*);

Overend, Gurney & Co. v. Gurney, 39
Law J. Rep. (N.S.) Chanc. 45; s. c.
Law Rep. 4 Chanc. 701.

Mr. Kay replied.

LORD CHELMSFORD.—This is an appeal from a decree of the Master of the Rolls, in a suit in which the appellant was plaintiff, and the respondents were defendants, dismissing the appellant's bill without costs.

The bill prayed in substance that the respondents, the directors of the company of Overend, Gurney & Co., and the respondents the Messrs. Gibb, the executors of a deceased director, might be decreed to make good to the appellant, or indemnify him against the loss which he had sustained by reason of his having become the purchaser of 2,000 shares in the company, and having been, as he alleged, deceived and misled by a prospectus put forth by the respondents and the deceased director, containing several misrepresentations and suppressions of material and important facts, with a view to deceive and mislead the public, and the appellant as one of the public.

The Master of the Rolls dismissed the appellant's bill solely on the ground of his delay in instituting proceedings; but he dismissed it without costs, because, in his opinion "the directors were guilty of gross misconduct in concealing the insolvency of the old firm" of Overend, Gurney & Co.

Upon the argument of this appeal, the respondents very properly declined to insist upon the point of delay as an answer to the appellant's suit. The Master of the Rolls proceeded upon the principle, established by many decided cases that an allottee or purchaser of shares in a company, who seeks to divest himself of his shares, upon the ground of having been induced to purchase them by misrepresentation, cannot be relieved if he has continued to hold the shares without objection after knowledge, or with the full means of knowledge of the falsehood by which he has been drawn in to acquire them. These cases proceeded upon the ground of acquiescence, and on the application of a more general principle, that an agreement induced by fraud is not

void, but that it is entirely in the option of the person defrauded whether he will be bound by it or not. The suit in the present case is not for the rescission of the contract, but it is founded upon the loss the appellant has sustained, and may sustain in consequence of his being bound by the contract he has entered into. It is a proceeding similar to an action at law for deceit; and the only amount of delay which could be a bar to relief is fixed by the Statute of Limitations by analogy to which Equity generally proceeds in questions of laches.

The questions to be determined upon this appeal are—

1. Whether the respondents ought to be decreed to indemnify the appellant for the loss he has sustained upon the shares he was induced to purchase by reason of their misrepresentation, or concealment of facts material to be known.

2. Supposing the directors to be liable, whether the remedy of the appellant extends to the executors of the deceased director, Mr. Gibb.

3. Whether, as the appellant was not an original allottee, but a purchaser of shares in the market, any injury he has sustained by becoming a holder of the shares is not too remote to entitle him to relief against the respondents.

First. In dealing with the first question it will not be necessary to enter into a minute detail of the affairs of the firm of Overend, Gurney & Co., who had for many years carried on a most extensive business as bill-brokers and money-dealers, with the highest credit and reputation in the commercial world.

Prior to the year 1860, their business had been carried on profitably, with the exception of the panic year of 1857, but from 1861 to 1865 no profits were divided. This is attributed to a departure from the legitimate business (as it is called) of the firm, by making advances to various persons upon securities of a speculative and uncertain character; these doubtful advances amounting to upwards of 4,000,000*l.* sterling. But even upon bills discounted in the regular course of the legitimate business of the firm during the above four years, there had been losses averaged at 32,532*l.* per annum, but which,

it is said, included one year (1864) of very unusual pressure. This state of things occasioned great anxiety and led to a careful investigation of the affairs of the firm; when it appeared from the books that there were outstanding debit balances to the above amount of 4,000,000*l.* and upwards, but it was estimated that of this sum 1,082,000*l.* would be realized; leaving a sum of upwards of 3,000,000*l.* to be provided for. No doubt the firm was in a hazardous condition. Possibly by care and circumspection in the future management of the business the affairs might have been brought round. But the partners, as it is said, "after mature deliberation, considered it desirable that the business should be strengthened by the introduction of fresh capital; and in the result it was determined that such object should be accomplished by the formation of a joint stock company."

It cannot be denied that if the condition of the firm of Overend, Gurney & Co. had been disclosed, the result must have been their stoppage, and no hope could have been entertained of establishing a company upon the basis of a concern in such a state. The foundation of the projected company was, therefore, necessarily laid in concealment; and to render the scheme attractive to the public, the promoters were not only compelled to hide the truth, but to give such a colour to the statements put forth in the prospectus as to render them, though it may be literally true, yet in the sense in which they must have known they would have been understood by the public, really false.

The arrangement for the establishment of the company was carried out by two deeds, both dated and executed on the 27th July, 1865, though only one of them was referred to in the prospectus issued on the 12th July, as "the deed of covenant," which might be inspected at the offices of the solicitors of the company.

By this deed Overend, Gurney & Co. agreed to sell, and the limited company agreed to purchase the business of bill-brokers and money-dealers for the sum of 500,000*l.*; the sum of 250,000*l.*, one moiety, to be paid or treated as paid by being brought into account as being

paid in cash on the day of completion, and the other moiety to be paid or treated as paid by the Limited Company issuing to Overend, Gurney & Co. 16,666 shares of 50*l.* each, on which 15*l.* per share was to be treated as paid up and allowed on account between the vendors and purchasers. And it was agreed that the Limited Company should be entitled to have the price or sum of 500,000*l.* applied and made available by way of material guarantee in aid of and for the purpose of ensuring the performance of the covenants of the vendors.

The other deed, called the deed of arrangement, was never made known to the public, but was alleged in argument by the appellant's counsel to have been studiously concealed. By this deed it was arranged that during a period, called the suspense period, from the 31st of July, 1865, to the 31st of December, 1868, a suspense and guarantee account should be opened and debited with the balance of the excepted accounts (meaning the outstanding accounts, debts, liabilities, transactions, matters, affairs and things connected with the business of Overend, Gurney & Co., which the directors of the Limited Company should deem it desirable or expedient to be wound up, settled or arranged by Overend, Gurney & Co.).

This suspense and guarantee account was to be credited with 250,000*l.*, the moiety of the sum to be paid for the transfer to the Limited Company of the business of Overend, Gurney & Co., and also with the dividends payable in respect of the 16,666 shares, and with all sums of money received upon the sale of any of these shares.

By this deed the complete liquidation of the excepted accounts, which were to be wound up by the firm of Overend, Gurney & Co. was limited to a period of three and a half years.

In these circumstances, where so much was to be concealed, and so much varnished over to tempt the public to join the proposed company, the prospectus was prepared. It was drawn up by John Henry Gurney, and discussed and considered by all the persons who were afterwards directors except Mr. Barclay.

It is unnecessary to consider in detail

the alterations which were made in the original draft, but one of them appears to me to deserve some attention. In the proposed prospectus there was a statement that the existing liabilities of Overend, Gurney & Co., which might be taken over by the company, would be "most amply and satisfactorily guaranteed." It was suggested that these latter words should be omitted, and their place supplied by the words "under the guarantee of the vendors." And the prospectus accordingly runs thus: "the vendors guaranteeing the company against any loss on the assets and liabilities transferred." This seems to be an indication of the opinion of the intended directors, who knew all the facts, and who, I assume, were desirous of making the statements in the prospectus as conformable to the truth as possible, that they could not truly represent the guarantee of Overend, Gurney & Co. to be an ample and satisfactory one. It is, however, sufficient to remark, that the prospectus was not framed in the terms in which it was issued, carelessly or inconsiderately, but designedly, and after deliberation.

It does not appear that the firm of Overend, Gurney & Co. had at this time lost any of its estimation with the public, and the well known name in capitals at the head of the prospectus, was likely to possess no inconsiderable attraction.

The prospectus is ushered in with the following statement—"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. Overend, Gurney & Co., of their long established business as bill-brokers and money-dealers, and of the premises in which the business is conducted, the consideration for the goodwill being 500,000*l.*, one half being paid in cash, and the remainder in shares of the company, with 15*l.* per share credited thereon, terms which in the opinion of the directors cannot fail to ensure a highly remunerative return to the shareholders." This is followed by the statement already adverted to of "the vendors guaranteeing the company against any loss on the assets and liabilities transferred."

Now what would be understood by any

person reading these representations? Unquestionably that the firm of Overend, Gurney & Co. was a sufficiently flourishing concern for the goodwill of the business to be worth half a million, and that the proposed company being guaranteed against any loss on the assets and liabilities transferred, the terms agreed upon for the transfer of the business could not fail to ensure a highly remunerative return. At this time the firm of Overend, Gurney & Co. was insolvent to the extent of 3,000,000*l.*, and the goodwill of the business was really not worth one farthing.

It is said that every statement in the prospectus is literally true; that 500,000*l.* was actually the sum agreed to be paid as the consideration of the transfer of the business of Overend, Gurney & Co., and that the company had really the guarantee of the vendors against any loss on the assets and liabilities of the firm. I am compelled, however, to question even the literal truth of the representation that the consideration for the goodwill was 500,000*l.*, one half being paid in cash, and the remainder in shares of the company. This imports, of course, that payment of the 250,000*l.* was to be really made to Overend, Gurney & Co., and the shares to be delivered to them for their own benefit. But so far was this from being the case, that under the deed of arrangement (not referred to in the prospectus) instead of the 250,000*l.* being paid to Overend, Gurney & Co., it was to be paid to the Limited Company, and the suspense and guarantee account was to be credited with that amount in discharge of so much of the liabilities of the firm; and with regard to the shares (the other moiety of the consideration) all benefit derived from them by Overend, Gurney & Co. was to be carried to the credit of the same account. Upon these facts, was it true, even in a literal sense, that the consideration for the business was to be paid to Overend, Gurney & Co., one half in cash and the remainder in shares? If not, then undoubtedly there was a misrepresentation, for which the respondents would be liable.

But the case must be examined with reference to the charge which is made against the respondents, of having con-

concealed material facts, by which the appellant alleges that he was deceived and drawn into the purchase of his shares in the company. It was argued on his behalf that the concealment of material facts which a person is bound to communicate, may be the ground of an action for deceit and of a suit for relief in equity. The concealment in the present case was of the all-important fact of the state of Overend, Gurney & Co.'s affairs, which, if they had been disclosed, the wildest speculator would have turned away from a proposal to build a company on such a foundation. That there was a moral obligation upon the respondents not to put forward a scheme which depended for its success upon keeping the public in ignorance of what ought in fairness to have been made known to them, no one can doubt; it is said that the directors entertained a *bona fide* belief that the company would be a prosperous and profitable undertaking, and they evinced the sincerity of their belief by all of them becoming holders of shares to a considerable amount. But they knew that the company could not possibly be upheld without the introduction of fresh capital, and that this fresh capital could only be obtained by concealing the real condition of the firm of Overend, Gurney & Co., and however they might be convinced that with an additional capital and a careful and prudent management the affairs of Overend, Gurney & Co. might be brought round, and afterwards a profitable business be carried on, yet, as this was an experiment which was to be made with the money of other persons, as well as their own, they were bound to give them such information as they themselves possessed to enable a competent judgment to be formed as to the prudence of joining the proposed company.

The question however is not as to the moral obligation of the respondents, but whether their intentional concealment, from whatever motive, of a fact so material that if it had been made known no company could have been formed renders them liable to an action for damages, or to the analogous proceeding in equity by the appellant, who was led by it to purchase shares in the company, by which

NEW SERIES, 43.—CHANC.

he has been subjected to a most serious loss.

This case is entirely different from suits instituted, either to be relieved from, or for the enforcement of contracts, induced by the fraudulent concealment of facts which ought to have been disclosed. Now does it resemble such cases as *Burrows v. Lock* (*ubi supra*), and *Slim v. Croucher* (*ubi supra*), where a person making an untrue representation to another about to deal in a matter of interest upon the faith of that representation, has been compelled to make good his representation, whether he knew it to be false, or made it through forgetfulness of the fact? It is a suit instituted to recover damages from the respondents for the injury the appellant has sustained by having been deceived and misled, by their misrepresentations and suppression of facts, to become a shareholder in the proposed company of which they were the promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity.

I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose. The case of *Keates v. Earl Cadogan* (1) may be mentioned as an authority to the contrary. There it was held upon demurrer that an action for deceit would not lie against the owner of a house who knew it to be in a ruinous and unsafe condition, for not disclosing the fact to a proposed tenant who wanted the house for immediate occupation. In the course of the argument, a case of *Hill v. Gray* (*ubi supra*) was cited, where the agent for the sale of a picture, knowing that the vendee laboured under a delusion (as it is called) that the picture was the property of Sir Felix Agar, did not remove it, and the defendant, under this misapprehension, purchased the pic-

(1) 10 Com. B. Rep. 591; s. c. 20 Law J. Rep. (N.S.) C.P. 76.

ture. Lord Ellenborough upon proof of these facts said, "The case has arrived at its termination, since it appears that the purchaser laboured under a deception in which the agent permitted him to remain, on a point which he thought material to influence his judgment." It is to be observed that *Hill v. Gray* (*ubi supra*) was not an action for deceit, but was brought by the owner of the picture against the purchaser upon the contract, and Jervis, C.J., in his judgment in *Keates v. Earl Cadogan* (*ubi supra*), took some pains to shew that there was something more in the case than mere concealment, and what amounted (as he called it) to aggressive deceit on the part of the agent of the seller. After quoting the following words of Lord Ellenborough: "The agent ought not to have let in a suspicion on the part of the purchaser which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it," he added, "That shews something like an act done." It may be questionable whether this effect could properly be given to the silence of the agent, but the attempted explanation shews the anxiety of the Chief Justice to reconcile *Hill v. Gray* (*ubi supra*) with the judgment of the Court, in the case before them, that the mere non-disclosure by the owner of the house of its ruinous state, was no ground for the action for deceit.

Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him, it appears to me that this additional element exists in the present case. The concealment of the insolvent state of Overend, Gurney & Co. was absolutely essential towards the formation of the Limited Company, and the respondents were not merely silent to this important fact, but actively represented that the firm was in such a flourishing condition that the goodwill of the business was worth half a million. It is said that the prospectus is true as far as it goes, but half a truth will sometimes

amount to a falsehood, and I go further and say that, to my mind, it contains a positive misrepresentation. The language of the prospectus must be read in the sense in which the respondents must have known it would be understood. In that sense, it is not true (as already observed), that the 500,000*l.*, the consideration for the business, was paid to Overend, Gurney & Co. in cash and in shares; for the whole of it was to be applied in liquidation of the enormous debt of the firm of Overend, Gurney & Co., the existence of which was designedly kept from the public, to whom the prospectus was addressed. I cannot doubt that there was, beyond the passive concealment of the state of affairs of Overend, Gurney & Co., an active misrepresentation of the truth by the respondents, for which they were answerable either in law or in equity.

It is hardly necessary to consider the separate case of Mr. Henry Ford Barclay, which was disposed of by the observations made in the course of the argument on his behalf. It was contended that he was not liable for any misrepresentations in the prospectus as he never took any part in preparing or issuing it, or gave any express authority to prepare or issue it, and never saw the prospectus till after it was issued and sent to him, or read it till after the stoppage of the company.

But the short answer to his defence is, that he was acquainted with all that the other directors knew; he consented to become a director knowing that a prospectus would, as a matter of course, be issued; he signed the memorandum and articles of association referred to in the prospectus; and upon receipt of the prospectus he filled up and signed the form of application for shares, printed with and forming part of the prospectus. Can he, upon these facts, be heard to say that he did not authorise the prospectus or sanction its publication?

The next question is whether, if the appellant is entitled to maintain his suit against the respondents, his remedy extends to the executors of the deceased director, Mr. Gibb? On their behalf it is contended that this is a proceeding to recover damages for a wrong done, and

that the maxim *actio personalis moritur cum persona* applies.

There can be no doubt that if an action at law had been brought by the appellant, instead of this proceeding in equity, the executors could not have been made liable; and in the exercise of a concurrent jurisdiction by Courts of law and equity, both Courts (as already intimated) ought to proceed upon the same principles.

Now this is not like the cases referred to in argument of the *Bishop of Winchester v. Knight* (*ubi supra*), and the *Marquis of Lansdowne v. Marchioness of Lansdowne* (*ubi supra*), where the wrong complained of benefited the estate of the testator, and on that account the executors were made liable. The same liability arises, and on the same ground, in Courts of law. As Lord Mansfield said in *Hambly v. Trott* (*ubi supra*), "Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall."

Mr. Gibb's estate derived no benefit from the misrepresentation to which he was a party, and, therefore, his executors, who can only be answerable for his acts in respect of his estate, cannot be made liable for the wrong done to the appellant.

The learned counsel for the appellant was asked in the course of the argument, whether there was any case in which equity had made personal representatives liable for damages which might have been obtained against their testator. To which no satisfactory answer was given.

The cases mentioned in argument where executors were made answerable for the acts of their testator out of his estate, were none of them simply questions of damages. *Ingram v. Thorp* (*ubi supra*) was a case like *Burrowes v. Lock* (*ubi supra*) and *Slim v. Croucher* (*ubi supra*), where the testator was party to an agreement charging certain property to the extent of 1,500*l.* for the benefit of the plaintiff, and had represented that the property was an ample security in value,

whereas the property was heavily encumbered and insufficient; and Vice-Chancellor Wigram held that the plaintiff was entitled to say to the owner of the property: If I pay 1,500*l.* upon a representation falsely made by you that the estate you gave as a security for it is worth 2,500*l.* more than it was in truth worth, you shall make good your representation out of the property so far as it will extend, and if it shall be insufficient then out of your other assets, so that the executor may be said to have taken the estate with the liability to make good his testator's representation out of it.

Walsham v. Stainton (*ubi supra*) was a case where Joseph Stainton and Henry Stainton, who were the confidential agents of a partnership, combined together to obtain for themselves the shares of the partners in the concern at an under value, by keeping the accounts of the partnership fraudulently, so as to conceal from the partners the true value of the shares. Joseph was a party to the fraud, but the whole benefit of it accrued to Henry. The suit was instituted against the personal representatives of both Joseph and Henry. The executor of Joseph demurred to the bill for want of equity, but the Lords Justices held that Joseph and Henry both stood in a fiduciary position to the partnership, and that both having concurred in a breach of duty, although only one of them derived benefit from the fraud, the other was liable in equity for the benefit so derived, and that consequently the liability attached to his personal representative, as if his own estate had been benefited.

The case of *Rawlins v. Wickham* (*ubi supra*) was not a suit to obtain damages from executors, but was brought against them to set aside, on the ground of fraudulent misrepresentation, a contract of partnership entered into between the plaintiff and James Wickham, the testator, and to obtain a decree for the defendants to indemnify the plaintiff against the liabilities of the firm. An action at law had been brought against Wickham and Bailey on the ground of the fraudulent misrepresentation. Wickham died before the declaration was delivered. The action proceeded against Bailey alone, and the

plaintiff obtained a verdict. The damages were referred to arbitration, and the arbitrator awarded a sum of 11,800*l.*, but owing to Bailey's circumstances, only a sum of 300*l.* was obtained. It may be doubted whether, looking to the nature of the suit, the rule of *actio personalis*, &c., applied. At all events, the question was never raised, and the Lords Justices held that the action brought against Bailey, which was urged as an objection to the suit, did not free the estate of the deceased from its liability in equity, where alone the estate could be reached, but that, whatever might be obtained under the judgment in the action against Bailey, should go in relief of Wickham's estate.

No case has been produced, and I assume that none can be found, in which upon a claim against the testator *ex delicto* executors have been held liable in equity to answer for it in damages, and it appears to me that it would be contrary to principle to hold that an action which in a Court of law would be held to die with the testator, should be maintainable against executors in a Court of equity of concurrent jurisdiction. In my opinion, whatever might be the case as to the other respondents, the executors of Mr. Gibb could not have been made liable in the present suit.

The last question to be considered is, whether the appellant, who alleges that he purchased his shares upon the faith of the prospectus, has a remedy against the respondents for the misrepresentations which it contains. The appellant contends that the prospectus being addressed to the public for the purpose of inducing them to join the proposed company, any one of the public who is led by it to take shares, whether originally as an allottee, or by purchase of allotted shares upon the market, is entitled to relief against the persons who issued the prospectus. The respondents on the other hand insist that the prospectus, not being an invitation to the public merely to become shareholders, but to join the company at once by obtaining allotments of shares, those only who were drawn in by the misrepresentations in the prospectus to become allottees, can have a remedy against the respondents.

There can be no doubt that the pro-

spectus was issued with the object alleged by the respondents. It is addressed from the temporary offices of the company for allotment and registration of shares. It states how much is to be paid upon application for shares, and how much upon allotment, and how and where the application for shares is to be made; and it gives the form of payment to the bankers, and of the receipt to be given by them to the applicant for shares to be allotted.

But the learned counsel for the appellant, not denying the original purpose of the prospectus, contended, upon the authority of decided cases, that the prospectus having reached the hands of the appellant, and he relying upon the truth of the statement it contained, having been induced to purchase shares, the respondents were liable as for a misrepresentation made to him personally. I must therefore examine shortly the authorities relied upon.

Bedford v. Bagshaw (*ubi supra*) is a case where the defendant and others forming the board of management of a joint stock company for the purpose of getting the shares of the company inserted in the official list of the Stock Exchange, untruly represented that two-thirds of the scrip had been paid upon. The shares being, in consequence of that representation, inserted in the official list, the plaintiff knowing the requirements of the Stock Exchange, on the faith that two-thirds of the scrip had been paid upon, purchased shares in the company. The jury found that the representation was made fraudulently. The Court of Exchequer held that the defendant was liable to the damages sustained by the plaintiff, although the representation was not made to him directly. Two of the learned Judges, Barons Martin and Bramwell, considered the case to be concluded by a former decision, in a case of *Seymour and Bagshaw*, against the same defendant. The proceedings in that case, however, hardly appear to recommend it as an authority. The action was tried by Lord Chief Justice Jervis, who told the jury that if the plaintiff was induced, by seeing the shares quoted in the official list of the Stock Exchange, to purchase them, and if they believed that the insertion of

the shares in the list was procured by the false and fraudulent representation of the defendant, the plaintiff was entitled to recover. A bill of exceptions was tendered to the Chief Justice's ruling. In the Exchequer Chamber, judgment was pronounced by consent, without argument, for the purpose of going at once to the House of Lords. This is stated in 18 Com. B. Rep. 903, but Baron Bramwell says, in 4 Hurl. & N. (pages 547-8), that the judgment in the Exchequer Chamber did not pass *sub silentio*.

No other trace, however, of the manner in which the case was disposed of is to be found, except in the short notice of it in the Common Bench Reports. On the case being called on in the House of Lords, the counsel for Bagshaw, the plaintiff in error, said he did not think he could usefully occupy the time of the House by arguing it, and he at once submitted to a judgment for the defendant in error. How, under these circumstances, this case could be considered as a conclusive authority by the Judges who decided *Bedford v. Bagshaw* (*ubi supra*), it is hard to understand. But the cases themselves cannot, in my opinion, be supported. The actions were brought upon the allegation of a false representation made to the plaintiff. But no representation at all was made which reached either his eyes or his ears. From his knowing the rules of the Stock Exchange he assumed that a certain representation had been made, and acted upon it. According to the judgment it was his knowledge of the rules which led him to appropriate the representation to himself, and therefore it could not be taken to be made to anyone who was ignorant of these rules. The decisions, and the grounds on which they proceeded, appear to me to be extraordinary, and I cannot bring my mind to agree with them.

In *Scott and another v. Dickson* (*ubi supra*), which is to be found in a note to the case of *Bedford v. Bagshaw* (*ubi supra*) in the *Law Journal*, an action was brought against a director of a banking company for falsely, fraudulently and deceitfully publishing and representing to the plaintiffs that a dividend was about to be paid out of the profits which were sufficient

for payment of the dividend, and that the shares were a safe investment for the money. The plaintiffs bought their shares upon the faith of a report made by the directors to the shareholders, which contained the false representations. Copies of this report were left at the bank, and were to be had by share-brokers or any persons applying for it who were desirous of information with regard to the affairs of the bank, with a view to the purchase of shares. The plaintiffs purchased at the bank, through their broker, a copy of the report. The Court of Queen's Bench held that there being positive evidence that the report was to be bought by any person who wished to become a purchaser of shares, and that it came into the hands of the plaintiffs in this manner, and by the perusal of it they were induced to buy shares in the bank, there was a publication to the plaintiff in the sense of the declaration; I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares, and the representation must be regarded as having been made, not indirectly, but directly, to each person who obtained the report from the bank, where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director.

Gerhard v. Bates (*ubi supra*) is supposed to be an authority in support of the argument that a prospectus, containing untrue representations, may be made the ground of an action by a purchaser of shares who has been deceived, and induced by the representations to become a shareholder. That case, however, establishes no such proposition, but rather, as I read it, the contrary. The question arose upon a demurrer to a declaration, upon which, of course, all the facts alleged were, for the purpose of the argument, taken to be true. The second count of the declaration, which was founded upon the deceitful representation by the defendant, alleged that the defendant and others had formed a company, with 90,000 shares, of which 12,000 were to be appropriated to the public at 12*s.* 6*d.* per share, free from further calls; that the defendant

being the promoter and managing director of the company, intending to defraud, deceive and injure the public, who might become purchasers of the 12,000 shares, and to induce them to become purchasers falsely, &c., caused it to be publicly advertised, by a prospectus issued by the defendant as such director that the promoters did not hesitate to guarantee to the bearers of the 12,000 shares, a minimum annual dividend of 33 per cent. &c.; and that the defendant, by means of the false, &c., pretences and representations, wrongfully and fraudulently induced the plaintiff to become, and the plaintiff, by reason thereof, actually became purchaser and bearer of 2,500 of the 12,000 shares, at 12s. 6d. per share; whereas the statement was false and fraudulent to the knowledge of the defendant, and the defendant had no ground for offering such guarantee to the public. Lord Campbell, in giving judgment for the plaintiff, said—"Had it been alleged that the defendant, meaning to deceive and injure the plaintiff, and to induce him to purchase shares in the company under the belief that it was a safe and profitable undertaking, fraudulently delivered to the plaintiff the prospectus containing the false representation whereby the plaintiff was induced to purchase the shares, there can be no doubt that the count would have been sufficient. The allegations which it does contain appear to us to be equivalent." And he afterwards adds, "if the plaintiff had only averred that having seen the prospectus he was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant and the act of the plaintiff from which the loss arose;" a remark which has a direct application to the present case.

The case of *Gerhard v. Bates* (*ubi supra*), therefore, is no authority for holding that upon a prospectus addressed to the public by the directors of a company, any one of the public who has been led to take shares upon the faith of the representations thus published can maintain an action against them. The observations of Lord Campbell rather indicate a contrary opinion. It appears to me that there must be something to connect the directors making the

representation with the party complaining that he has been deceived and injured by it; as in *Scott v. Dickson* (*ubi supra*) by selling a report containing the misrepresentations complained of to a person who afterwards purchases shares upon the faith of it; or, as suggested in *Gerhard v. Bates* (*ubi supra*), by delivering the fraudulent prospectus to a person who thereupon becomes a purchaser of shares, or by making an allotment of shares to a person who has been induced by the prospectus to apply for such allotment. In all these cases the parties, in one way or other, are brought into direct communication; and in an action the misrepresentation would be properly alleged to have been made by the defendant to the plaintiff; but the purchaser of shares in the market upon the faith of a prospectus which he has not received from those who are answerable for it, cannot, by acting upon it, so connect himself with them, as to render them liable to him for the misrepresentations contained in it as if it had been addressed personally to himself. I therefore think that the appellant cannot make the respondents responsible to him for the loss he has sustained by trusting to the prospectus issued by them inviting the public to apply for allotments of shares; and upon this ground only (being different from that on which the Master of the Rolls proceeded) I submit to your Lordships that the decree appealed from should be affirmed.

LORD COLERIDGE.—My Lords, I agree in the result at which my noble and learned friend has arrived. We must take this case upon the footing upon which it is presented to us, not of a guarantee, but of a transfer or purchase of shares, and we must look at the allegation of the purchaser, that he was misled by certain statements which were contained in the prospectus issued by the respondents. I think, with my noble and learned friend, that this prospectus did suppress important matter, and if it did not contain any direct allegation of what was false, it was at least of a misleading character. It was a *suppressio veri*, which, if it did not amount to an *allegatio falsi*, at least amounted to a *suggestio falsi*, and I cannot see any grounds upon which I could justify it.

I think that there is very great difficulty in distinguishing the cases of the different defendants, as I would call them, or respondents here from each other. Those who were concerned in issuing that prospectus can hardly be listened to when they say that they did not know what were the contents of it, or that they had not sufficiently examined into the matter before putting it forth. That would be a reckless putting forth of statements which they did not know to be true, and which were calculated to induce people to subscribe.

But that does not solve this case. I agree in the view taken by the respondents that the proper office of a prospectus is to invite persons to become original partners in a company—that is to say, allottees of shares; and I do not think that the responsibility towards those allottees which attached to the directors who issued the prospectus, followed the shares when they were transferred to any number of persons, however distant from the allottees, who ultimately purchased those shares. I think that the office of the prospectus was fulfilled when the allottee got his shares as far as regarded those shares. I think, further, that in a case of this kind it is necessary to make out some direct connection between the directors and the party who alleges that he was deceived.

I do not find that any of the authorities that have been cited support the opposite view of the matter. I shall only notice one of those cases, with which I happen to be familiar. I mean the case of *Cullen v. Thompson* (*ubi supra*). That was a case not at all in point at present. In the first place the question that came to this House in that case was a question whether the manager and the accountant of a bank, as being servants of the directors, were personally liable for the false allegations contained in a report. The Court below were of opinion that the directors were responsible, but they were of opinion that there was not, in a very confused record, sufficient issuable matter to be sent to trial as against the officials. This House thought otherwise. We thought that there might be extracted from the record, confused as it was, sufficient is-

suable matter, and we sent back the case to the Court accordingly. But what were the facts as regards Mr. Cullen, and what was the ground upon which that case proceeded? Mr. Cullen was an original proprietor and allottee of shares, and being as such a partner of the company, and being present at a meeting of the company to receive a report of the directors, that report was read to him and to others, and it was transmitted to him and to others who were shareholders. And, not only so, but upon some inquiry of his, there was a letter written, and a circular sent to the shareholders containing all those misrepresentations and misstatements, upon which he founded his case. In consequence of these misrepresentations he purchased 170 additional shares, and then he brought his action against the directors for having communicated to him this false statement, and he claimed to hold them liable in damages for it. So far from that being in point in a case of a party having no such communication made to him, and yet making such a claim, it is the very reverse. It is the case of a party who had a most direct and positive representation made to him by the directors against whom he instituted proceedings.

I do not find, as I have said, that there is any case which supports the conclusion that the appellant seeks to arrive at in this case according to the very clear and very ingenious speech that was presented to us on his behalf. Therefore I concur in the judgment which has been proposed by my noble and learned friend.

LORD CAIRNS.—I agree with my noble and learned friends who have preceded me, that the delay in instituting this suit is not a ground upon which the judgment of the Master of the Rolls can be supported. The suit is in the nature of an action for damages for misrepresentation; it is in the nature of an action or proceeding *ex delicto*, and it appears to me that to such an action or proceeding there is no bar arising from delay, unless the delay be such as would bring the Statute of Limitations applicable to the case, into operation.

The two questions which, as it appears to me, it is material to answer are these

—First, did the respondents, in the prospectus issued as to the company, make representations which, in point of fact, were untrue? and, secondly, is the appellant able to connect himself with these representations so as to enable him to say that they were made to him, or were made to induce him to act on them, and that he did so act?

I have limited the first question to the prospectus, because that is really the only matter to which your Lordships need direct your attention; nothing else is relied upon as a ground of relief in the bill. It is true that a good deal was said during the argument about the proceedings taken to obtain a settling day on the Stock Exchange; but although the obtaining of a settling day on the Stock Exchange is mentioned in the pleadings, it is not made any ground for relief.

In the 39th paragraph of the bill it is stated that—"The plaintiff made the purchases of shares, and entered into the contracts of membership solely on the faith of the statements contained in the prospectus." That allegation excludes any reference to any other alleged misstatement. It is impossible to say, and it would be impossible to say, even though the pleadings had been different, that anything that passed with the committee of the Stock Exchange was, in this case, a representation either made to the appellant or made for the purpose of being communicated to the appellant.

This brings me, therefore, to the consideration of the prospectus; and before looking at the terms of it, I may say that I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this action. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which

is not stated makes that which is stated absolutely false.

This prospectus is certainly free from many of those extravagant terms and flattering descriptions which we are accustomed to see in documents of this kind. I will not dwell upon the words that the terms made "in the opinion of the directors cannot fail to ensure a highly remunerative return to the shareholders." That was a reference not to fact, but to opinion, and, strange as it may appear to us now looked at by the light of subsequent events, I am not satisfied that this statement, as to the opinion of the directors, was not perfectly consistent with the opinion which they really held. I do not dwell upon any of the latter sentences in the prospectus; and the only two sentences, to which I will direct attention, are the first and the second.

The first sentence runs thus—"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase, from Messrs. Overend, Gurney & Co., of their long-established business as bill-brokers and money-dealers, and of the premises in which the business is conducted; the consideration for the goodwill being 500,000*l.*, one-half being paid in cash and the remainder in shares of the company, with 15*l.* per share credited thereon." Now it appears to me that any person reading that statement would be entitled to say, "Here is a company, with the name of which we are quite familiar, and here are new directors, persons of known wealth and character in the commercial world, joining that company for the purpose of making a new and limited partnership. They are independent of the old partnership, and able to form an independent judgment upon it; they are going to put in fresh capital themselves, and we understand from this statement that there is to be a transfer of the assets and liabilities of the old concern; the whole business, as a going concern, is to be taken over. We, the outside public, have no opportunity of looking into the accounts of the old concern, but these new directors have done so, and, having looked into the accounts, and estimated

the relative value of assets and liabilities, they think that the whole business upon this footing is worth a sum, for the goodwill of it, of half a million of money. One half of that amount is to be paid down and taken away by the old partnership; the other half is to be given to the old partnership as so much capital in the new concern." In this point of view, which, as it appears to me, is the point of view in which I repeat any member of the outside public might regard and understand this statement, the payment of so large a sum for the goodwill of the concern, the actual payment of half, and the actual assignment of the other half by way of capital, would become a material guarantee that the bargain was at all events, in the opinion of those who made it, a good and sound bargain.

But, in order to understand the full meaning of this statement, the second sentence in the prospectus must also be taken into account—"The business will be handed over to the new company on the 1st of August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred." I read that again as meaning, consistently with the sentence which I read in the first instance, that there is to be a transfer of all the assets and all the liabilities—that the business (to use the expression I used before) is to be transferred as a going concern, and is to be transferred at a value which is placed at half a million of money, on the basis of all the assets and liabilities being made over, and a guarantee given on the part of the old partners that whatever valuation was put upon the assets and liabilities was a valuation which would be secured by them and made good by them: so that on the one hand the assets would not be deficient, and so that on the other hand the liabilities would not be excessive, as compared with the valuation which had been put upon both. In point of fact the sentences which I have read appear to me to represent what I may term an out-and-out transaction—the business transferred, the money paid, and a sum assigned for the goodwill upon the footing of a transaction of that kind.

Now, were these the facts of the case?

NEW SERIES, 43.—CHANC.

I will contrast with this statement in the prospectus the statement of the real transaction, which I will take, for brevity, from the case of Messrs. Gurney before this House. I find there this statement, which is entirely in accordance with the evidence—is, in point of fact, a summary of the evidence—"Under these circumstances, the scheme of the proposed joint-stock company was that it should purchase the goodwill of the bill-broking and bill-discounting business carried on by Overend, Gurney & Co., which was of a most profitable character, for 500,000*l*."

Even in that sentence there is a complete alteration, a complete departure from the prospectus, "That it should purchase the goodwill of the bill-broking and bill-discounting business," a distinction being drawn in those words between that portion of the business and the portion of the business which was not described as bill-broking and bill-discounting, as indeed the case goes on to explain.

"That it should purchase the goodwill of the bill-broking and bill-discounting business carried on by Overend, Gurney & Co., which was of a most profitable character, for 500,000*l*., and that the doubtful accounts" (a matter altogether separate), "which made up the said sum of 4,194,000*l*., should not be transferred, but should be excepted out of the assets made over to the company, and should be retained and wound up by the vendors, and that all sums of money received therefrom, and all other sums of money payable by the company to the vendors (including the said sum of 500,000*l*., which was payable half in cash and half in shares) should be applied towards the liquidation of the amount of the excepted accounts, with which the vendors were to be debited in the books of the company under the head of suspense and guarantee account." Here I may point out that that is a wholly different transaction. That is a transfer, not of the business, but of a portion of the business, which is described as a profitable part, namely, the bill-broking and bill-discounting. There is a separation from that portion of the business of other business, which had resulted in doubtful accounts to the amount of 4,194,000*l*., which doubtful accounts were not trans-

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ferred to the new company, but made the subject of a separate piece of book-keeping, involving the non-transfer of them, and in that separate book-keeping the 500,000*l.* was applied on the opposite side of the account.

The case affords us a succinct statement of the deed No. 2, which is the deed that gave effect to this part of the arrangement—

"The deed (No. 2) regulated the details of the arrangement contemplated by the 16th clause of the deed No. 1, and provided for the liquidation of the accounts, which, by virtue of that arrangement, were excepted from the accounts of Overend, Gurney & Co., and transferred to the limited company. It in effect provided that a separate account to be called 'Overend, Gurney & Co.'s Suspense and Guarantee Account,' should be opened in the books of the limited company, and should be debited with the total amount of the balance which, as struck on the 31st of July, 1865, should appear to the debit of the accounts specified in the schedule" (which I may say were the accounts amounting to upwards of four millions), "and be credited with 250,000*l.* (being one moiety of the price of the goodwill), and also with 45,000*l.*, the price of the business premises of the firm, and the balance due to the partners on their private accounts, and the amount from time to time realised by the sale of the shares which were issued to the vendors as part of the said purchase-money. The account was to be closed on the 31st of December, 1868, when the balance, if on the credit side, was to be paid by the company to the members of the firm within a month, and if on the debit side to be deemed a debt due to the company from the firm." So that, I may say in passing, if by any accident, which was a most improbable contingency, these accounts had turned out, not hopeless, but accounts from which a larger sum than was expected was realised, that benefit was to go, not to the new limited company, but to the old partners. "It gave to the company a lien on the 16,666 shares to be issued in payment of one moiety of the purchase-money of 500,000*l.*, and on all property

retained by the firm, to be applied in winding up the excepted accounts, and the company were to be entitled to have the shares and property made available, through the medium of a sale or otherwise, to secure the performance of the vendor's covenants, and to indemnify the company."

To complete the narrative of this arrangement, I must read also a statement with regard to it from the answer of Mr. John Henry Gurney. He says—"In the investigation of the state of the affairs of Overend, Gurney & Co., prior to the formation of the limited company, it appeared from their books that there were then outstanding various debit balances, which were considered to be of a doubtful nature, to the amount of 4,199,000*l.*, or thereabouts; but upon a careful examination of the securities held in respect of them, and the probable winding-up of such of them as were not secured, it was estimated that, of the total amount of 4,199,000*l.*, the sum of 1,082,000*l.* would be realised, leaving, therefore, the sum of 3,117,000*l.* still to be provided for. At this period it was estimated that the balances to the credit of the partners, when made up in the private ledger, would amount to 940,000*l.*, and which balances had been calculated as liabilities of the firm; but deducting the amount thereof from the balance of 3,117,000*l.* so left unprovided for, there remained the sum of 2,177,000*l.* still outstanding and to be provided for.

"Upon a careful examination and estimate of the private estates of the several partners comprising the firm of Overend, Gurney & Co., and of their interest in the banking business carried on in Norfolk and elsewhere, it was estimated that such several private estates would produce the further aggregate sum of 2,320,000*l.*, and after taking credit for the 500,000*l.* to be received for goodwill, and for 45,000*l.* as the estimated value of the premises in Lombard Street, there would have remained a surplus of 688,000*l.* in favour of the individual partners after providing for every liability of the firm of Overend, Gurney & Co."

The result of these statements appears

to me to be obvious. There was nothing paid for the goodwill of the firm; there was no transfer of assets and liabilities as something which, upon a proper valuation, were worth paying for in the shape of goodwill, with an independent guarantee from the old partners that those assets and liabilities would produce the amount at which they were valued. The principle of the valuation proceeded upon this, that if all the assets and all the liabilities were looked at, there was an enormous deficiency. The mode in which that deficiency was made up was this—the accounts, amounting to upwards of four millions, which caused the deficiency, were not really transferred; they were carried to a separate suspense account by themselves, and upon the other side of that account, or for the purpose of balancing the admittedly disastrous outcome of those accounts, there was taken into account the value of the private estates of the partners (upon which, I must observe at the same time, that no security whatever binding those estates was taken), and there was taken into account also the 500,000*l.*, the sum which had been fixed upon as the estimated value of the goodwill. In point of fact, therefore, your Lordships will observe that the use that was made of the private estates, and of the sum named for the goodwill, was to fill up that vacuum of insolvency which was apparent on the mere statement of the figures to which I have referred; and that so far from any sum being paid for the goodwill, nothing was paid whatever, and so far from the sum named for the goodwill being a test of the excellence of the bargain, it was exactly opposite, because, upon the same principle as the 500,000*l.* was appropriated in the manner that I have mentioned, had the insolvency been greater, had there been 500,000*l.* more of insolvency, the value of the goodwill might have been estimated at a million, and the million might have been used in the same way that the 500,000*l.* was used.

I have thus stated shortly the facts as they present themselves to my mind, and I am bound to say, that now that we know these facts, and now that we compare these facts with the statement in

the two first sentences of the prospectus I am unable to arrive at any other conclusion than this, that the statement in those two first sentences was a statement of that which was not justified by the facts of the case.

We were pressed very much in argument with considerations as to the motives of those who made this statement; and it was pointed out with great accuracy, that upon a trial in the nature of a criminal proceeding it had been held that they were not chargeable with that which was laid to their charge in that proceeding. I must say that so far as I understand the case, I entirely agree with the result at which the jury arrived in that proceeding, and, strange as it may appear, I think there is a great deal in the papers before your Lordships to shew that the gentlemen who formed this company were themselves, judging by the extent to which they embarked their means and continued their property in the concern, labouring under the impression that this transaction, disastrous as it ultimately turned out, had in it the elements of a profitable commercial undertaking; and so far as motive is concerned, they may be absolved from any charge of a wilful design or motive to mislead or to defraud the public. But in a civil proceeding of this kind, all that your Lordships have to examine is the question, was there or was there not misrepresentation in point of fact, and if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done.

But, now, having answered the first question as I am obliged to answer it, I come to the second question in the case, viz., how does the appellant connect himself with this statement? The prospectus was issued on the 12th or 13th of July, 1865, and a copy was received or was obtained by the appellant. It is not proved from whom he obtained it. The object of the prospectus, on the face of it, is clearly to invite the public to take shares in the new company. The prospectus is, as is usual in such cases, an invitation, and there is appended to it a form of application for shares which was to be filled up, and upon

which form the invitation was to be answered. It is a prospectus in this shape, addressed to the whole of the public no doubt, and any one of the public might take up the prospectus and appropriate it in that way to himself, by answering it upon the form upon which it is intended by the prospectus that it should be answered. The appellant however did not take up and did not appropriate the prospectus in this way. For reasons which it is unnecessary to enquire into, he declined to take, or at all events he did not take any shares originally in the company. The allotment of shares began on the 24th of July, it appears to have been completed on the 28th of July, and it is stated that two or three times the number of shares to be had in the company were applied for. The allotment having been completed, the prospectus, as it seems to me, had done its work, it was exhausted. The share list was full, the directors had obtained from the company the money which they devised to obtain. The appellant subsequently upon the 17th of October, several months afterwards, bought 1,000 shares at a premium of something over 7*l*., and again, still later on the 16th of December, he bought 1,000 other shares at a premium of something over 6*l*.. He bought them on the Stock Exchange, and of course did not know in the first instance from whom he bought them. In point of fact it appears that, as to the greater part of them, they were shares which had originally been allotted to one of the old partners, Samuel Gurney, by whom they were transferred to a nominee, for himself, in whose name they were registered, they were then sold upon the market, and re-sold apparently several times, because the premium seems to have risen from a much smaller to a much larger sum, and ultimately they were sold at the premium which I have stated to the appellant, and were registered in his name.

I ask the question—How can the director of a company be liable, after the full original allotment of shares, for all the subsequent dealings which may take place with regard to those shares upon the Stock Exchange? If the argument of the appellant is right, they must be liable

ad infinitum, for I know no means of pointing out any time at which the liability would in point of fact cease. Not only so, but if the argument be right, they must be liable, no matter what the premium may be, at which the shares may be sold. That premium may rise from time to time from circumstances altogether unconnected with the prospectus, and yet, if the argument be right, the appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold, for all that he may expend in buying the shares. I ask is there any authority for this proposition? I am aware of none.

During the course of the argument I took the liberty of putting to the learned counsel for the appellant a case which I think was not answered, and to which, so far as I know, no answer can be given that would be favourable to the appellant. I put the case of a person having built a house and desiring to sell it. He comes to me and wishes me to purchase it—he describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations, but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money, I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage has been lost, and I commence an action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie.

I take the rule on this point to have been happily stated in some expressions of my noble and learned friend, the late Lord Chancellor (Lord Hatherley), when

he was Vice-Chancellor, in the case of *Barry v. Croskey* (*ubi supra*).

At page 17 of the report in 2 Jo. & H., during the argument, and upon a reference to the case of *Levy v. Langridge* (*ubi supra*), the Vice-Chancellor said, "I take the ground of that decision to have been that the false representation was made by the defendant, with a view that it should be acted upon by the son in a manner that occasioned the injury." Lord Wensleydale says: "There is a false representation made by the defendant with a view that the plaintiff should use the instrument in a dangerous way. The father, acting upon the faith of that representation, put the gun into the hands of his son, who fired it off, when it burst and injured him. Suppose a stranger, knowing nothing of what had passed between the father and the defendant, to have found the gun, lying for instance at an inn. If a stranger so finding the gun had taken it up and fired it, and the gun had burst and injured him, would he have had his action against the defendant upon the ground that Nock's name appeared upon the gun, and the defendant had sold it with that name appearing upon it and as a gun made by Nock?" Again, in the course of the argument, the Vice-Chancellor, addressing Mr. Rolt, says: "Your argument would shew that every person who, in consequence of De Berenger's frauds upon the Stock Exchange, was induced to purchase stock at an advanced price, in reliance upon the false rumour he had circulated that peace was concluded, was entitled to maintain an action against De Berenger for the increase of price. Would not such consequences lie too remote to form ground for an action?" Finally, in giving judgment, the Vice-Chancellor stated what he understood to be the principles applicable to such a case. First, that "every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting is injured or damnified. Secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified—provided it appear that such false repre-

sentation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss." And thirdly, he continues, "But to bring it within the principle, the injury, I apprehend, must be the immediate, and not the remote, consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting, is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss." And his Honour comments a second time on the case of *Levy v. Langridge* (*ubi supra*) as consistent with that principle.

Upon the grounds which I have mentioned, and upon the principles laid down in the case of *Barry v. Croskey* (*ubi supra*), which appear to me to be consistent with what is stated by all the authorities that might be referred to, I am of opinion that the appellant in this case has entirely failed to connect himself with the representations made in the prospectus, of which, in my opinion, an original allottee might have complained, but of which the present appellant cannot, I think, complain. On these grounds, therefore, I agree to the motion of my noble and learned friend that this appeal ought to be dismissed.

LORD CHELMSFORD.—I wish to ask your Lordships whether you think that there is anything in this case at all to take it out of the ordinary rule with regard to costs.

LORD CAIRNS.—Your Lordships have been in the habit, I think, of adhering very firmly to the rule that in this House the costs on the dismissal of an appeal should follow the result. I see nothing in this case to make it an exception to that general rule. Your Lordships arrive at the conclusion which was arrived at by the Court below, although not on the same grounds; but if by reason of the circumstance that the grounds are not the same, the costs were not to follow the result, this consequence would happen, that in every case in which the decision

below is confirmed, if the grounds upon which the confirmation proceeds are not the same as the *ratio decidendi* of the Court below, the unsuccessful party must be absolved from paying the costs of his unsuccessful appeal.

Decree appealed from affirmed, and appeal dismissed with costs.

Solicitors—Mr. W. A. Downing, for the appellant; Messrs. Young, Jones & Co., for the directors who were partners in the old firm of Overend, Gurney & Co.; Messrs. Beran & Whitting, for Mr. Henry Ford Barclay; Messrs. Wilson, Bristows & Carpmael, for Mr. Henry George Gordon; Messrs. Young, Maples & Teesdale, for Mr. William Rennie; Messrs. Upton, Johnson, Upton & Budd, for the executors of Mr. Thomas John Gibb.

JESSEL, M.R. }
1873. } MAXFIELD v. BURTON.
Nov. 17. }

Equitable Mortgage—Deposit of Deeds—Legal Estate—Marriage Settlement—Enquiry as to Deeds—Solicitor—Negligence—Notice.

A deposited the title deeds of an estate with his bankers, and signed a memorandum charging the estate with payment of a sum due from him to the bankers. He afterwards married, and in consideration of such marriage he settled the estate by articles and shortly after marriage executed a settlement conveying the legal estate to a trustee. During the negotiations he told the lady's solicitor that he was entitled to the estate free from incumbrances, and that the deeds were at his bank for safe custody:—Held, that the solicitor ought to have enquired of the bankers whether they had a charge upon the deeds, and that, as he omitted to do so, all persons claiming under the settlement were fixed with constructive notice of the charge.

This was a suit by the public officer of a bank at Leicester, against a Mr. and Mrs. Ladkin, and a Mr. Burton, who was trustee of a settlement executed by Mr. and Mrs. Ladkin.

On the 12th of March, 1866, Mr. Ladkin effected a policy of insurance on his life, and on the 2nd of April he deposited the policy and also the title deeds of an estate of which he was seised in fee simple with the plaintiff's bank, and signed a memorandum charging the policy and the estate with payment of a sum due from him to the bank, and containing an agreement to execute a legal mortgage. On the 16th of April, 1866, the bank gave notice to the insurance office of the charge on the policy.

On the 15th of March, 1871, Mr. Ladkin having come to London to be married, had an interview with his intended wife and a solicitor at Mr. Burton's house, and gave instructions for a settlement of the policy and the estate, to both of which he stated himself to be entitled free from incumbrances. The solicitor asked where the title deeds of the estate were, and Mr. Ladkin answered that they were deposited at the plaintiff's bank for safe custody. On the 15th of March, 1871, articles embodying the intended settlement were executed, and the next day the marriage took place. On the 10th of May a settlement was executed in pursuance of the articles, and thereby the policy was assigned and the estate granted to Mr. Burton upon trust for Mrs. Ladkin for life, with remainder to Mr. Ladkin and their children.

The bill prayed for the common foreclosure decree against all the defendants, and for an order on Mr. Burton to assign the policy and convey the legal estate in the land to the plaintiffs.

It was admitted that the plaintiff was entitled to the relief sought as to the policy, but Mrs. Ladkin contended that the settlement was valid as to the land, the legal estate having become vested in a purchaser for value without notice of the plaintiff's charge.

Mr. Southgate and Mr. Leonard Field, for the plaintiffs.—When deeds are at a banker's it is at least as probable that they are pledged as that they are left for safe custody. The lady's solicitor on hearing that they were at the bankers should have enquired by letter or personally, and he would thereby have heard of our charge. Moreover, in this case, the al-

leged purchaser did not at first get a legal estate, but only an equity, and then there being two equities the conveyance of the legal estate to the person with less right to call for it could not give him priority. There is a dictum in

Sharples v. Adams, 32 Beav. 213 (1863)

to that effect.

[THE MASTER OF THE ROLLS enquired whether the obligation of a purchaser to investigate a title was extended by any case to a purchaser by marriage, observing that it would be hard to put the wife's solicitor in the dilemma of giving offence by making enquiries, or running the risk of an action for negligence by omitting them.]

[In answer *Mr. Southgate* cited—

Jackson v. Rowe, 2 Sim. & S. 472 s. c. 4 Law J. Rep. (o.s.) Chanc. 118 (1826),

and *Mr. Langley* mentioned—

Wormald v. Maitland, 13 W.R. 832 (1865).]

Mr. Blackmore, for *Mr. Burton*, submitted to deal with the property as the Court might direct.

Mr. Langley, for *Mrs. Ladkin*.—The cases have established that if no enquiry be made for deeds, a purchaser may be fixed with notice of a deposit of them. But if enquiry be made and a reasonable excuse be given for their absence, the purchaser gets a good title. The doctrine that a trustee for one person conveying the legal estate to another does not give the second a good title against the first has never been applied to a case of a mortgagor creating several incumbrances.

In—

Dixon v. Muckleston, 42 Law J. Rep. (N.S.) Chanc. 210; s. c. Law Rep. 8 Chanc. 155 (1872),

a lady asked for the deeds and was told that they were in a parcel, which was not true, and she did not inspect the parcel, but was nevertheless held to have a good title.

THE MASTER OF THE ROLLS.—In this case there are two points, notice and breach of trust. On the question of notice I have no doubt. There was clear constructive notice of the plaintiff's

charge. A man having a freehold estate tells the solicitor of the lady to whom he is about to be married that the title deeds are deposited with his bankers for safe custody. It turns out that they were pledged. Well I hold that it was the duty of the solicitor to enquire of the bankers whether they claimed any charge upon the deeds. If he had done so he would have been told that the representation was incorrect, inasmuch as they were mortgaged. I consider that was constructive notice and bound the lady who was about to be married. I am very sorry for her, but it would be still harder on the bankers if, through the negligence of her advisers, they were deprived of their security.

I decide the case on the ground of notice preferentially. But I do not think I should be at liberty, seeing that the memorandum here contains a contract to convey, to hold that the man who signed that contract could squeeze out the mortgagee claiming under it by a subsequent conveyance of the legal estate, though I am not sure I should go so far as my predecessor's illustration in *Sharples v. Adams* (*ubi supra*). The plaintiff is, therefore, entitled to the decree asked for.

Solicitors—Messrs. Field, Roscoe, Field, Francis & Osbaldeston, agents for Messrs. Stone, and Billson, Leicester, for plaintiff; Mr. G. Johnson, for *Mrs. Ladkin*; Mr. L. Hand, for *Mr. Burton*.

[IN THE FULL COURT OF APPEAL]

SELBORNE, L.C.	} In re THE BLAKENEY	
JAMES, L.J.		ORDNANCE COMPANY (LIMITED); BRETT'S CASE;
MELLISH, L.J.		1873.
July 29, 30,		} In re THE ORIENTAL COM-
Aug. 6.	MERCIAL BANK (LIMITED), MORRIS'S CASE.	

Companies Act, 1862 (25 & 26 Vict. c. 89.), sec. 38—Contributories on the B list—Extent of Liability—Application of their Contributions.

A past member of a company in course of winding up is only liable to contribute in

respect of debts contracted before he ceased to be a member to the extent to which those debts remain unsatisfied after the application, *pari passu*, of the contributions of the present members to the payment of the general liabilities of the company; and he is at liberty to make any arrangement with the creditors in respect of those debts; and if the result of such arrangement be that the company is released from those debts, he will escape all liability as a contributory.

But the contributions of past members are part of the general assets of the company, and are not applicable exclusively to the discharge of those debts in respect of which they are paid.

Webb v. Whiffin (42 Law J. Rep. (N.S.) Chanc. 161; s. c. Law Rep. 5 E. & I. App. 711) examined and explained.

The decision of the House of Lords in *Webb v. Whiffin* (*ubi supra*) being considered to have affected the principle upon which these two cases were decided by the Court of Chancery, the official liquidator in each case applied for and obtained a rehearing before the full Court.

In *Brett's case* (reported 40 Law J. Rep. (N.S.) Chanc. 222, and on appeal, *ibid.* 497), Mr. Brett had transferred his shares in the Blakeney Ordnance Company on the 4th of Aug., 1865; the winding up commenced on the 20th of June, 1866; and the certificate of debts shewed that there were only four debts due which had been contracted on or before the 3rd of Aug., 1865—viz., two very small ones and two others, amounting to upwards of 16,000*l.*

After the list of creditors had been settled, Mr. Russell, a friend of Mr. Brett, paid off the two smaller debts and bought up at much less than their nominal value the two larger ones, taking assignments thereof to himself by deeds, and by a deed poll dated the 20th of October, 1870, he released the company, its assets and liquidator, from all liability in respect thereof.

Under these circumstances Lord Romilly, M.R., held that the company being released from all those debts in respect of which Mr. Brett was liable as a past member, he was entitled to escape all liability as a contributory, and this deci-

sion was affirmed by the full Court of appeal.

In *Morris's case* (reported 40 Law J. Rep. (N.S.) Chanc. 520, and on appeal 41 *ib.* 11), Mr. Morris had transferred fifty shares in the Oriental Commercial Bank to Demetrio Pappa, and the transfer was registered on the 25th of November, 1865. At the date of the transfer the debts of the company amounted to upwards of 200,000*l.*, but at the commencement of the winding up in June, 1866, only 642*l.* of this amount remained undischarged. The sum of 800*l.* remained unpaid on the fifty shares: Pappa became bankrupt and his estate paid no dividend. The contributions of the members on the A list of contributories were sufficient to pay 15*s.* in the pound, so that the debts due to creditors who were creditors on the 25th of Nov., 1865, were reduced to 160*l.* 10*s.*

Bacon, V.C., held that Morris was liable to contribute with other past members to the full amount of 642*l.* without any deduction for dividends received in respect of the contributions of present members; but upon appeal the Lords Justices being of opinion that he was liable to contribute, *pari passu*, with the other past members who were liable for the same debts, to the amount of 160*l.* 10*s.* only, varied the Vice-Chancellor's order accordingly, and declared that the sums contributed by the B contributories respectively ought to be applied exclusively in payment of the debts which were incurred before the dates of the respective transfers and remained unpaid at the commencement of the winding up.

In *Webb v. Whiffin* (*ubi supra*) the House of Lords held that although past members were only liable in respect of debts existing at the time of their retirement, their contributions were part of the general assets of the company, and must be applied in discharging the general liabilities; and that creditors in respect of debts contracted before the retirement of such members were not entitled to have such contributions applied or appropriated exclusively or in priority to the payment of those debts; and some of the observations made by some of their Lordships in that case being considered to raise a doubt whether past members were not liable to

contribute in respect of the whole amount of debts due at the time of their retirement and undischarged at the date of the winding up without regard to any subsequent release or reduction of those debts, the Court allowed these two cases to be reheard.

Sir Richard Baggallay and *Mr. Whitehorn* appeared for the official liquidator of the Blakeney Ordnance Company in *Brett's* case.

Mr. Kay and *Mr. Jackson*, for the official liquidator of the Oriental Commercial Bank in *Morris's* case.

The Solicitor-General (Sir G. Jessel) and *Mr. Frederic Harrison*, for *Mr. Brett*.

Mr. Fry and *Mr. Westlake*, for *Mr. Morris*.

Mr. Eddis and *Mr. Higgins*, for the creditors' representatives.

THE LORD CHANCELLOR (on Aug. 6) delivered the following judgment—

These cases have been reheard before us by reason of the decision of the House of Lords in *Webb v. Whiffin* (*ubi supra*). The points which may be regarded as settled by that decision are first, that the liability of a past member of a joint-stock company under s. 38 of the Companies Act, 1862, is a liability to contribute to the general assets of the company in the event of its being wound up, and not a liability to contribute to a fund appropriated (so far as creditors are concerned) for the payment of any particular debts of the company; and secondly, that the rights of creditors of the company, at whatever time their debts may have been contracted, are, as against the company and its assets (including all contributions to its assets made by past members), similar and equal, or, in other words, that such creditors are not divisible into classes with different rights against different funds; and as a necessary consequence, that there is neither occasion nor room for any marshalling of assets between them. In one of the cases before us (that of *Morris*) a different view of the law had been taken by the Lords Justices, and in that respect the order in *Morris's* case must of course now be altered so as to make it conformable to the judgment of the House of Lords. But

there remain two other questions which it is necessary for us to determine—the one (a question arising both in *Brett's* case and in *Morris's* case), whether when the assets of a company which is being wound up are insufficient to discharge its debts and liabilities and the costs of the winding up, without recourse to past members, calls can be made on past members, in respect of debts or liabilities contracted by the company before they ceased to be members, to the same extent as if those debts or liabilities had not been reduced by any dividends paid them after the winding up out of the property of the company independently of calls, or by means of calls upon present members; the other (which arises in *Brett's* case only), whether calls can be made upon past members in respect of any debt or liability of the company contracted before they ceased to be members, which has been released or extinguished between the date of the winding up order and the time of making such calls, and which, therefore, cannot participate in any dividend which may be made out of the proceeds of such calls. Neither of these questions came before the House of Lords for decision in *Webb v. Whiffin* (*ubi supra*), but observations bearing more or less upon them were made by four of the noble and learned lords who then advised the House, and some variety of opinion may be traced in those observations. Certain passages in the speeches of Lord Chelmsford and Lord Cairns have been relied upon before us as favouring the view, that the measure of the liability of a past member under the 38th section, so far as it depends upon the existence of debts of the company contracted before he ceased to be a member, ought to be determined solely by the amount of such debts as they stood at the commencement of the winding up, without reference to any subsequent event by which that amount may have been reduced or even wholly extinguished. On the other hand, it seems clear that Lord Westbury and Lord Hatherley would have returned a negative answer to the first, and (Lord Hatherley at least) to the second also of the questions now requiring our decision. In this state of things, it cannot be said that any binding or au-

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thoritative exposition of the law upon these points is derivable from the case of *Webb v. Whiffin* (*ubi supra*), and we are unable to escape from the necessity of finding both according to the best of our own judgment. There is this peculiarity in the liability of past members of a company, that (whatever may be its measure and extent) it is created entirely by statute, and does not result from any contract. It does not result from any contract between the past members and the company; on the contrary, the contract of the present members, who alone constitute the company for the time being, is to bear the whole burden, to the complete exoneration and indemnity of all the past members. Nor does it result from any contract between the past members and the creditors; for the contract of each creditor is (as was pointed out by Lord Cairns in *Webb v. Whiffin*) (*ubi supra*) with the company, and not with its individual members; and although it is true that the creditors are entitled to work out the payment of their debts by enforcing the liability of all persons liable to contribute to the assets of the company when it is wound up, the House of Lords has determined that there is no separate liability of past members to those creditors whose debts were contracted before their shares were transferred or forfeited. It is, I think, consistent with all principles and all authority to hold that the words of s. 38 with respect to past members ought so to be construed and receive effect as to make them so far as possible consistent with the rules of reason, justice and equity. It was in this spirit that the provisions of this and other statutes in *pari materia* were examined by the highest tribunal in the cases of *Oakes v. Turquand* (1), and *Williams v. Harding* (2); and to these (if it were necessary or useful) other authorities might be added. Reason, justice and equity appear to me to require that as to all the matters for which, under s. 38, that liability is cast upon past members, the liability of all the present members should be first exhausted,

or (which is the same thing) ascertained to be insufficient; and accordingly we find it expressly so provided in sub-sec. 3, which says that "no past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;" those contributions being such that, if satisfied in full, they would leave nothing to be otherwise provided for. Again, with respect to the liability of past members to contribute to the assets of the company to an amount sufficient for payment (besides debts and liabilities) of "the costs, charges and expenses of the winding up, and of such sums as may be required for the adjustment of the rights of the contributories among themselves," it is, I think, impossible to suppose that the Legislature, when comprehending "every present and past member" under this general formula, intended to give to present members a right to exact through the Court or the official liquidator contributions from past members towards any fund which might be required, after all costs had been paid, and after all the debts and liabilities of the company had been satisfied, for the adjustment *inter se* of the rights of present members. It seems equally impossible to imagine that if there were no debts contracted before the past members left the company and remaining unpaid, they were under this formula meant to be made liable to contribute till a fund had been formed sufficient for the payment of all the costs, charges and expenses of the winding up, which by s. 110 ought to be paid "as the Court thinks just," and which, under s. 144, in the case of a voluntary winding up, are to be paid out of the assets of the company, in priority to all other claims. If, indeed, there were any debts contracted before the past members left the company in respect of which they ought to be called upon to contribute, it might possibly happen that this might involve some costs, and perhaps also some adjustment of mutual rights of past members *inter se*, in respect of which it might be just and reasonable to call on them for further contributions. But this could be no ground for including in the measure of

(1) 36 Law J. Rep. (N.S.) Chanc. 949; s. c. Law Rep. 2 E. & L. App. 325.

(2) 35 Law J. Rep. (N.S.) Bankr. 25; s. c. Law Rep. 1 E. & L. App. 9.

their total liability any costs to which they were not justly liable to contribute, or any sums necessary for the adjustment only of the rights of present members. Applying the same principle to debts, I am of opinion that when the Legislature said, "no past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member," it was meant that if the question of contribution arose as to past members (which could only be, under sub-sec. 3, after the inability of the existing members to satisfy the contributions required to be made by them had been ascertained) no debt or liability of the company was to be regarded or taken into account for any purpose whatever, directly or indirectly, except such of the debts and liabilities contracted before the time when the past members left the company as might at that time constitute part of the indebtedness of the company. To swell the amount of that indebtedness by the fictitious process of treating as then due and unpaid any part of the original amount of those debts and liabilities which might have been previously satisfied by dividends out of the property in hand or by the contributions of present members, or any part thereof which might have been previously released or extinguished—to do this (as it necessarily would be done) for the sole purpose of increasing the dividends of those other creditors whose debts were contracted after these past members had left the company, would, as it seems to me, be a violation both of the letter and of the spirit of sub-sec. 2. It would be introducing, for the benefit of the subsequent creditors and to the prejudice of the past members, that principle of marshalling which (when proposed to be introduced for the benefit of the prior creditors) was excluded by the decision of the House of Lords in *Webb v. Whiffin* (*ubi supra*). In this and in ss. 74, 75, "liability to contribute to the assets of the company in the event of its being wound up," appears to me to be merely another expression for liability to calls under s. 102; and those calls are to be made to the extent of the liability of the several contributories for payment of

all or any sums which the Court deems necessary to satisfy the debts and liabilities of the company—that is to say, in the case of past members—which the Court deems necessary to satisfy the debts and liabilities of the company, contracted before they ceased to be members, and still constituting part of the indebtedness of the company when the call is made. This, with such costs and adjustment moneys (if any) as may be properly incident thereto or consequent thereon, is, in my opinion, the extreme measure and limit of the liability of past members to contribute to the assets of the company under s. 38. To enlarge that limit because the fund, when contributed, will be divisible *pro rata* among all the creditors of the company, at whatever time their debts may have been contracted, would, as it seems to me, be at least as much against the express words and the real meaning of s. 38, sub-sec. 2, as the appropriation of the fund contributed by past members to the payment of the particular class of creditors in respect of whose debts they are called upon to contribute could possibly be against the letter or spirit of ss. 98 and 133. [The time when the call is made must necessarily be looked to, and the payments of present members after the commencement of the winding up must necessarily be taken into account for the purpose of giving effect (in the case of a limited company) to another material qualification of the liability of past members, contained in s. 38—namely, "that no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a past or present member." Why, then, are not the payments made up to the commencement of the winding up equally to be regarded when the question has reference to the debts and liabilities of the company in respect of which a past member is required to contribute?] (3). Let it be supposed that after a winding up order all the debts due when the latest transfer by a past member was executed were absolutely re-

(3) The words within brackets were not in the judgment as originally delivered, but were added afterwards by the Lord Chancellor.

leased by the creditors or voluntarily paid off by a stranger in exoneration of the whole company before the payment of a dividend by the company upon any part of them. How could a call on past members "in respect of" these debts—a call the proceeds of which would create a fund for division exclusively among the subsequent creditors—be justified under such circumstances by the statute? What would be true in that case of all the prior debts seems to be equally true of any prior debt or any part of a prior debt in any lawful manner released, paid off or extinguished; and, as the property in hand at the date of the winding up and the contributions of all the present members were primarily and justly liable to pay all the debts of the company rateably and equally as far as they would extend before any liability of past members could arise, I am unable to perceive any sound distinction between the effect of a past payment so made and a reduction to the same extent of the same debts by any other means. My conclusion is that both in *Morris's case* and in *Brett's case* the liability of past members to contribute in respect of debts contracted before they ceased to be members could not exceed the amount of the "residuum" of these debts, to use Lord Westbury's expression, after writing off from them the full amount of the dividends paid out of the property in hand and the contributions of present members; and that in *Brett's case* the entire claim as to all this residuum and as to all future dividends thereon having been in substance and effect released and discharged to the company, no call in respect of any such debt or liability could properly be made. In *Brett's case* I agree in result with the original conclusion of the full Court of appeal, and in *Morris's case* with the original conclusion of the Lords Justices on both these points, though some of the reasons assigned by the learned judges at the original hearing have been displaced by the decision of the House of Lords in *Webb v. Whiffin* (*ubi supra*).

LORD JUSTICE JAMES.—I entirely agree in the judgment which the Lord Chancellor has pronounced, and also in the reasons which he has assigned for it. I

have fully and carefully considered the speeches of the noble and learned Lords who advised their Lordships in the House of Lords in *Webb v. Whiffin* (*ubi supra*). I still think that our ultimate decision in *Brett's case* remains unaffected by them, and also our decision in *Morris's case*, and I am therefore of opinion that those decisions should remain as they were originally pronounced—except, of course, as to the point in *Morris's case* mentioned by the Lord Chancellor.

LORD JUSTICE MELLISH.—I am of the same opinion.

Costs in both cases out of the estate.

Solicitors—Messrs. Lewis, Munns & Longden, for the official liquidator of the Blakeney Ordnance Company; Messrs. Harrison, Beal, & Harrison, for Brett; Messrs. Upton, Johnson, Upton & Budd, for the official liquidator of the Oriental Commercial Bank; Messrs. Ashurst, Morris & Co., for Morris.

MALINS, V.C. }
1873.
Nov. 17.

KITCHIN v. IBBETSON.

County Court Appeal—Bankruptcy Act—Administrator dealing with Intestate's Effects as Absolute Owner—Bankruptcy of Administrator—Goods in "Order and Disposition" of Bankrupt—Bill of Sale—Delay in Enforcing—Rights of Creditors.

Upon the death of an intestate his administratrix continued his business on her own account and took possession of certain furniture forming part of his estate, but which had been mortgaged by him to the plaintiffs under an unregistered bill of sale. She remained in possession of the furniture for fourteen months, ostensibly as absolute owner, no steps having been taken by the plaintiffs to enforce their bill of sale. She then became bankrupt; whereupon the plaintiffs instituted a creditors' suit against her for the administration of the intestate's estate, and claimed the furniture as part of his estate:—Held, that the furniture was at the time of the bankruptcy of the administratrix in her order and disposition

with the consent of the plaintiffs as true owners, and therefore passed to her creditors and not to the creditors of the intestate.

This was an appeal from the County Court at Leeds.

Edward Ibbetson was at the time of his death carrying on the business of an innkeeper at the "Harper's Arms" inn, Leeds. He died intestate on the 1st of October, 1870, and on the 14th of November following, administration to his estate was granted to his mother, the defendant Elizabeth Ibbetson. At the time of his death the intestate was indebted to the plaintiffs in the sum of 109*l.* and interest for goods sold and delivered, which debt was secured by an unregistered bill of sale of furniture and effects dated the 31st of January, 1865. Subsequently to the death of the intestate his administratrix continued the business on her own account, the licenses being taken out in her name, and the rent of the house being paid by her. She retained possession of the specific property included in the bill of sale, and which the plaintiffs had never possessed themselves of under that security, as well as other property of the intestate, until the 13th of January, 1872, when she filed a petition in the County Court for liquidation under the Bankruptcy Act, 1869, and the defendant Mayhall was duly appointed receiver and trustee of her estate, and thereupon took possession of the property at the inn including the effects comprised in the bill of sale, which were shortly afterwards sold by him and realised about 93*l.*

The plaintiffs, not having previously taken any steps to enforce their bill of sale, on the 30th of January, 1872, filed a plaint in equity for the administration of the intestate's estate, and on the 21st of March, 1873, the County Court Judge made a decree deciding that the 93*l.*, the produce of the goods comprised in the bill of sale, was applicable in the hands of the trustee for payment of all the creditors of Elizabeth Ibbetson, and that the plaintiffs could only be at liberty to prove with the other creditors of the

intestate, against a sum of 36*l.* 16*s.* 9*d.* being the amount of his assets in the hands of his administratrix.

From this decision the plaintiffs now appealed.

The questions submitted by the County Court Judge for the opinion of the Vice-Chancellor were—

First, Whether the goods comprised in the bill of sale were the property of the intestate at the time of his death, subject to the bill of sale, and whether the same, at the time of the filing of the petition in bankruptcy by his administratrix, were in her hands as such administratrix as part of the intestate's estate, and the proceeds thereof applicable for the payment of his debts; or,

Secondly, Whether such goods were at the time of filing the petition the property of the plaintiffs by virtue of their bill of sale, and were in the order and disposition of the bankrupt by their consent.

Mr. Cotton and *Mr. W. Barber*, for the appellants.—The goods were part of the intestate's estate; they were trust property, the administratrix holding them as trustee only; therefore they could not be in her order or disposition so as to be liable to her debts—

Stocken v. Dawson, 9 Beav. 239.

The case differs from that of an executor *de son tort*, who has taken possession of property belonging to a testator and afterwards becomes bankrupt, as in

In re Thomas, 2 Mont. D. & D. 294; s. c. 10 Law J. Rep. (n.s.) Bankr. 75; s. c. reversed 3 Mont. D. & D. 40; s. c. 1 Phil. 159; s. c. 12 Law J. Rep. (n.s.) Chanc. 59;

and

Fox v. Fisher, 3 B. & Ald. 185.

The "order and disposition" clause in the Bankruptcy Acts does not apply to a lawful and necessary possession *en autre droit*, as that by executors and administrators;

Ex parte Marsh, 1 Atk. 158.

Mr. Williamson (*Mr. Glasse* with him), in support of the decree of the Court below.

I do not dispute the general proposition that trust property is not within the "order and disposition" clause, but

I contend that these goods were not trust property at all. They were treated by the bankrupt as her own, and she carried on the business ostensibly on her own account. The law is correctly stated in

Lewin on Trusts, 5th edit., p. 196, where it is said, "There is no exemption from the forfeiture (under the 'order and disposition' clause) if the executor can be proved to have dismissed the character of personal representative and to have assumed that of absolute owner." Moreover, the plaintiffs are too late. They being the true owners under their bill of sale allowed the administratrix to retain possession for fourteen months and did not attempt to enforce their security during the whole of that period. The case therefore comes within

Ray v. Ray, G. Cooper 264;
and

In re Thomas (ubi supra).
Mr. Barber, in reply.

MALINS, V.C., said that, although the amount in dispute was small, the principles involved were very important. The contest lay between the creditors of the intestate and the creditors of the administratrix; the former contended that the furniture comprised in the bill of sale was trust property, and therefore not within the order and disposition of the administratrix, whereas the latter said it was within her order and disposition at the time of her bankruptcy, and therefore passed to her trustee in bankruptcy. It was clear, that as a general rule trust property did not pass to a bankrupt's assignee, because it was not in his order and disposition. But the circumstances in the present case were peculiar. When Mrs. Ibbetson took out administration no doubt she was a trustee; but when she proceeded to carry on the business on her own account she dealt with the property as her own. She in fact dismissed the character of administratrix and assumed that of absolute owner. As the intestate died insolvent all his property belonged to his creditors. The bill of sale, though unregistered, was not void as against his mere legal personal representative; the plaintiffs,

therefore, had acquired a good title under their bill of sale. Why then did they not avail themselves of it and sell the furniture? They allowed her to go on with the business, and by their consent the furniture became in the order and disposition of the administratrix, she carrying on the business on her own account. They gave up their position as creditors under the bill of sale and became ordinary creditors. She was, therefore, in possession with the consent of the true owners. This went on for fourteen months. It was said that because the furniture once belonged to the intestate, it belonged to him or formed part of his estate for all time. But the cases of *Fox v. Fisher (ubi supra)* and *Ray v. Ray (ubi supra)* were opposed to such a contention, and it would be a dangerous principle to hold that an executor or administrator could carry on ostensibly as his own a business which had been carried on by his testator or intestate, and then when he became bankrupt turn round and say it was not his property beneficially but only as trustee. On every ground he was of opinion that the decision of the County Court Judge was right, and the appeal must be dismissed with costs.

Solicitors—Messrs. Riddale, Craddock & Riddale, agents for Mr. Thomas Turner, Leeds, for plaintiffs; Messrs. Williamson, Hill & Co., agents for Messrs. Bond & Barwick, Leeds, for defendants.

BACON, V.C. }
1873. }
June 28, }
July 1, 2, 4. }

CLEVE v. THE FINANCIAL
CORPORATION.
WILLIAMS v. THE SAME.

Company—Voluntary Winding up—Compulsory Winding up—Amalgamation—Sanction by Liquidators to transfer upon terms—Companies Act, 1862, ss. 35, 51, 84, 95, 129, 131, 133, 138, 146, 153.

In May, 1865, resolutions were passed for amalgamating the F. Company with the O. Bank, and to wind up the F. Company voluntarily for enabling the amalgamation to be carried out. The two plaintiffs, who had recently purchased shares in the F.

Company — the one the day before the resolutions for amalgamation were confirmed, the other shortly after—in the same month of May contracted to sell their shares and executed transfers thereof. On the 2nd of June following, and before the transfers were sent in for registration, the liquidators under the voluntary winding up passed a resolution that they would not register any more transfers, except upon the terms of the transferors executing a deed by which they should guarantee the payment of all calls by their transferees. The plaintiffs not being able to obtain transfers otherwise executed the deeds in April, 1866. In 1866 the voluntary winding up was superseded by a compulsory winding up. In July, 1868, actions were commenced against the plaintiffs on their deeds to recover the amounts due from them for calls and for damages, and thereupon the plaintiffs filed these bills, alleging that the liquidation was invalid, and that the deeds were obtained from them without consideration, by misrepresentation and concealment, and praying that they might be cancelled, and the actions stayed.

In another suit against the same company it had been decided, and confirmed on appeal, that the amalgamation was *ultra vires* and void:—

Held, that the liquidation proceedings were valid and could not be set aside, because the amalgamation, for which they had been instituted, had been declared void.

Also that there was ample consideration for the deeds, and that there was no evidence of misrepresentation or concealment, and that the liquidators were justified in refusing to sanction the transfers except upon such terms as they thought were for the benefit of the company.

It is not the effect of a compulsory winding up order to nullify proceedings which have been taken under a previous voluntary winding up.

The Financial Corporation was registered in 1863 under the Companies Act, 1862.

On the 27th of March, 1865, the directors of the Corporation sent a circular to the shareholders stating that they had entered into an agreement to amalgamate the Corporation with the Oriental Com-

mercial Bank, Limited. With this circular the directors sent a notice that an extraordinary general meeting of the shareholders of the Corporation would be held on the 12th of April next, "for the purpose of carrying into effect the amalgamation," and "in order thereto of passing a resolution for winding up the company voluntarily, and taking such other steps as may be requisite." The extraordinary general meeting was held on the 12th of April pursuant to the notice, and at this meeting the following resolutions were passed—

1. "That the Financial Corporation, Limited, shall be amalgamated with the Oriental Commercial Bank, Limited, pursuant to the terms and conditions of the memorandum or preliminary agreement, dated the 24th of March, 1865, and signed by certain directors of the said bank and of the said corporation."

2. "That for enabling the said agreement and the amalgamation thereby agreed on to be carried into effect, the said Financial Corporation, Limited, shall be wound up voluntarily."

3. "That the directors of the said Financial Corporation, Limited, are hereby authorised and requested to take and do all other proper and necessary steps and things as and for the purposes of the said voluntary winding up, and for the said amalgamation, and for carrying the same into effect pursuant to the said agreement."

On the 22nd of April another notice was sent to the shareholders that the above resolutions had been passed on the 12th of April, and that another meeting would be held on the 9th of May to confirm them, and for the purpose of appointing liquidators.

Pursuant to this notice an extraordinary general meeting of the corporation was held on the 9th of May, 1865, when the resolutions passed at the meeting of the 12th of April were confirmed, and the defendants, Robert Collum, Thomas Key and Cornelius Walford were appointed liquidators for the purposes of the voluntary winding up.

It was also agreed as part of the terms for the amalgamation, that 5,000*l.* should be given to Cornelius Walford as com-

pensation for the loss of his salary as managing director of the corporation, but this fact was not made known to the shareholders at the time.

On the 15th of May, 1865, the plaintiff, Charles Cleve, purchased on the Stock Exchange, as agent for the secretary of the Financial Corporation, Demetrio Pappa, 500 shares in the corporation, and on the 30th of the same month he executed as transferee a transfer of these shares from the defendants, Thomas Key and Robert Eagle, to himself, and on the same day he executed as transferor a re-transfer of the same shares from himself to Demetrio Pappa. The latter transfer was dated the 2nd of June, 1865, but it was in fact executed on the 30th of May.

On the 2nd of June, 1865, the liquidators resolved that no transfer should be entered upon the books of the corporation without a guarantee in writing from the transferor to pay all calls not paid by the transferee.

It was also alleged on behalf of the liquidators, that on the 9th of June a circular was sent to all transferors who before that date had sent in transfers for registration, informing them that no transfer would be registered without a guarantee. A similar notice was also sent to all transferors who left transfers after that date.

On the 20th of November, 1865, a suit of *Clinch v. The Financial Corporation* (1) was commenced, and the bill prayed for a declaration that the amalgamation was *ultra vires*, and that the resolutions of the 12th of April, 1865, were not binding on the plaintiff.

The plaintiff Cleve supposed that his transfer had been registered in the books of the company immediately after its execution, and did not discover till April, 1866, that it had not then been so registered. On the 28th of April, 1866, he received a letter from the then secretary of the corporation, John Biggam, stating that the transfer would be registered on the transferor's signing the accompanying form of indemnity.

(1) 37 Law J. Rep. (N.S.) Chanc. 281; s. c. Law Rep. 5 Eq. 450; s. c. on app. 38 Law J. Rep. (N.S.) Chanc. 1; s. c. Law Rep. 4 Chanc. 117.

Accordingly on the 20th of April the plaintiff Cleve executed the indemnity. This was in the form of a deed-poll, and after reciting that the shares had been duly transferred from Cleve to Pappa, witnessed that in consideration of the premises and of the liquidators having sanctioned the transfer, Cleve covenanted and agreed with the corporation, and with Robert Collum, Thomas Key and Cornelius Walford, the then present liquidators, and with the liquidators for the time being, that he would, without prejudice to the liability of Pappa, duly and punctually pay to the liquidators all calls which should thereafter be made under the voluntary winding up, or in any winding up by the Court under supervision, in respect of the said shares or any of them, and that the deed should operate as a continuing covenant and guarantee.

On the 16th of May, 1866, a petition was presented for the compulsory winding up of the corporation; on the 28th of May, 1866, an order was made by the Master of the Rolls that the corporation should be wound up compulsorily under the direction of the Court, and on the 4th of June following Lewis Henry Evans was appointed official liquidator. Calls had been made on the 500 shares standing in the name of Cleve which had not been paid or not fully paid.

On the 28th of February, 1868, a decree was made by the then Vice-Chancellor Wood, in the suit of *Clinch v. The Financial Corporation* (*ubi supra*), declaring that the arrangement for amalgamation was void, and beyond the powers of the directors of the Financial Corporation, and not authorised by the articles of association, and also declaring that the resolutions of the 12th of April, 1865, were not within the powers of a general or any other meeting of the Financial Corporation, and that they were not binding on the plaintiff in that suit, or on any other dissentient member of the Financial Corporation.

On the 6th of November, 1868, this decree was confirmed in the full Court of Appeal, with some variations immaterial to this case.

In *Williams' Case*, the plaintiff, Thomas George Williams, became in February and March, 1865, the owner of 250

shares in the corporation. On the 8th of May, 1865, Williams sold 200 shares to Nichau Harentz, and fifty more to Edward Adams, and both the transfers were dated the 25th of May. The transfer to Harentz was registered on the 17th of July, 1865, and the transfer to Adams on the 16th of April, 1866. In both cases Williams signed a deed of indemnity, similar to the one signed by Cleve, before the liquidators would allow the transfers to be registered.

On the 8th of July, 1868, actions were commenced against both plaintiffs in the Court of Common Pleas by the Corporation, and the declarations in both actions set forth the respective deeds of indemnity, and averred that calls had been made in respect of the shares which had not been paid, and damages were claimed in the action against Cleve to the amount of 2,000*l.*, and in the action against Williams to the amount of 1,000*l.*

On the 18th of December, 1868, a bill was filed by Cleve, and on the 10th of February, 1869, a bill was filed by Williams, against the Financial Corporation, and against the three liquidators, Collum, Key and Walford. Both bills alleged that the agreement made on the amalgamation to pay Walford 5,000*l.* was fraudulent; that the resolutions were *ultra vires*; and that the plaintiffs had been compelled to execute the deeds of indemnity. Cleve, in addition, alleged that he purchased his shares from the defendant Key, that Key knew they were bought for Pappa, but that he induced him to take a transfer to himself instead of having a transfer made directly from Key to Pappa, and then immediately after was party to the resolution of the 2nd of June.

By the bill filed by Cleve it was prayed—

1. "That it may be declared that the said deed-poll of the 20th of April, 1866, was obtained from the plaintiff without consideration, by misrepresentation and concealment on the part of the defendants, and by the unlawful threat of retaining the plaintiff's name on the register of shareholders of the corporation, and that the said deed-poll is null and void, and ought to be delivered up to be cancelled."

NEW SERIES, 43.—CHANC.

2. "That it may be declared that the plaintiff is not liable to pay any calls made upon the said 500 shares hereinbefore mentioned, or if he should be held to be under any liability in respect of the said shares, then that the defendants, Robert Collum, Thomas Key and Cornelius Walford are bound to indemnify him against it."

The bill also prayed that the deed-poll might be delivered up to be cancelled, and for an injunction to stay the action.

The prayer in the bill filed by Williams was similar to the prayer in Cleve's bill.

Mr. Benjamin and Mr. Bradford appeared for Williams.—As far as concealment and misrepresentation is concerned the case is *res judicata*. The very case itself has been decided before in

Olinch v. The Financial Corporation
(*ubi supra*),

and the decision of Vice-Chancellor Wood in that case was affirmed on appeal.

It was the duty of the directors when the transfers were sent in to register them at once—

Weston's Case, 37 Law J. Rep. (N.S.)
Chanc. 617; s. c. Law Rep. 6 Eq.
17.

If it is said that the refusal was made by liquidators and not by the directors, we come back to the question whether there was any voluntary liquidation going on at the time, and as to this, we say that the liquidators were not properly appointed, because the notice calling the meeting at which they were appointed was bad, owing to its being accompanied by a circular which has been declared fraudulent—

In re The Bridport Old Brewery Company, Law Rep. 2 Chanc. 191;

Re The Imperial Bank of China, 35 Law J. Rep. (N.S.) Chanc. 445;

s. c. Law Rep. 1 Chanc. 339;

Smith's Leading Cases, vol. ii. 382-3.

The execution of the deeds of indemnity created a new class of shareholders, who were neither A shareholders nor B shareholders; this was beyond the power of the liquidators.

Mr. Higgins and Mr. Hemming, for Cleve.—The real question is whether the deed of indemnity is valid or not. We

contend, first, that the amalgamation was void; secondly, that the liquidation, as forming part of the amalgamation, was invalid; and thirdly, that if the liquidation was invalid, all the acts done under the liquidation were invalid, and among them the deeds of indemnity which the liquidators compelled the transferors to execute.

The first of these points is admitted. The second is decided by Lord Justice Turner in

Re The Imperial Bank of China (ubi supra),

and the only decision conflicting with this is that of Lord Justice Mellish—

In re Irrigation Company of France, 40 Law J. Rep. (N.S.) Chanc. 433-438; s. c. Law Rep. 6 Chanc. 176,

and we contend that this was made in forgetfulness of the powers vested in the Court by the Companies Act, 1862, s. 86. In that case, too, the petitioner was bound by long acquiescence.

The liquidation is invalid because the notices calling the meetings at which the resolutions were passed were bad—

In re The Bridport Old Brewery Company (ubi supra).

The company could only be wound up voluntarily where resolutions had been properly passed—

Companies Act, 1862, s. 129, clause 2.

The liquidation commenced either on the 9th of May, 1865, or on the 16th of May, 1866; if on the former date the transfer to Cleve must have been bad—section 153; if it commenced at the latter date, on the presentation of the petition under section 84, then before that time there was nothing to prevent Cleve transferring at will. It is true the Court under section 146 might, if it thought fit, have adopted in the compulsory winding up the proceedings taken under the voluntary winding up, but the Court did not do so, and no provision of the kind is made in the order for compulsory winding up.

The delay in registering the transfer or in giving Cleve notice entitles him to relief—section 35—

Nation's Case, 36 Law J. Rep. (N.S.) Chanc. 112; s. c. Law Rep. 3 Eq. 77;

Read's Case, 36 Law J. Rep. (N.S.) Chanc. 472.

It is clear the deed was executed under compulsion, for no one would have executed such a deed if he could have obtained a transfer without. The voluntary liquidators might have refused to allow the transfer, but had no power to sanction it upon terms, and so to alter the status of the members—sections 131 and 138.

There is no difficulty in annulling the proceedings under the voluntary winding up—

The Bank of Hindustan v. Alison, 40 Law J. Rep. (N.S.) C.P. 1, and on appeal in 40 Law J. Rep. (N.S.) Ex. Ch. 117; s. c. Law Rep. 6 C.P. 54 and 222;

Re The Bank of Hindustan, &c.; ex parte Alison, 42 Law J. Rep. (N.S.) Chanc. 505; s. c. Law Rep. 15 Eq. 394;

Re The Bank of Hindustan, &c., Campbell's Case, 42 Law J. Rep. (N.S.) Chanc. 771; s. c. Law Rep. 16 Eq. 417.

Mr. Kay and Mr. Robinson, for the corporation.—The only difference between the two cases is that Williams contracted to sell his share on the 8th of May, the day before the winding up resolution was confirmed; but Williams did not execute a transfer till the 25th, and Cleve not till the 30th of May.

From the 9th of May there has been a voluntary winding up, and this has never been set aside, except that afterwards the voluntary was changed into a compulsory winding up. The plaintiffs knew of the voluntary winding up, and knew what its effect was on the status of the corporation under section 131.

Even if the voluntary liquidation can be set aside, yet it did *de facto* exist, and

Campbell's Case (ubi supra) shews that a voluntary liquidation exists till a competent Court decides against it. In this case even the amalgamation existed till a competent Court set it aside.

If liquidators have power to give or withhold their consent to a transfer, surely they may give their consent upon terms.

The rule is the same both at law and in equity, that the plaintiffs having acted on

the faith of these deeds, the Court will not now set them aside—

Olarks v. Dickson, E. B. & E. 148; s. c. 27 Law J. Rep. (N.S.) Q.B. 222;
The Deposit and General Life Assurance Company v. Ayscough, 6 E. & B. 761; s. c. 26 Law J. Rep. (N.S.) Q.B. 29;

In re The Royal British Bank; ex parte Nicol, 3 De Gex & J. 387-431; s. c. 28 Law J. Rep. (N.S.) Chanc. 257;

Mixer's Case, 4 De Gex & J. 575-586; s. c. 28 Law J. Rep. (N.S.) Chanc. 879.

The plaintiffs were not compelled to execute these deeds; they might, without any expensive or protracted proceedings, have applied to the Court under sections 35 and 138 for an order to register the transfers without their executing any indemnity.

A compulsory winding up supersedes a voluntary winding up, but does not annul the latter—section 84, and no proceedings ever have been taken to annul the voluntary winding up.

The minutes of the general meetings of the Corporation shew that, in the opinion of many of the shareholders, the affairs of the company were in such a position that it ought to be wound up.

Mr. Eddis and Mr. Kekewich, for the defendants, Key and Collum.—The plaintiffs having lost their right to proceed against the company, cannot now proceed against the directors upon the same misrepresentation—

Ogilvie v. Currie, 37 Law J. Rep. (N.S.) Chanc. 541.

The Court will not mulct the directors or liquidators in damages unless their proceedings have been distinctly fraudulent—

Henderson v. Lacon, Law Rep. 5 Eq. 249;

Ship v. Crosskill, 39 Law J. Rep. (N.S.) Chanc. 550; s. c. Law Rep. 10 Eq. 78.

If Collum and Key were liquidators, they had power to impose terms on the transferees; if not, they can have done no wrong.

Mr. Everitt, for Walford.

Mr. Higgins in reply.

BACON, V.C., said—I have heard at very great length the arguments in this case. I should like to begin with the bill, and see what this bill is about which has occupied so much time. The prayer of the bill is exceedingly plain. [His Honour then read the first paragraph of the prayer, and continued.] That is the whole case I have to dispose of. I do not mean to say that any of the arguments have been misplaced or that they have been too long, because, of course, parties have a right to manage their own cases in their own way, but I say that my duty is only to ascertain whether, upon this record, the suggestions contained in the prayer (and they are also to be found in the shape of allegation in the bill) are sustained, and I look in vain for any ground which can induce me to believe that these deeds were obtained without consideration. The consideration is not only plainly stated on the deed, but it is plain in itself. The plaintiff was the registered proprietor of certain shares. He was under liability in respect of those shares, and he desired to shift that liability on to the shoulders of another man. He asked the persons who had the power to consent to his transferring his shares to permit him to do so. In the discharge of their duty they refused to permit him to do so, except upon the terms that the interests of the company which they were to protect, and which was then in the course of winding up, should not be prejudiced by the transaction, and upon the stipulation that the plaintiff would make their plight no worse, and the rights of the company no less than they were at that time. Upon these terms they did consent to his making the transfer. That is said to be a transaction without consideration. In my opinion there never was a plainer consideration, nor a more reasonable one in point of a business-like transaction, than existed in this case.

It is said that the deeds were also procured by misrepresentation and concealment; but of neither the one nor the other is there a trace of evidence in the case. There is no misrepresentation as alleged, and no concealment as said to have been practised. With respect to Mr. Williams, neither one nor the other

can be truly alleged, for he was himself a party to the meeting which preceded the resolution by which the company agreed to wind up first and amalgamate afterwards, or rather to amalgamate when they were wound up. Therefore he seems to have had perfect knowledge on the subject. What degree of knowledge Mr. Cleve had does not seem quite so distinct; but at least I have no reason to doubt that Mr. Cleve knew, and to say that anybody misrepresented any fact to him, or that any fact was concealed from him, is to say what the evidence in support of the allegation does not justify me in adopting.

The third ground is, that the plaintiff was induced to execute by the unlawful threat of retaining his name on the register of shareholders. First, there is no evidence of any threat having been used. Cases were referred to from *Smith's Leading Cases*, and many others no doubt might be found, in which a man, who has been induced under what is called "pressure" to enter into an engagement, has a right to be relieved in this Court; but then, as Mr. Bradford read to me from the case, that must be where a man has no alternative. Not only is there no suggestion of any threat having been used, but it is inconsistent with the case that any threat should have been used; and I am asked to say that the plaintiff has no alternative but to comply, when it is quite plain the law was open to him. If the liquidators had made an unreasonable request, he was not bound to comply with it—he might then have resorted to his legal rights, if he had any—and might have said, "I am entitled to transfer these shares." That clause in the Act of Parliament which gives that right was referred to in the course of the argument, and perfectly distinct and plain it is. If, on the day when he executed the deed, his case was what it is said to be now, there is no suggestion that he was under any pressure whatever. He was under the inducement, that by shifting the present burden from his own shoulders to those of Demetrio Pappa or somebody else, he might get a collateral security—a chance at least—if no more, that what he owed or might owe to the company would be paid by somebody else. That is called "a threat."

Now, treating this case as I can only treat it upon this record, as an application to that ancient jurisdiction of the Court—hitherto an exclusive jurisdiction—how long it may remain exclusive the future alone can tell—I mean the right to be relieved on the ground of equitable considerations against obligations which by their tenor and effect are legally enforceable—treating it as an application under that old familiar head of equity, in my opinion it fails in every point and in every respect.

But it would not be right, after the lengthened arguments I have listened to, to part from the case without some observations upon those arguments, although the decision, as far as I am concerned, must be that which I have stated. Reference was made copiously to the Act of 1862. It was argued that the notice convening this meeting was not a proper notice; and, even if it was, that the resolutions come to there were unlawful resolutions. In my judgment there is no foundation for either of those suggestions. The notices are distinct and explicit; answering the only purpose for which they were issued, viz., to inform the shareholders to whom they were addressed what was the purpose of the meeting then to be called. They contain, no doubt, reference to two things—an amalgamation of this company with the other, which amalgamation has been decided to be unlawful, and a suggestion that this company should be wound up. And because these two things occur in one notice it is said that they are both unlawful; that because one is unlawful the other must also be unlawful. I am unable to follow that reasoning. I think it would have been perfectly competent to the company, after those resolutions were passed, to forego their intention of amalgamating and yet to hold to their determination of winding up; and, although it is not necessary to take the point into consideration, there are abundant reasons why, whether they amalgamated or not, this company should be wound up. The suggestion that the notice is bad in my opinion cannot be supported.

Then it is said that this is *res judicata*, for that the Lord Justice Turner decided in the case of *In re The Imperial Bank of*

China (ubi supra), when there were resolutions very similar to the present, that if a notice for one purpose was bad, or if the resolution comprehended two purposes, one of which was bad, they all fell together; that if one could not be accomplished the other became futile. Well, there are expressions, no doubt, in the judgment of the Lord Justice (of whom I speak with the utmost veneration and respect) which seem to justify that conclusion. And the same thing may be said of a great many other judgments, well considered and well expressed, from which a part of a sentence or a piece of a line may be extracted, so as to sustain anything that is desired to be founded upon it. The Lord Justice did say in that case no doubt, "If the resolutions for the voluntary winding up of this company had stood apart from the amalgamation, I should have thought that the petition ought to have been dismissed upon this point also; but the resolutions for winding up the company voluntarily, and for amalgamation, are plainly parts of the same transaction, and if the resolution cannot stand as to one part of the transaction, neither, I think, can it stand as to the other part of it, and if it cannot stand as to either, the petitioners, as it seems to me, will have a sufficient case for an order to wind up this company compulsorily." That is the passage which was quoted in support of the plaintiff's case. But when the case comes to be examined, although those expressions did fall from the learned Judge, he adopts the voluntary winding up as an existing thing, treats it as an existing thing which was and had been an existing thing until the compulsory winding up order was made. The conclusion of the judgment is, that the petitioners were to be at liberty to make out a case if they could for a compulsory winding up, which order, if it was made, would supersede the voluntary winding up order. And that is the whole scope of the judgment. In my opinion, notwithstanding the passage which I have read, and it is the strongest that can be found in that case, the decision does not in the slightest degree support the notion that because a company, at a duly convened meeting, having in their contem-

plation two objects, one of which they could accomplish, and the other they could not, resolved to do both, they cannot do either because they cannot do one. It is a strange sort of reasoning, and I am quite sure that, looking at the case and the ultimate judgment upon it, that cannot have been the decision of the learned Lord Justice Turner. There is no ground that I know of upon which it can be said that the business of joint-stock companies should be so hampered and interfered with, as that after they have come to a resolution to wind up, upon a mere cavil, upon mere special pleading, upon mere spelling out of bits of Acts of Parliament, and more or less of judgments upon other subjects, their deliberate and serious resolutions shall be interfered with and the transactions of years shall be undone.

Then it is said that *Clinch v. The Financial Corporation (ubi supra)* has disposed of this, and that it is now *res judicata*. Now, that contention deserves every attention, because it was asserted very positively. Clinch's case was this: there had been a resolution to amalgamate, and there had been also a resolution to wind up. The plaintiff in that case did not trouble himself in the slightest degree with the resolution to wind up. He made parties to his bill the two sets of directors who were parties to the amalgamation, and he prayed by his bill that it might be declared that the arrangement which had been come to between the directors of the corporation and the directors of the bank for an amalgamation of the two companies, was beyond the power of the directors of the corporation, and not authorised by the articles of association of the corporation, and that such arrangement was not binding upon the plaintiff nor upon any member of the corporation. The bill also prayed for a declaration that the resolutions were not within the powers of a general or any other meeting, were not authorised by the memorandum or articles of association, and were not binding upon the plaintiff or any other dissentient member of the corporation. It is impossible to understand that without reference to the previous passage which I have read, because the arrangement for amalgamation was the only thing then in contemplation,

and it could not have been said that the resolutions were not within the powers of a general or any other meeting; for the Act of Parliament plainly provides for the passing of such resolutions. It is one of the incidents to a corporation of this sort. But reading it as it ought to be read, by reference only to the arrangement for the amalgamation, then it is perfectly consistent and right. It asked, further, for a declaration that the resolutions were void for want of due confirmation. Then it alleged misrepresentation and concealment, then it asked a declaration that such an agreement for amalgamation as aforesaid was null and void by reason of the variation between the terms in the statement and the circular, and that the corporation and directors might be restrained from carrying into effect the proposed amalgamation, and that the liquidator might be restrained from parting with the assets of the bank.

The issue then between the parties there was this: that the plaintiff complained only that the amalgamation should be allowed to subsist, and although the case was heard, as it seems, at great length, the decree does not go one step beyond the prayer of the bill. It does not pronounce anything as to the validity of the winding up order, although the winding up order had then been long in operation. The Court did declare (and this is in the very terms of the bill) that the arrangement in the plaintiff's bill mentioned as come to between the directors of the corporation and the directors of the bank for an amalgamation was beyond the power of the directors of the corporation, and was not authorised by the articles of association, and that such arrangement was not binding upon the plaintiff nor on any of the members, nor on the shareholders, and it declares further, that the resolutions were not within the powers of the general or any other meeting of the corporation, that they were not authorised by the memorandum and articles of association, and that the same were not binding upon the plaintiff or any other dissentient member of the corporation. In my opinion it is impossible to read that bill, or the decree or the printed report to which reference

has been made and to say, with any chance of success, that in *Olinch v. The Financial Corporation* (*ubi supra*) anything was decided as to the voluntary winding up. The resolution for voluntary winding up, therefore, being, in my opinion, properly and lawfully come to, the liquidators were properly and lawfully appointed under that resolution; and for twelve months that resolution was acted upon, and was in full force and operation, and up to this day no attempt has been made to impeach it. There are the means under the Act of Parliament—and, if necessary, filing a bill in this Court—of setting aside anything that had been done wrongly under that winding up resolution. No such attempt has been made. A year after an order is made for the compulsory winding up of this company. Reference is made to a clause, relied upon by the plaintiff, in the Act of Parliament (the 146th section, I think), under which—an order for compulsory winding up being made—the Court may, if it think fit, adopt anything that has been done under a winding up order. It has been argued as if the effect of that was to nullify, to abrogate everything that had been done under the voluntary winding up. Not only do the words not justify any such conclusion, but it is impossible to impute to the Legislature the intention of so acting on, or so dealing with, a voluntary winding up and the transactions which have taken place under it. The Court may say, upon a proper case being submitted to it, that a transaction may be inchoate. Expenses may have been incurred from the commencement of it, and more expenses may be necessary to conclude it. The official liquidator appointed under the compulsory winding up order is, under the authority of the Court, to take the matter up in the unfinished state in which he finds it and complete it. That, and that only, or cases like that, are those which are intended to be reached by that clause of the Act of Parliament to which I have referred.

Well, then, what else is there? I have already said that the notion that the liquidators were not at liberty to exact—if that word is properly used—these terms is, in my opinion, wholly unfounded.

What was the duty of the liquidators under the winding up order? To protect the property of the company by all the means in their power. That was their first duty, whether expressed in the Act of Parliament or not, and any violation of that duty would fix them with responsibility. When they are asked to permit a transfer which, by the very terms of the Act, cannot take place unless they sanction it, they say, "Very well, if it is convenient to you, you may transfer. You may get anybody else to undertake to pay what you do owe or may owe; but we will not let go the hold we have upon you now, and we will only let you transfer on the terms that you will keep us in as good a condition as we should be if we did not let you transfer."

That is said to be in excess of the powers of the liquidators. In my opinion the liquidators have acted with perfect propriety, and it seems, in point of fact, not without due deliberation, and not without taking advice upon the subject, although that of course would not make good anything which was in itself wrong. It is worthy of notice that the liquidators acted with a due exercise of the discretion placed in them, and they insisted that before these gentlemen should slip their necks out of the noose, they should undertake to come back and put themselves in that place again if the man to whom they transferred, Demetrio Pappa, or anybody else, should fail to perform the obligations incident to the transfer of the shares.

Something has been said about delay. An argument was attempted, but dropped afterwards, that from the time when the shares were sent in for registration there had been such a delay in effecting the transfer as that the plaintiffs were entitled to consider that the transfer had been sanctioned. That, in my opinion, is not to be sustained. The directors, notwithstanding the terms of the resolution to which my attention was called, had lost all power in the face of the Act of Parliament. If the directors had been ever so willing that these gentlemen should transfer, they could not transfer without the sanction of the liquidators, and there is no pretence for saying that there is any proof of any application being made to the

liquidators, and of that application being neglected, or postponed or delayed so as to prejudice the rights of the plaintiffs.

Now I believe I have gone through the several topics which were urged in argument in favour of the plaintiffs; and although, as I have said, I could not pass them over without notice, I do not think that any one of them is of the slightest force, if indeed it were properly raisable upon this record, which, in my judgment, it is not. If the plaintiffs had any right to complain, not of the amalgamation, for that is gone, but of the winding up order or anything done under it, while it remained a vital winding up order unimpeached, and before the compulsory order was made, they were at perfect liberty to try that. They come into Court with a bill addressed to the jurisdiction which the Court has to give relief against fraudulent legal instruments. They allege that they were threatened into the execution of them, and not only do they not prove it, but the contrary is proved. They say it was without consideration; that is wholly unproved. They say it was effected by means of concealment and misrepresentation, and there is not a trace of such misrepresentations or concealment. In my opinion in every respect the case of the plaintiffs fails. Nothing can be done upon these bills—both of them, for there is no distinction in this respect—but to order that they shall both be dismissed with costs, including the costs of the action at law and of the special jury, with leave to issue execution on the judgment, and liberty to the plaintiffs to make application in Chambers in the winding up to reduce the amount. As against the co-defendants the bill will be simply dismissed with costs.

Solicitors—Messrs. Tindale & Grove, for Cleve; Messrs. Rooks, Kenrick & Harston, agents for Mr. G. H. Saunders, Chipping Norton, for Williams; Messrs. Argles & Rawlins, for the corporation; Messrs. Loxley & Morley, for Collum and Key; Messrs. Sharp & Turner, for Walford.

MALINS, V.C. }
 1873. } RAGGETT v. FINDLATER.
 Nov. 11, 12. }

Trade Mark—Imitation of Labels—English Adjective denoting Quality—"Nourishing Stout"—Misrepresentation by Plaintiff.

An English adjective merely descriptive of the quality of an article is not by itself entitled to protection as a trade-mark.

The bill stated that in the year 1855 the plaintiff purchased the business of Messrs. Blockey, brewers, of Duke Street, St. James's, who were the manufacturers of a description of stout suited to invalids, and then known as "Blockey's Stout." The plaintiff continued the manufacture of this stout, which in the year 1860 became and was thenceforward known, as he alleged, under the name of "Nourishing Stout." The plaintiff further stated that the stout had been analysed and reported on by Dr. Hassall, an analytical chemist, and had been recommended by medical men of eminence. The plaintiff adopted by way of a trade-mark a circular label, bearing on the circumference in large letters the words, "Nourishing London Stout," in the centre "Raggett, late Blockey," and on a band across it, "Analysed and reported on by Dr. Hassall." The defendants, who carried on the business of spirit, stout and ale merchants in London and elsewhere, under the firm of Findlater, Mackie & Co., in the year 1870, being desirous of adopting a distinctive label for their stout, adopted a label oval in shape, bearing at the top and bottom in large letters "Nourishing Stout," and on a band across it, "Bottled by Findlater, Mackie & Co."

The plaintiff then, on the ground that the defendants' label was an intentional imitation of his own, filed this bill to restrain them from holding themselves out as vendors of "Nourishing Stout," and from using labels in imitation of or only colourably differing from his labels.

When the case originally came on upon a motion by the plaintiff for an injunction, he represented that his stout was expressly brewed for him by Messrs. Truman, Hanbury & Co., but this representation was not borne out by the evidence at the

hearing, and it was in fact then admitted by the plaintiff that Messrs. Truman brewed the same beer for him as for their other customers, and that the wholesome and nutritious qualities claimed by the plaintiff for his stout, were imparted to it after it had been delivered to him by Messrs. Truman. It also appeared that the plaintiff's stout was not known in the trade as "Nourishing Stout" simply, but as "Blockey's" or "Raggett's Nourishing Stout."

Mr. Cotton and Mr. Woodhouse, for the plaintiff, contended that the defendants had adopted a colourable imitation of the plaintiff's label, and further that, although the word "nourishing" was an English adjective descriptive of quality, yet the plaintiff had acquired the exclusive right to its use in connection with the word "stout" by an exclusive user of it in that manner from the year 1860, and the article manufactured by him having obtained a celebrity, and having been generally purchased by the public and known in the market under the name of "Nourishing Stout," the word "nourishing" had thus acquired a secondary signification, had become a trade denomination, and would be protected as a trade-mark.

They cited

- Cocks v. Chandler*, 40 Law J. Rep. (n.s.) Chanc. 575; s. c. Law Rep. 11 Eq. 446;
- McAndrew v. Bassett*, 4 De Gex, J. & S. 380; s. c. 33 Law J. Rep. (n.s.) Chanc. 561;
- Lawson v. The Bank of London*, 18 Com. B. Rep. 84; s. c. 25 Law J. Rep. (n.s.) C.P. 188;
- Knott v. Morgan*, 2 Keen 213;
- Wotherspoon v. Currie*, 42 Law J. Rep. (n.s.) Chanc. 130; s. c. Law Rep. 5 E. & Ir. App. 508;
- Braham v. Bustard*, 1 Hem. & M. 447;
- Ford v. Foster*, 41 Law J. Rep. (n.s.) Chanc. 682; s. c. Law Rep. 7 Chanc. App. 611;
- Marshall v. Ross*, 39 Law J. Rep. (n.s.) Chanc. 225; s. c. Law Rep. 8 Eq. 651;
- Seiao v. Provezende*, Law Rep. 1 Chanc. App. 192;

Lee v. Haley, 39 Law J. Rep. (N.S.)
Chanc. 284; s. o. Law Rep. 5
Chanc. App. 155.

Mr. Glasse and Mr. F. A. Lewin, for the defendants, submitted that the plaintiff had been guilty of misrepresentation in stating that his stout was especially brewed for him exclusively, and that consequently on that ground alone the Court would not interfere—

Perry v. Truefitt, 6 Beav. 66.

They were then stopped by the Court.

MALINS, V.C., said that the case involved a question of considerable importance, because, on the one hand, every protection should be given to trade-marks within just limits, and, on the other hand, the right to use a trade-mark should not be unduly extended, and the Court should not give undue protection to a man who adopted a particular word as a trade-mark. Now, the first question in the present case was, What was the plaintiff's trade-mark? He said that his trade-mark was the word "nourishing." But the whole of the plaintiff's label must be taken as his trade-mark, and it was only justice to the defendants to say that if it had been their object to imitate the plaintiff's trade-mark, he never saw an object so signally fail. In the first place, the size of the defendants' label differed from that of the plaintiff's, and in the next place, the defendants' label was oval, while the plaintiff's was circular. If the object of the defendants had been the fraudulent one of palming off their stout as the plaintiff's, they could easily have adopted some closer imitation than this. It appeared that the defendants had already possessed labels for their ale, and that in 1870 they were desirous of adopting a separate label for their stout, and they accordingly adopted the label in question. But the plaintiff said, Why should they have used the word "nourishing"? What the defendants, however, put on their labels was not "Nourishing London Stout," the words used by the plaintiff, but simply "Nourishing Stout." Now in most cases of this kind there was usually a studious imitation of the trade-mark, whether it consisted of a label or a word, and something on the part of the

defendant shewing that his object was to mislead the public, and make them believe they were purchasing the plaintiff's goods, while they were in fact purchasing the defendant's. If this was the object of the defendants in this case, their object, as he had said, had signally failed. Their labels and the plaintiff's were so dissimilar that they could not be mistaken the one for the other. He therefore could not say that there had been an imitation of the plaintiff's label. But the plaintiff had put his case on a higher ground than that, for he said he had a right to the exclusive use of the word "nourishing." Had, then, a person the right to use an English adjective and make it his trade-mark? The word "nourishing" was a word in common use and generally understood. It was particularly applicable to good stout, which many people would say was a beverage bearing that distinctive quality. Now he conceived it was undoubtedly, and he thought reasonably, settled by the rules of the Court, that where a man imported or manufactured a particular article he could distinguish it by a mark of his own, and he could then restrain other persons from using that mark. But upon principle, could a man have the right to use as his trade-mark a word simply descriptive of quality? If the particular quality of stout was nourishing, could a man be prevented from selling it as a "nourishing" beverage? Why could not the defendants call their stout "nourishing" as well as the plaintiff? To take a word as a trade-mark there must be something more than an English word describing the quality of the material; a foreign word not commonly known might be used as a trade-mark, as for instance, the word "Anatolia," as *McAndrew v. Bassett* (*ubi supra*). Lord Westbury in that case said nothing to shew that a mere English word denoting quality could be used as a trade-mark. [The Vice-Chancellor then referred at some length to the various cases cited on behalf of the plaintiff, and continued.] All those cases seemed to him to proceed on a totally different principle to the present. The case which approached most nearly to the present was *Braham v. Bustard* (*ubi supra*), the "Excelsior Soap" case, before

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Vice-Chancellor Wood, which apparently recognised the principle that an English word merely descriptive of quality could not be a trade-mark. For the protection of the public a trade-mark should be something much beyond an English word denoting quality. It was incumbent on the present plaintiff to associate with the words, "Nourishing Stout," either his own name or that of his predecessors, and so distinguish his stout from that of other persons, who had a right to sell their stout as nourishing if it were really so. Whether, therefore, the plaintiff's case rested upon colourable imitation or upon the word "nourishing," it totally failed. He was also of opinion upon the evidence that the plaintiff's stout was not known in the trade by the distinctive name of "Nourishing Stout," but as "Blockey's" or "Raggett's Nourishing Stout. If he attached either of those names he would then have a proper trade-mark, but the mere description of quality would not do. Therefore he was of opinion that the plaintiff's case wholly failed, let him put it on whichever ground he liked. He did not approve of the spirit in which the plaintiff had acted. It appeared that he had filed a bill against a man for selling stout as "Nourishing Dublin Stout," whereas he, the plaintiff, was selling his stout as "London" Stout, a different thing, Dublin Stout having a celebrity of its own. The Court could give no encouragement to persons who set up claims of this kind, and therefore this bill must be dismissed. Then as to the question of costs. The evidence failed to shew that the defendants had acted with any intention of fraud. The original motion for an injunction was brought before him upon false representations, because it was said that the plaintiff's stout was brewed expressly for him by Messrs. Truman, Hanbury & Co., whereas it turned out that they brewed the same beer for him as for their other customers. The qualities claimed for it by the plaintiff, it was now stated, were imparted to it after it had come into his cellar, and the statement that the stout was expressly brewed for him by Messrs. Truman, Hanbury & Co. was admitted to have been a fiction, and he was strongly inclined to think that

what he put into it was a fiction too. The plaintiff had launched his case on fictitious grounds. It appeared that an offer had at one time been made to him by which he might have retreated from the litigation, but he had chosen to go on with it. He had entirely failed in his contention, and looking at his unfair conduct, he was of opinion he ought to pay the costs of the suit. The bill must therefore be dismissed with costs.

Solicitors—Mr. T. George, for plaintiff; Messrs. Lewin & Co., for defendants.

MALINS, V.C. } In re WIGHT'S MORTGAGE
1873. } TRUSTS.
April 18. }

Mortgage—Register County—Registered Mortgage—Unregistered Charge—Priority—West Riding of Yorkshire Registry Act (9 Anne c. 18).

A. took an agreement, not under seal, to execute a second mortgage of land in Yorkshire as security for money lent, but did not register:—Held, that a subsequent third mortgagee who registered, had priority over A.—Moore v. Culverhouse, 27 Beav. 639; s. c. 29 Law J. Rep. (N.S.) Chanc. 419, followed; Wright v. Stanfield, 27 Beav. 9; s. c. 29 Law J. Rep. (N.S.) Chanc. 183, not followed.

In the month of May, 1867, Wight being about to purchase certain houses in Yorkshire from Bell, and having borrowed 700l. towards the purchase money from his solicitor Holland, upon an agreement to grant him a mortgage of the houses when conveyed to him, borrowed from his brother-in-law, Dickinson, the sum of 100l. to make up the purchase money. As a security for this loan, he gave to Dickinson a memorandum in writing, dated the 2nd of May, 1867, in the following terms—"Mr. J. Dickinson having advanced me 100l., I hereby agree that I will, as soon as I conveniently can after the completion of my conveyance from Mr. Bell of five houses at Worsborough

Dale, and the mortgage to Mr. Holland for 700*l.*, give to the said J. Dickinson a second mortgage on the said property, for securing the said sum of 100*l.*, and interest at five per cent. per annum; a promissory note to be given." This memorandum was never registered in Yorkshire. Two days afterwards Wight executed a legal mortgage, dated the 4th of May, 1867, to Holland, of the five houses, to secure the repayment of 700*l.* and interest. This mortgage contained a power of sale, and was duly registered in Yorkshire by Holland, to whom the title-deeds were delivered.

On the 2nd of November, 1871, Mr. Dibb, the solicitor of two gentlemen of the name of Jackson, to whom Wight was proposing to grant a second mortgage of the five houses, wrote to Holland as the solicitor of the first mortgagee for a copy of the first mortgage, offering to pay his charges. On the 4th of November Holland sent to Dibb a copy of his mortgage, with his charges for the same; and on the 6th, Dibb wrote to Holland, enclosing the amount of his charges, and enquiring if the whole 700*l.*, and what interest, was owing.

Holland replied that 150*l.* had been repaid, and that only 550*l.* remained owing; and on the 29th of November Wight executed to the Messrs. Jackson a mortgage of the five houses, to secure (subject to Holland's mortgage) the repayment of 500*l.* and interest. The Messrs. Jackson, on the 13th of December, 1871, gave Holland notice of their mortgage, and registered it in Yorkshire on the 18th of December.

In March, 1872, Wight entered into an arrangement with his creditors for liquidation under the Bankruptcy Act of 1869; and on the 3rd of April, 1872, Holland, under the power of sale in his mortgage, sold the five houses for 785*l.* On the 12th of April, 1872, Dibb wrote to Holland, saying that he understood that the property had been sold, and that his clients, the Messrs. Jackson, the second mortgagees, would be glad to concur in the sale, join in the conveyance, and receive the balance of the purchase money, after the mortgagee's principal, interest and expenses were satisfied.

On the 13th of April Holland wrote to Dibb as follows—"A title will be made under the mortgage, and your clients will not be required to join in the conveyance. Mr. James Dickinson is entitled to receive his 100*l.* and interest in priority to your clients. The balance I shall hand to the Messrs. Jackson."

To this Mr. Dibb replied on the following day, "I am surprised to learn that Mr. Dickinson has a prior mortgage to my clients. I must ask you to accept this as notice not to pay over any money to him until I have been duly satisfied of his priority."

Holland subsequently, on the 21st of November, 1872, filed an affidavit in the matter of the arrangement, stating the repayment of the 150*l.*; and that Wight had borrowed the 100*l.* from Dickinson, and signed the above-mentioned memorandum. Negotiations then ensued without result. Holland paid the balance in his hands after satisfying the first mortgage into Court, and the Messrs. Jackson presented the present petition for payment out of this balance to them.

Upon the hearing of the petition evidence was produced as to the foregoing facts, and in addition, affidavits were filed on behalf of Dickinson that Holland had prepared, and witnessed the signature of the memorandum of the 2nd of May, 1867, and on behalf of Holland in reply that he had not acted as Dickinson's solicitor, that the loan was made without his knowledge, that he understood it was agreed to be upon a promissory note, but that he had suggested Wight should also give the memorandum which he had drawn up and witnessed, but that nothing had been said about a second mortgage to Dickinson.

Mr. Glasse and *Mr. Humphreys*, for the Messrs. Jackson, in support of the petition.—Our mortgage, being duly registered, must have priority to the charge in favour of Dickinson, of which we had no notice until the 13th of April, 1872. No negligence can be imputed to the Messrs. Jackson, who, although they gave Holland notice that they were about to become second mortgagees, were not informed by him of Dickinson's charge. Although the Master of the Rolls in

Wright v. Stanfield, 27 Beav. 8; s. c. 29 Law J. Rep. (N.S.) Chanc. 183, decided that an agreement to mortgage property in Middlesex does not come within the Registry Act (7 Anne, c. 20), his Lordship in

Moore v. Culverhouse, reported in the same volume of *Beavan's Reports*, p. 639, s. c. 29 Law J. Rep. (N.S.) Chanc. 419) held that an unregistered equitable charge on the equity of redemption of a property in Middlesex must be postponed to a subsequent registered mortgage of the same property, and the latter decision must be taken to have overruled the former, which was apparently founded on a decision of Lord Tenterden's in

Sumpter v. Cooper, 2 B. & Ad. 223; s. c. 9 Law J. Rep. K.B. 226, in which latter case there was no memorandum or agreement at all, but simply a deposit of title-deeds.

[MALINS, V.C.—It is difficult to see how *Wright v. Stanfield* and *Moore v. Culverhouse* (*ubi supra*) can stand together.]

We rely, however, upon

Neve v. Pennell, 2 Hem. & M. 170; s. c. 33 Law J. Rep. (N.S.) Chanc. 19,

where, after an elaborate argument, in which both *Wright v. Stanfield* and *Moore v. Culverhouse* (*ubi supra*) were referred to, Vice-Chancellor Wood held that an agreement that a deposit of title-deeds of lands in Middlesex should be made to secure the payment of a debt, which agreement contained a provision that a legal mortgage should be given on demand, was a document requiring registration under the Middlesex Registry Act.

Mr. Higgins and *Mr. Simpson*, for Dickinson.—The 100*l.* which Dickinson advanced was to pay for the property afterwards mortgaged, and was in the nature of unrepaid purchase money. There is a clear distinction between

Wright v. Stanfield and *Moore v. Culverhouse* (*ubi supra*).

In *Moore v. Culverhouse* (*ubi supra*) the agreement was simply a request to hold certain deeds as a security, which amounted to a complete equitable assignment, requiring registration as an equitable con-

veyance. In *Wright v. Stanfield* (*ubi supra*), which is on all-fours with and governs the present case, the agreement was merely executory, being an agreement at a future time to execute an assignment, which assignment could not be registered until completed. So here the contract was to execute a mortgage at a future time. Moreover Holland must be taken to have acted as Dickinson's solicitor in the preparation of the memorandum, and being aware of the charge, should have disclosed it to the Messrs. Jackson. They also referred to

Jones v. Smith, 1 Hare, 43; s. c. 12 Law J. Rep. (N.S.) Chanc. 381; 1 Ph. 244, affirming s. c. 11 Law J. Rep. (N.S.) Chanc. 83;

Whitbread v. Jordan, 1 You. & C. Excheq. 303, 328;

Wormald v. Maitland, 13 W.R. 832;

and

Sugden's Vendors (14th edit.), 727.

Mr. W. Pearson, for Holland.

MALINS, V.C.—There is no question that although the memorandum was in the form of an agreement to execute a mortgage at a future time, it operated as an absolute and immediate charge on the property.

Now it is perfectly true, as *Mr. Higgins* has stated, that if this property had not been in a register county, these transactions would have been in order of date, and the charges would have ranked accordingly. The difficulty is, that this property is in a register county, and the object of the Registration Acts being that everything which is a charge upon the land should be registered, when the charge or memorandum is registered it ranks according to the priority of registration.

Now Dickinson was bound to know as well as the plaintiffs that it was his duty to register his charge, and that by neglecting to register it he might enable the mortgagor to commit a fraud upon any unregistered mortgagees. The petitioners have not been negligent; they did all that they could have been expected to do; they made enquiries as to the amount of the first mortgage, and

were told that it was so much. They could not have known that Dickinson had a pocket memorandum which was not registered; there was no means of their acquiring this information.

Now what are the authorities? In *Sumpter v. Cooper* (*ubi supra*) the Court of King's Bench held that the statute of Anne referred only to the registration of instruments under seal; but that is not the construction put upon the Act by this Court. Mr. Higgins, on behalf of Mr. Dickinson, relied on *Wright v. Stanfield* (*ubi supra*), and I confess I am somewhat surprised at the conclusion which the Master of the Rolls seems to have come to in that case, a conclusion in my mind contrary to the rules of the Court; but I am relieved from any difficulty by another case decided by the Master of the Rolls, and reported in the same volume of *Beavan's Reports*. I mean *Moore v. Culverhouse* (*ubi supra*), where his Lordship came to a different conclusion, and held that an unregistered equitable charge on the equity of redemption of a property in Middlesex must be postponed to a subsequent registered mortgage of the same property. I do not think that these two cases can stand together, and I am of opinion that *Moore v. Culverhouse* (*ubi supra*) overruled *Wright v. Stanfield* (*ubi supra*). This appears to have been the view taken by Vice-Chancellor Wood in *Neve v. Pennell* (*ubi supra*), who I consider to have decided that *Wright v. Stanfield* (*ubi supra*) is not to be followed, and that the decision in *Moore v. Culverhouse* (*ubi supra*) is to be taken as the rule of the Court.

It is said that there was constructive notice, but I cannot find anything of the sort. Holland, the first mortgagee, was not actually asked in terms whether there was any other charge subsisting on the property, and when it is alleged that it was his duty to have given notice of Dickinson's charge, his answer is, that he did not know that it was a charge in the nature of a mortgage. I am clearly of opinion that the Messrs. Jackson, by registering their mortgage deed, gained priority over the prior unregistered charge of Mr. Dickinson. Mr. Dickinson would have stood before them if this had not

been a register county. As it is he loses his priority, and the Messrs. Jackson must rank as the second mortgagees. They are consequently entitled to the whole fund. The costs, charges and expenses of Holland must be taxed and paid by the petitioners, and the petitioners' costs, including those paid to Holland, must be paid by Mr. Dickinson.

Solicitors—Messrs. Torr, Janeway, Taggart & Janeway, agents for Messrs. Dibb & Raley, Barnaley, for petitioners; Messrs. Brooksbank & Galland, and Mr. Somerville, for respondent.

MALINS, V.C. }
1873. } In re STRUTT'S TRUSTS.
July 19. }

Leases and Sales of Settled Estates Act, 19 & 20 Vict. c. 120. s. 17—Petition—Concurrence—Unascertained Contingent Remaindermen—Devises in Trust for Sale.

Lands were devised to trustees in trust for a tenant for life, and after her death upon trust to sell, with power to give receipts, and to hold the proceeds on trust for all the children of the tenant for life who should be living at her death and should attain twenty-one, and the issue then living, who should attain twenty-one, of any child who should have previously died, per stirpes, as tenants in common.

The tenant for life had six children, one of whom, Mrs. Were, was married and had infant children. Upon a petition for a sale under the Leases and Sales of Settled Estates Act, the trustee, the tenant for life, and all her children were either represented or willing to concur, but the infant children of Mrs. Were were not represented:—

Held, first, that, as a class of persons entitled to a contingent interest who could not at present be ascertained, the concurrence of the infant children of Mrs. Were was not requisite.

Secondly, that the property being devised to trustees upon trust for sale with power to give receipts, the concurrence of the cestui que trusts was unnecessary.

Mr. Jedediah Strutt, by a second codicil to his will, dated the 25th of September,

1854, devised his Woodeaves estate unto George Henry Strutt and Walter Evans, their heirs and assigns, upon trust for the testator's daughter, Marianne Fox, for her life for her separate use without power of anticipation, and after her death in case her husband should survive her, upon trust for him for his life, and after the death of the survivor of Marianne Fox and her husband, upon trust to sell the said estate by public auction or private contract, with power to give receipts for the purchase money thereof; and the testator declared that his trustees should stand possessed of the moneys to arise by any sale or sales, after payment of expenses, upon trust for all and every the child and children of the testator's said daughter, Marianne Fox, who should be living at the death of the survivor of the testator and of the said Marianne Fox and her husband, and who should attain the age of twenty-one years or marry, as tenants in common, if more than one, and also the issue then living, and who should attain the age of twenty-one years or marry, of any child or children of the testator's said daughter, Marianne Fox, who should have previously died either in the testator's lifetime or after his decease, such issue through all their degrees to take *per stirpes*, and if more than one, as tenants in common, such share or shares only as his, her or their parent or respective parents would have been entitled to if living.

Walter Evans disclaimed the trusts of the will and codicils, and George Henry Strutt contracted to sell the Woodeaves estate to Sir W. Fitzherbert, subject to the approval of the Court, under the Leases and Sales of Settled Estates Act.

Mr. and Mrs. Fox being both alive, and having six children, all of whom had attained twenty-one, and one of whom, Mrs. Were, was married and had two infant children, a petition under the Leases and Sales of Settled Estates Act was presented, in which Henry Strutt, Mr. and Mrs. Fox and five of their children were the petitioners, for the purpose of obtaining the sanction of the Court to the said contract and of appointing a new trustee. Mr. and Mrs. Were were made respondents to the said petition, and Mr. Were accepted service thereof on

behalf of himself and his wife, but neither of them appeared on the hearing of the petition. An order was made on the 21st day of January, 1873, approving the contract and appointing a new trustee, and by such order liberty was given to the petitioners to apply in chambers.

On the hearing of the petition, the attention of the Court was called to the fact that Mrs. Were and all persons, if any, other than the petitioners, interested in the proceeds of the proposed sale, were considered to be sufficiently represented for the purpose of the Leases and Sales of Settled Estates Act by the trustee.

A question was then raised by the purchaser, whether or not the order so made was binding as against Mrs. Were and her children, the purchaser insisting that their interests were not affected by the said order, while the vendors contended that their interests, or at any rate the interests of Mrs. Were's children, were sufficiently represented by Mr. Strutt.

The purchaser being willing to appear and submit to the jurisdiction, a summons was on the 18th day of March, 1873, taken out by the petitioners and the new trustee, that the purchaser might be ordered, upon the due execution by all proper parties of a conveyance to him of the hereditaments comprised in the contract, to pay or secure his purchase money, and such summons was now adjourned into Court.

Mr. F. A. Lewin, for the petitioners, contended that all proper parties were before the Court. The interest of the infant children of Mr. and Mrs. Were was contingent upon their surviving the tenants for life, and persons contingently interested need not be represented upon a sale under the Leases and Sales of Settled Estates Act—

Beioley v. Carter, 38 Law J. Rep.

(N.S.) Chanc. 92; on appeal, *ibid.*

283; s. c. Law Rep. 4 Chanc. 230;

In re Pott's Estate, Law Rep. W.N.

(1866) p. 315; s. c. 15 W. R. 29.

Mr. Badnall, for the purchaser.—The ground of the judgment in

Beioley v. Carter (*ubi supra*), was that there was no one could say he was "the person whom Mary Green would leave her heir-at-law;" and

In re Pott's Estate (ubi supra) is directly opposed to the authorities.

Here there are children of Mrs. Were actually in existence, and although their interests are contingent, their consent is capable of being obtained, and they ought to be before the Court or they will not be bound—

Eyre v. Saunders, 4 Jur. N.S. 830;

Grey v. Jenkins, 26 Beav. 351;

Goodess v. Williams, 2 You. & C.C.C. 595;

In re Merry's Settled Estates, 36 Law J. Rep. (N.S.) Chanc. 168; a. c. 15 W. R. 307.

At all events the purchaser is entitled to require that these infant children should be made respondents, and consent to the order.

MALINS, V.C., without calling for a reply.—This is a question raised by a summons, whether the order to sell an estate under the Leases and Sales of Settled Estates Act has been made with the necessary concurrence. Now, the order for sale was made upon a petition in which the concurring parties were the devisees upon trust, the tenants for life and five out of the six children of the tenants for life. The sixth did not concur on that occasion, not being served, but, as I understand, now joins in the conveyance to the purchaser, so as to remove all difficulty on the ground of want of concurrence.

The objection of the purchaser is that Mrs. Were, one of the daughters, has infant children, and that her children are not made parties. Now it is perfectly clear that no child of Mrs. Were could have any interest in this property, unless that child should survive Mrs. Were herself, and also the grandfather and grandmother who are the tenants for life. The surviving children are a class of persons that cannot be ascertained, and therefore the case, in my opinion, falls within the judgment of the Lords Justices in *Beioley v. Carter (ubi supra)*, where their Lordships overruled the Master of the Rolls. In that case property was settled upon a woman and her husband for life, with remainder on such trusts as she should appoint, and upon default of appointment,

upon trust for the person or persons who would take as her heirs-at-law. There the person who would be heir-at-law could not be ascertained, and the Master of the Rolls held that there was not the necessary concurrence under the 1st section of the Settled Estates Act, and therefore the order for sale was invalid; but upon appeal before the Lords Justices Selwyn and Giffard, they decided that, whilst the concurrence of persons who could be ascertained to have an interest in the property was required, yet as they could not tell who the heir-at-law would be until the lady died, the concurrence of that heir-at-law could not be required; and to hold that the property could not be sold without that concurrence, would be to hold that the property was really inalienable. So here in the present case, it never could be ascertained who would be entitled until the death of the tenant for life, and therefore the consequence of so holding would be, as pointed out by the Lords Justices, that the property would be inalienable. Mr. Badnall says the concurrence of these children is necessary, because they are the persons who might become entitled. To that argument in this case there are two fatal objections; first, it has been decided in *Re Pott's Estate (ubi supra)*, that where property has been devised, as in this case, to trustees upon trust to sell, with a power of giving receipts, that it is not necessary to have the concurrence of any *cestuis que trust* whatsoever. The grandchildren here are to take the property not as an estate, but as money. The Master of the Rolls himself in *Re Pott's Estate (ubi supra)* held that where property is devised on trust to sell, it is not necessary to have the concurrence or the consent of the *cestuis que trust*. Therefore I should come to the conclusion, in this case, that if I had not the concurrence of any child or grandchild of Mrs. Fox, but merely the concurrence of Mr. and Mrs. Fox and the trustees, I should have the consent of the persons necessary to the sale. But it happened in this case that, there being six children, by way of being perfectly safe, five out of the six children are made to concur. There being, then, sufficient concurrence, even without any one of the

five concurring, certainly with the five there must be so, and I come to the conclusion that enough has been done here to give the purchaser a good title. I understand, moreover, that the vendors are ready to give the concurrence of the sixth child. I follow the decision of *Beioley v. Carter* (*ubi supra*), and I consider that it is not the duty of a purchaser to create difficulties, but rather to assist to remove any difficulties that exist. Therefore I will give my formal declaration that the necessary concurrence has been obtained, and then the purchase money will be dealt with accordingly.

Solicitors—Mr. W. H. Bishop, for the vendors;
Mr. Henry Tyrrell, for the purchaser.

MALINS, V.C. } *In re* HEMSLEY'S SETTLED
1873. } ESTATES.
June 27. }

*Practice—Settled Estates Act, ss. 20, 23—
Error in Advertisements—Gen. Ord. XLI.
Rules 14, 15—Payment of Purchase Money
to Trustees.*

In a petition presented under the Settled Estates Act for the sale of certain devised estates, the testator was correctly described as of Gotham, in the county of "Nottingham," but in the advertisements issued under s. 20 of the Act, and Gen. Ord. XLI. rules 14, 15, he was by mistake described as of Gotham, in the county of "Middlesex: "—Held, that the error was not one likely to mislead, and that therefore the irregularity might be waived.

The will contained a trust for sale and division of the proceeds, but not being immediately exercisable by the trustees, a sale was ordered under the above Act:—Held, that the proceeds might be paid to the trustees, instead of being applied as directed by section 23.

In re Morgan's Settled Estates (Law Rep. 9 Eq. 587), followed.

This was a petition under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), for the sanction of the

Court to the sale of certain real estate devised by the will of H. Hemsley to trustees upon trust, to pay out of the income an annuity to his widow during her widowhood, and, subject thereto, upon trust for his daughter for life for her separate use, and after her death upon trust for sale, and to divide the proceeds of sale among his daughter's children as therein mentioned.

The petitioners were the trustees and the several persons beneficially interested in the property. In the petition the testator was correctly described as of Gotham, in the county of "Nottingham," but in the advertisements issued in pursuance of the 20th section of the Act and Rules 14 & 15 of Gen. Ord. XLI., he was by mistake described as of Gotham, in the county of "Middlesex."

Mr. Bevir, for the petitioners, submitted that the error was not one likely to mislead, and that the Court might therefore waive the irregularity—

In re Bicknell's Settled Estates, Law Rep. 14 Eq. 467;

In re Whiteley's Settled Estates, Law Rep. 8 Eq. 574.

The purchase money might be paid to the trustees, to be held upon the trusts of the will, instead of being applied as directed by section 23 of the Act—

In re Morgan's Settled Estates, Law Rep. 9 Eq. 587.

MALINS, V.C., said it was a mistake which could not possibly affect anyone. All the parties interested were petitioners, and under all the circumstances he should make the order asked for, and the money would be paid to the trustees, to be held by them upon the trusts of the will, according to *In re Morgan's Settled Estates* (*ubi supra*).

Solicitors—Messrs. Peacock & Goddard, agents for Messrs. Thompson, Phillips & Evans, Stamford, for the petitioners.

JESSEL, M.R.

1873.

Nov. 6.

MARLER v. TOMMAS.

*Voluntary Settlement—False Recital—
Nudum pactum—Appointment by Deed—
Transfer of Shares.*

*A married woman executed a voluntary settlement containing a recital that she had paid 2,000*l.* to the trustee and declaring trusts of the sum. In point of fact she had not paid and never did pay any money to the trustee. The trustee also executed the deed:—Held, that neither the settlor nor the trustee incurred any obligation whatever in respect of the 2,000*l.**

Shares were settled on trust for such persons as A. might by deed or will appoint. A. took a transfer of the shares into her own name in the ordinary way, executing the transfer under hand and seal:—Held, that this amounted to an appointment by A. in her own favour.

Fletcher v. Green, 33 Beav. 426 (1864), explained.

The bill in this suit was filed by J. J. Marler, one of the next of kin of E. M. Tommas, deceased, against Robert Tommas, her widower and administrator, and Luke Marler, one of her brothers, who was the trustee of the settlement herein-after mentioned.

E. M. Tommas was formerly the wife of George Field, deceased, and was possessed of considerable separate property, including 100 shares in the Railway Rolling Stock Company, which were standing in the name of Robert Marler as trustee for her.

During the life of George Field a settlement bearing date the 8th of June, 1865, was executed by E. M. Field, and also by George Field, Robert Marler and Luke Marler. This settlement recited, amongst other things, that Mrs Field was entitled to a sum of 2,000*l.* which had been paid to the defendant, Luke Marler, immediately before the execution of the settlement, and by the settlement itself Robert Marler and Mr. and Mrs. Field were expressed to assign the shares in the Railway Rolling Stock Company to the defendant, Luke Marler, and it was declared that Luke Marler should stand possessed

of the 2,000*l.*, and also of the premises thereby assigned to him on trust for Mrs. Field for life for her separate use, and after her death in trust for such person or persons, and to and for such ends, intents and purposes as the said E. M. Field should, whether covert or sole, by any deed to be by her duly executed, or by will direct or appoint, and in default of appointment for her children, and if no children, which happened, for her next of kin in blood.

The recital that 2,000*l.* had been paid to Luke Marler was untrue. No money had been paid to him at the time and no money was ever paid to him afterwards.

George Field died on the 15th of June, 1865, without leaving any issue, and on the 29th of July, 1865, Robert Marler transferred the 100 shares in the Railway Rolling Stock Company to E. M. Field herself. It was admitted that this transfer was in the ordinary form, that it bore Mrs. Field's signature with a seal against it, and an attestation clause signed by a witness commencing with the words "signed, sealed and delivered." It was stated in Court that there was a liability on the shares.

On the 29th of May, 1871, E. M. Field married the defendant, R. Tommas, and on the 20th of January, 1872, she died intestate and without leaving issue, and shortly afterwards R. Tommas took out administration to her. The shares were still standing in her name.

The bill set up a claim to the shares on behalf of the next of kin of the late Mrs. Tommas, and also claimed to have the 2,000*l.* raised out of her assets, and sought to fix Luke Marler with liability to make good that sum in case of a deficiency of assets of Mrs. Tommas.

The settlement had comprised also a leasehold house and some furniture, about which no question was raised. According to the statements in the bill it appeared that the next of kin of Mrs. Tommas were numerous. The plaintiff claimed a forty-ninth share.

The defendant, R. Tommas, by his answer, besides raising the point on which the case was decided, submitted that the settlement of the shares was never completed, but as his counsel were not called

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upon, this point was not brought to the attention of the Court.

[On this point see

Milroy v. Lord, 4 De Gex, F. & J. 264; s. c. 31 Law J. Rep. (N.S.) Chanc. 798 (1862).]

Sir R. Baggallay and *Mr. E. A. Hadley*, for the plaintiff.—As to the appointment, Lord Eldon expressed his opinion in

Ellison v. Ellison, 6 Ves. 656; s. c. 1 W. & T. L. C. Eq. 3rd ed. 223 (1802),

that an act could not be considered as an appointment unless it manifested an intention to appoint.

We rely on

Fletcher v. Green, 33 Beav. 426 (1864), the head note of which is—

“Trust money was settled on a married woman for life, for her separate use, without power of anticipation, but with power to her to appoint the capital after her death by deed. The trustees lent part of the trust money to the husband on mortgage, and she consented to the investment by the mortgage deed. Part of the trust money having thereby been lost:—*Held*, that the wife had not, by executing the deed, appointed the reversion so as to make it liable for the loss.”

[THE MASTER OF THE ROLLS on looking into this case observed that the married woman was alive at the time the bill was filed, and that no question could arise as to the reversion, but all that was decided was that the trustees were bound to replace the fund while the restraint on anticipation lasted.]

Counsel proceed to cite

Reith v. Seymour, 4 Russ. 263 (1828), where a widow being executrix and tenant for life of the estate, with a power of appointment over a moiety, sold some consols which constituted nearly the whole of the estate and invested the proceeds in Long Annuities, and this was held not to amount to an exercise of her power. And

Hughes v. Wells, 9 Hare 749 (1852), where a married woman having a power to appoint funds by deed, with her husband's consent, attested by two witnesses, executed a power of attorney to deal with the funds with the required formalities, and that was held not to be an execution of the power.

Also

Brookman v. Hales, 2 Ves. & B. 45 (1813),

where a lady, tenant for life of a lease with a general power of appointment, took a renewal in her own name, and it was held not to be an exercise of the power.

As to the 2,000*l.*, they submitted that the trustee became liable by executing the deed, and the lady became liable to indemnify him.

Mr. Fry and *Mr. Beale*, for *Mr. Tommas*, and

Mr. Southgate and *Mr. Alfred Smith*, for *Luke Marler*, were not called upon. But after the judgment was delivered *Mr. Southgate* mentioned the case of

Gaston v. Frankum, 2 De Gex & S. 561 (1848),

as one on which he had intended to rely.

THE MASTER OF THE ROLLS.—This is a bill really filed under very extraordinary notions as to the rights of a volunteer. A married lady promised to settle 2,000*l.* out of property belonging to her for her separate use. The settlement was to be on herself for life, with remainder as she might by deed or will appoint, and in default for her children, and if she had no children for her next of kin. A few days afterwards her husband died, and as there were no children there was no longer any occasion for a settlement, and she therefore did not pay the money to the person named trustee. Now, one of the next of kin imagines that he can enforce against the assets of the lady this voluntary agreement to settle 2,000*l.* I need hardly say that no such claim can be entertained.

Then the second claim is this—there were shares belonging to the lady held by a trustee for her separate use, and these were expressed to be included in the settlement. Then after her husband's death she took a transfer of these shares into her own name, and I am told that that is not a sufficient execution of the power, though it was a general power to appoint to such persons as she might think fit, and was exercisable by deed, and the transfer was made by a deed which she executed. She thereby, in effect, by deed directed the shares to be transferred to

herself. She cannot have intended to keep up the settlement, since this transfer was contrary to the trusts of it, for under it she ought not to have had the shares transferred into her own name, but into the name of the trustee of the settlement. The fact was that she had a general power of appointment, and the settlement was no longer wanted, and she therefore took the property into her own keeping. There was in the nature of the transaction sufficient evidence that she meant to do exactly what she did. I consider the shares were validly appointed to herself.

Now, the defendant, Luke Marler, is made a party to make him liable for the 2,000*l.* and the shares, and I dismiss the bill against him with costs. As to the rest of the relief asked for I feel some hesitation. It appears, unluckily for the other parties interested, that a house of small value and some furniture have to be divided amongst various persons in forty-nine shares, and the Court will have to find out who are entitled and in what proportions. And I cannot help regretting that the result of the decree I am about to make will exhaust this estate in costs. I suppose I must direct an enquiry in chambers as to who are entitled to this property and how it ought to be divided.

Solicitors—Messrs. Robinson & Preston, agents for Mr. Alexander Harrison, Birmingham, for the plaintiff; Messrs. Mathews & Mathews, agents for Messrs. Mathews & Smith, Birmingham, for the defendant, R. Tommas.

MALINS, V.C. }

1873.

June 23. }

ELLWAY v. DAVIS.

Forest of Dean—Free Miner—Grant of Gales—Right to—Exhaustion of Gale—1 & 2 Vict. c. 43. s. 61.

A gale to work a coal mine is "exhausted" within the meaning of 1 & 2 Vict. c. 43. s. 61, when there is not enough coal left in it to make it worth working.

The bill in this suit was filed by John Ellway, a registered free miner of the hundred of St. Briavel's, in the county

of Gloucester, who was as such entitled to obtain grants of "gales" for working coals in the Forest of Dean, and it prayed for a declaration that the defendant, James Davis, another registered free miner, was not entitled to have any further gale granted him by the gaveller or deputy gaveller of the forest, until one or more of three gales of which he was already grantee should be worked out or exhausted of its ore, and for an injunction to restrain him from prosecuting an application for or accepting any new gale.

It appeared that the soil and minerals of the Forest of Dean are vested in the Crown, subject to certain privileges claimed by the free miners. From time immemorial these persons, who must be males of twenty-one years of age, born and abiding within the hundred of St. Briavel's, and having worked a year and a day in a coal or iron mine, have enjoyed the right of working the coal and iron mines in the Forest of Dean, subject to the license of the gaveller or deputy gaveller of the forest, and to the payment of an annual galeage rent to the Crown. In ancient times the customs and practices of the free miners were regulated by a court or jury of free miners, who met at the speech house in the centre of the forest, and in more modern times various Acts of Parliament in relation thereto have been passed, from the reign of King Charles I. downwards. The principal of these Acts is 1 & 2 Vict. c. 43, which provided for the ascertainment and register of persons entitled to be considered free miners, appointed "The Dean Forest Mining Commission," and regulated the granting of gales to open mines within the forest, to which the registered free miners were to have the exclusive right; and this Act, in the 61st section, enacted as follows—

"That no free miner, except under the award of the Commissioners, shall hereafter be entitled to have more than three gales awarded to him at any one time, and notwithstanding he may have applied in writing for more than three gales; nor shall any free miner have any other gale granted to him by the said gaveller or deputy gaveller until one or more of the said three gales shall be exhausted, and notwithstanding the said gale or gales

may have been disposed of to any other person or persons whomsoever."

It was not disputed that the defendant had had three gales granted to him, and the only question was, whether one of these three, the Speedwell Little Delf Colliery, had not been "exhausted" within the meaning of the above section. The defendant had applied for a fourth gale to be granted to him, and the plaintiff having also subsequently applied for the same gale, and his claim to a grant being (subject to the defendant's right) prior to that of any other free miner, he objected to any grant being made to the defendant, on the ground that neither of the gales previously granted to the defendant had been "exhausted" within the meaning of the 61st section of the above-mentioned Act.

The deputy gaveller having given the plaintiff notice of his intention to accede to the defendant's application, the plaintiff then filed the present bill.

It appeared by the defendant's evidence that he attempted to work the Speedwell Little Delf Colliery by means of a company established for the purpose, but finding that there was not sufficient coal in the colliery to make it worth the working, he surrendered the gale to the deputy gaveller in the year 1850, and the surrender was accepted.

The plaintiff now moved for an injunction as prayed for in this bill.

Mr. Cotton and *Mr. Cookson*, for the plaintiff, in support of the motion.—As between galee and galee, the 61st section of the Act 1 & 2 Vict. c. 43, must be strictly construed, and the defendant can have no fourth gale granted to him until one of the three gales already granted to him has been exhausted. The only question here is, whether the Little Speedwell gale has been exhausted within the meaning of the section. Now it is not the interest of the galee in the gale, but the gale itself, i. e. the coal in the gale, which must be exhausted; and it does not appear from the evidence that the coal in the Speedwell Colliery has been worked out and exhausted. All that appears is that the defendant partially worked it, found that working it would not pay, and then surrendered it without having worked it

out. As between galee and galee this cannot be an exhaustion within the meaning of the Act, which could not have intended that when a miner had applied for a particular gale and procured a grant of it, he should be able to give it up, and to get one which might turn out more profitable, without first *bona fide* working out the one already granted.

Mr. Glasse and *Mr. J. G. Wood* were not called upon.

MALINS, V.C.—This case raises a question affecting the somewhat curious rights of the free miners of the Forest of Dean. To be a "free miner" a person must be a male of twenty-one years of age, born and abiding within the hundred of St. Briavel's, and have worked for a year and a day in an iron or coal mine. When all these requisites concur, the free miner has a right to apply for a grant of "gales," and the grants are generally made in priority of application, the applications usually specifying the precise spot for which the application is made. These grants or gales are generally very valuable, and the grantees frequently sell their grants to capitalists, or to companies, who, by reason of their capital, are better able to work them. Accordingly, in order to prevent one free miner from engrossing too much of the forest, the 61st section of the Act was passed. Now the question arises between the defendant, *James Davies*, who, it appears, had three gales granted to him in the year 1843, and the plaintiff, *John Ellway*, who is also a free miner, and who is entitled, in case the defendant has no right to a fourth gale, in priority to all other applicants. It appears that in the year 1853 the defendant found that one of the gales which had been granted to him could not be worked at a profit, and he accordingly gave notice to the deputy gaveller that he would surrender the gale, as it was not worth working; and that surrender was duly accepted by the deputy gaveller. Having thus surrendered one of his three gales, he remains as the grantee of two only. But the plaintiff says, "You cannot stand in my way, because you have had three gales granted to you, none of which have been ex-

hausted ;" and the only question is, has the defendant exhausted one of his gales within the meaning of the Act. Now a coal mine is, in my opinion, "exhausted" when there is not sufficient coal left to make it worth while to work it. Upon this point the evidence satisfies me that a *bona fide* attempt was made by the defendant to work the Speedwell gale; that he found it was not worth while to continue the working; and that he surrendered the gale by giving notice in due form to the gaveller that he would give it up. That gale was, therefore, in my opinion, "exhausted" within the meaning of the 61st section of the Act. It is moreover a material point in the defendant's favour that the deputy gaveller accepted his surrender, which that officer ought not to have done unless he was satisfied that the coal could not be worked at a profit. That being so, the defendant is now only a grantee of two gales, and as such is entitled to a third. The motion, therefore, cannot be entertained. The costs will be costs in the cause.

Solicitors—Messrs. Waterhouse & Winterbotham, agents for Mr. M. F. Carter, Newnham, for plaintiff; Messrs. Peacock & Goddard, agents for Messrs. Smith & Son, Newnham, for defendant.

HALL, V.C. }
1873. }
Nov. 19. }

WATTS v. WATTS.

Wills Act—1 Vict. c. 26. s. 23—*Ademed Devise*—Rents.

Where a testator had specifically devised certain lands, but notice to treat as to such lands was served by a railway company and the purchase-money fixed in his lifetime, so that the devise was adeemed:—Held, that the rents received between the death of testator and the conveyance of the property passed to the devisees.

William Watts, by his will dated the 6th day of September, 1859, bequeathed as follows—

"I bequeath to my sister, Ann Watts, her executors, administrators and assigns, my two leasehold houses, Nos. 5 and 6,

Barossa Terrace, Cambridge Heath, with their appurtenances, she indemnifying my general estate against the lessee's liabilities in respect thereof."

In the month of June, 1865, the Great Eastern Railway Company, under their compulsory powers, served the testator with the usual notice to treat for the purchase of the two leaseholds.

In March, 1867, the testator's surveyor settled with the company's surveyor the amount of purchase and compensation money to be paid to the testator.

The testator died in the month of February, 1869, and the will was, on the 25th February, 1869, proved by the sole executrix. On the 4th of January, 1870, the contract was signed by the executrix, and by the agent of the company; and in April, 1870, the purchase was completed.

The legatee, Ann Watts, filed a bill for administration against the executrix, and contended, first, that the property remained unconverted at the time of the testator's death, and as such passed to her by his will; secondly, that, even if it should be held that there was a binding contract for sale and a conversion previously to the testator's decease, she was still entitled to the purchase-money, on the ground that such bequest as aforesaid passed whatever interest the testator had therein at the time of his decease.

Mr. Roberts, for the plaintiff, contended, first, that there was no completed contract, and therefore no ademption; secondly, at any rate the rents, until the completion of the purchase, would pass, under section 23 of the Wills Act—

Townley v. Bedwell, 14 Ves. 590;
Stat. 1 Vict. c. 26. s. 23.

Mr. Dickinson and Mr. Woodroffe, for the executrix, contended, first, on the authority of

Haynes v. Haynes, 1 Dr. & S. 426;
s. c. 30 Law J. Rep. (n.s.) Chanc.
578,

that the purchase-money and rents accrued since the testator's death formed part of his residuary estate, for that a complete contract, enforceable on either side, ensued on the price being fixed, and the effect of this was absolutely to convert the property, not only as between vendor and purchaser, but as regarded the rights

of other parties, and notwithstanding that the vendor had in fact no option but to sell; secondly, that as there was thus a complete ademption of the subject-matter of the bequest, the testator retained nothing to bequeath except the legal estate of which he was a trustee for the purchaser, and the rents were part of the property adeemed.

HALL, V.C., after deciding on the first point, that the case was governed by *Haynes v. Haynes* (*ubi supra*), and that the contract was sufficiently complete to adeem the bequest, said that there was no very satisfactory authority as regarded the rents received subsequently to the testator's death, but on the whole, as there was no time fixed for completion of the contract, he considered that the rents might be considered as an interest remaining in the testator disposable by his will, and that the plaintiff was entitled to them.

Solicitors—Messrs. Lewis & Lewis, for plaintiff;
Mr. Robert Voss, for executrix.

MALINS, V.C. }
1873. } GREENWOOD v. WADSWORTH.
June 5. }

Burial Acts—18 & 19 Vict. c. 128. s. 9
—*New Burial Ground*—*Dwelling House*.

The provisions of s. 9 of the 18 & 19 Vict. c. 128, whereby it is enacted that no ground not already used as or appropriated for a cemetery shall be used for burials under the Act of 15 & 16 Vict. c. 85, or that Act, within the distance of 100 yards from any dwelling-house, without the consent in writing of the owner lessee and occupier, are general provisions, and apply to all new burial grounds, whether parochial or non-parochial.

This was a motion on behalf of the plaintiffs, the owners of a piece of ground at Rawden, in the county of York, upon which two dwelling-houses were situated, for an injunction to restrain the defendants, the trustees of a Baptist chapel at Rawden, from using for burials any part

of a new burial ground recently formed by them, which should be within 100 yards of the houses in question, without the consent in writing of the plaintiffs.

The chapel and the old burial ground were separated from the houses in question by a narrow lane, and were more than 100 yards distant from them, but the new burial ground, which was a continuation of the old one, and sloped downwards towards the plaintiff's houses, was within that distance.

In April, 1872, the plaintiffs ascertained that the Secretary of State for the Home Department had signified his approval of the proposed new burial ground. The plaintiffs thereupon communicated with the Home Office, and received the following answer—

"Whitehall, 15th May, 1872.

"Gentlemen,—I am directed by Mr. Secretary Bruce to acknowledge the receipt of your letter of the 13th instant, and to inform you in reply that the fact of the site of the proposed burial ground at Rawden being approved amounts only to the removal of the prohibition to establish a new burial ground in the parish without the sanction of the Secretary of State, and does not interfere with the right of your clients to take such steps as they may be advised to take, with a view to prevent the site being used for burial.

"I am, Gentlemen,

"Your obedient servant,

"A. F. O. Liddell.

"Messrs. J. & J. R. W. Thompson,
Bradford, Yorks."

After some fruitless negotiations, the plaintiffs filed the present bill, and now moved in the terms mentioned above for an injunction. The Acts of Parliament affecting the question are the 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 17 & 18 Vict. c. 87; and 18 & 19 Vict. c. 128; and the following are the most material clauses of those Acts—

By the 9th section of 15 & 16 Vict. c. 85, it is enacted that—

"No new burial ground or cemetery (parochial or non-parochial) shall be provided and used in the metropolis, or within two miles of any part thereof, without the previous approval of one of her Majesty's Principal Secretaries of State."

And by the latter part of the 25th section, it is enacted that—

“No ground not already used as, or appropriated for, a cemetery, shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act, nearer than 200 yards to any dwelling-house, without the consent in writing of the owner, lessee and occupier of such dwelling-house.”

By the 1st section of 16 & 17 Vict. c. 134, it is in effect enacted that, in case it should appear, for the protection of the public health, that in any city or town, or within any other limits, the opening of any new burial ground without the approval of the Secretary of State should be prohibited, or that burials should be either wholly or partially discontinued, it should be lawful for her Majesty, by the advice of her Privy Council, to order that no new burial ground should be opened without such approval, or that burials should be wholly or partially discontinued in such city or town, or within such limits.

By the 7th section of the same Act, it is enacted that—

“All the provisions in the said Act, 15 & 16 Vict. c. 85, from section 10 to section 42 (both inclusive) of the said Act, and also in sections 44, 50, 51 and 52 of the said Act, shall extend and be applicable to and in respect of any parish not in the metropolis.”

By the 12th section of 17 & 18 Vict. c. 87, after providing that the clause in 15 & 16 Vict., forbidding the appropriation of ground within 200 yards of a dwelling-house as a burial ground or an addition thereto, should not extend to any burial ground provided under that or the present Act, it is enacted, “That no ground not already used as or appropriated for a cemetery shall be appropriated under the said Act of last session and this Act, or either of them, as a burial ground, or as an addition to a burial ground, nearer than 100 yards, without such consent as aforesaid.”

By the 9th section of 18 & 19 Vict. c. 128, after repealing the above-mentioned latter part of the 25th section of the 15 & 16 Vict. c. 85, it is enacted that no ground not already used or appropriated for a cemetery shall be used for burials

under the said Act or this Act within the distance of 100 yards from any dwelling-house, without such consent as aforesaid.

And by the 21st section it is enacted, that “the said Acts of the 15 & 16, 16 & 17, and 17 & 18 Vict. and this Act, shall be read and construed together as one Act.”

Mr. Pearson and Mr. Graham Hastings, for the plaintiffs, in support of the motion, after referring to the foregoing provisions, were stopped by the Vice-Chancellor.

Mr. Cotton and Mr. W. Barber, for the defendants.—The new burial ground of the defendants is a private non-parochial burial ground, intended not as a burying place for the use of the public in general, but only for the use of the members of the particular sect to which the defendants belong; and the Burial Acts, referring as they do only to public burying grounds, have no application to the present case.

Mr. Pearson, in reply.

MALINS, V.C., said that the question raised in this case was a very important one, viz., whether the provisions in the Burial Acts that no ground not already used for a burial ground shall be used for burials within the distance of 100 yards from a dwelling-house applied to all or only to parochial burial grounds. The Burial Acts which had been referred to were all part of one system, and had one general policy. The 9th section of 15 & 16 Vict. c. 85, applied to new burial grounds, whether “parochial or non-parochial,” that is, to burial grounds of all kinds, and the wording of the 25th section was likewise general. These were general enactments, and his Honour could not hold that it was the intention of the Legislature that the restrictions should apply to public and not to private burial grounds.

Again, what were the other provisions of these Acts? It was admitted that an application had been made by the defendants under these Acts to the Secretary of State to send over an inspector to inspect and report upon this new burial ground, with the view of obtaining his approval, and that this had been done. Now

if the words of the Act were to be restricted to parochial burial grounds in one case, they must be restricted in the other, and unless the Act had a general application, the Secretary of State had not the right, which the defendants admitted him to have had, of sending down the inspector and signifying his approval. If he had the right, the Act was a general one. The 100 yards limit had been introduced by the 12th section of 17 & 18 Vict. c. 87, and the application of it had been extended by the 9th section of 18 & 19 Vict. c. 128. Those provisions are general provisions, and as the defendants proposed to have this new burial ground within 100 yards of these dwelling-houses, the injunction must go.

Solicitors — Messrs. Evans, Foster & Rutter, agents for Messrs. J. & J. R. W. Thompson, Bradford, for plaintiffs; Messrs. Ridsdale, Craddock & Ridsdale, agents for Mr. Thos. Turner, Leeds, for defendants.

BACON, V.C. }
1873. } BEATTIE v. LORD EBURY.
Nov. 8. }

Practice—Consolidated Order, 40—Taxing Master—Discretion.

The Court refused to entertain the question whether the taxing master had properly disallowed costs of separate answers.

The taxing master allowed several defendants, directors of the Union Bank, the costs of only one answer, they having severed in their defence. This was a summons to review the taxation.

Mr. T. A. Roberts took the preliminary objection, that by Consolidated Order, Rule 40, the matter was entirely within the province of the taxing master.

Mr. Speed, for the summons, said the Court had a general controlling power over the taxing master, and this was a question of principle.

BACON, V.C., said—The General Order had imposed the duty of deciding the matter on the taxing master. The taxing master had decided that only one answer

was required for the defendants, and had discharged his duty by so deciding. It was not a question of principle, and the summons must be dismissed.

Solicitors—Mr. A. Dobie, for plaintiff; Messrs. Baxter, Rose & Norton, for defendants.

MALINS, V.C. }
1873. } LORD COLCHESTER v. LAW.
July 5. }

Suitors' Deposits—Interest on—Chief Clerk of Queen's Bench—Abolition of Office—Right to retain Deposits—Public Moneys—Right of Crown—1 Vict. c. 30.

The Chief Clerk of the Court of King's Bench was the custodian of moneys deposited by the suitors to await the result of actions, and invested a portion of them in exchequer bills. When the late Lord Ellenborough succeeded to the office in 1811, he found a sum of 5,000l. so invested. He received for his own benefit the interest thereupon until the report of the committee of the House of Commons on sinecure offices in 1834, in deference to which he received no further dividends, but caused them to be carried by his bankers to a separate account. After his death a suit was instituted to administer his estate, and upon a summons taken out thereon, it was held, that the funds thus accumulated formed no part of his estate, but must be treated as public moneys, and that the Crown, in right of the public, was entitled to receive them.

Adjourned summons.

This suit was instituted by Lord Colchester and Sir Robert Dallas, the executors of the late Earl of Ellenborough, who died on December 22nd, 1871, to have the trusts of his will administered under the direction of the Court; and, in the course of such administration, a question arose as to the right of the executors to certain exchequer bills and moneys in the hands of Messrs. Hoare, the bankers, which were standing to an account called the account of "The Chief Clerk's Guarantee Fund," under the following circumstances—The late

Lord Ellenborough, the testator, held the office of Chief Clerk to the Court of King's Bench, from Michaelmas Term, 1811, to January 1st, 1838, when the office was abolished. In the capacity of such Chief Clerk he was, from time to time, in receipt of moneys paid into Court by the suitors, to await the result of actions commenced by them. He considered himself during his life as custodian of such moneys, in the capacity of banker. He did not consider he was bound to invest them, or to deal with them in any way, otherwise than to hand them over to the suitors, by direction of the Court, when orders were, from time to time, made for payment out thereof; nevertheless, his predecessor in office, for his own security, from time to time, invested certain balances; and when Lord Ellenborough was appointed to the office in Michaelmas Term, 1811, he found a sum of 5,000*l.* invested in Exchequer bills, which were deposited with Messrs. Hoare, the bankers, who banked for him, in respect of all suitors' moneys, from time to time in his hands. The testator's father, the Lord Chief Justice, disposed of the income arising therefrom for his own private purposes; and after his death in December, 1818, his son, the testator, always received and appropriated the dividends and interest accruing therefrom up to the date of a certain report of the select committee of the House of Commons on sinecure offices; from which time, in deference to, but not as being bound by, the opinion expressed by the committee in such report, he refrained from receiving any further dividends. When, however, the office of Chief Clerk was abolished, under the provisions of the Act of 7 Will. 4. and 1 Vict. c. 30 (passed in consequence of such report), he, under the provisions of the 8th section thereof, paid over to the Master of the Court of Queen's Bench, appointed by such Act, the balance of suitors' moneys then in his hands, and rendered an account thereof; but he neither paid over, nor in any way accounted for, the interest which had accumulated on the said 5,000*l.* Exchequer bills, as from the date of such report, and such interest he allowed to remain at the bank of Messrs. Hoare, partly invested in Ex-

chequer bills and partly in cash, up to the time of his death; and, with regard thereto, he left the following memorandum, addressed to his executors—

"My executors will find a few Exchequer bills, and a small balance at Messrs. Hoare's, under the head of Chief Clerk's Guarantee Fund, the whole not amounting to much more than 700*l.* The origin of the sum is this—A committee of the House of Commons came to the opinion that the Chief Clerk should not derive any advantage from the interest on the 5,000*l.* Exchequer bills, in which a portion of the balance of the suitors' money in his custody was invested; and from that time, about 1829 or 1830, I have not derived any benefit from it: but what was I to do with the interest? The public had nothing to do with the money. It was the money of the suitors temporarily deposited with the Chief Clerk, as the banker of the Court, and he had always dealt with it as any other banker would. When the office fell under my father's management he directed 5,000*l.* Exchequer bills to be sold, and the money produced by the sale was added to the balance in Messrs. Hoares' hands, because my father not banking with them, they ought, he thought, to have ample profit upon the business they transacted for him. I thus have done what the committee of the House of Commons decided in deriving no profit from the custody of the suitors' money, but my executors must consider what shall be done with it."

The moneys in question now amounted to about 1,100*l.*, and the executors took out a summons, in order to raise the question as to who was entitled to them.

Mr. Glasse and *Mr. Nalder*, for the executors.

Mr. Cotton and *Mr. Owen*, for the residuary legatees.

The Solicitor-General (*Sir George Jessel*) and *Mr. Hemming*, for the Crown, contended that the Chief Clerk of the Court of King's Bench did not hold the moneys in question in the capacity of a banker, but as a trustee; that neither the suitors nor the Chief Clerk could have any right to interest on moneys so paid in, and that the fund arising from such interest must

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be treated as public moneys, which the Crown was entitled to claim.

MALINS, V.C., held that the fund in question, being the accumulated interest upon moneys received by the late Lord Ellenborough, in the capacity of Chief Clerk to the Court of Common Pleas, must be treated as belonging to the Crown, for the benefit of the public. His Honour therefore directed that the fund should be handed over to the Paymaster-General.

Solicitors—Messrs. Collyer-Bristow & Co., for plaintiff and defendant; Messrs. Raven & Bradley, for the Treasury.

JESSEL, M.R. }
1873. } ROBINSON v. EVANS.
Dec. 10. }

Settlement—Construction—Precedents—Authorities—Legal Personal Representatives—Next of Kin—Statutes of Distribution.

A fund was settled on A for life, then on any husband she might leave for life, then on her children, and in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—Held, that legal personal representatives meant next-of-kin according to the Statutes of Distribution.

Semble, on points of construction precedents may not be cited as authorities unless they explain the meaning of technical terms or lay down general principles.

By two indentures, dated the 30th and 31st of August, 1827, certain real estate was vested in trustees on trust to sell the same and invest the proceeds on personality, and pay the income to Edward Willington, sen., for life, with remainder to Sarah Willington during widowhood, with remainder, as to one-fifth of the trust fund, to Hannah Willington for life, for her separate use without power of anticipation, with remainder to any husband of Hannah Willington for life, with remainder to her children as she

might by deed or will appoint, and in default of appointment for all her children equally who should attain twenty-one, or, being daughters, marry, and in default of such issue, which happened, in the words following—"Upon trust, that the said trustees shall transfer and pay the said trust moneys and premises unto the person or persons who shall happen to be the legal personal representative or representatives of the said Hannah Willington at the time of her decease."

The words executors and administrators occurred in various places throughout the settlement, but there was not any passage which formed a strong contrast to the sentence above set out.

The question was whether legal personal representatives meant next-of-kin or executors or administrators. The executor of Hannah Willington was also her residuary legatee, so that no question arose as to whether the executor was to take beneficially or upon the trusts of her will, but it was admitted in argument that the latter would be the law.

Mr. Roxburgh and Mr. W. Pearson, for the plaintiffs, the trustees of the settlement, stated the case to the Court.

Mr. Southgate and Mr. Batten, for some of the next-of-kin, cited—

Robinson v. Smith, 6 Sim. 47; s. c.

2 Law J. Rep. (N.S.) Chanc. 76;

King v. Cleaveland, 4 De Gex & J.

477; s. c. 26 Beav. 26, 166; s. c.

28 Law J. Rep. (N.S.) Chanc. 835;

Baines v. Otley, 1 Myl. & K. 465;

s. c. 1 Law J. Rep. (N.S.) Chanc.

210;

Briggs v. Upton, 41 Law J. Rep. (N.S.)

Chanc. 519; s. c. Law Rep. 7

Chanc. 376;

and urged the argument stated in the judgment.

Mr. Joshua Williams and Mr. T. A. Roberts, for the rest of the next-of-kin, were not called upon.

Mr. Fry and Mr. Maclean, for the executor, who was also residuary legatee, of Hannah Willington, urged that the primary meaning of legal personal representatives was executors or administrators and that a word was not to be held to bear any other meaning unless a contrary intention was clearly shewn in the docu-

ment. That was the case with respect to wills—

Hawkins on Wills, p. 107; and the same rules held good for settlements, and were indeed less flexible. They cited the judgment of Kindersley, V.C., in—

In re Crawford's Trusts, 2 Drew. 230; s. c. 23 Law J. Rep. (N.S.) Chanc. 625;

as laying down that strong reasons were required for giving the words here used a secondary meaning. Also—

Hinchliffe v. Westwood, 2 De Gex & S. 216; s. c. 17 Law J. Rep. (N.S.) Chanc. 167;

Kilner v. Leech, 7 Beav. 202;

Alger v. Parrott, Law Rep. 3 Eq. 328.

[In the course of the argument the question was discussed how far decided cases were authorities in such a case as the present. The Master of the Rolls, during a previous case heard on the same day, had laid it down that authorities could only be cited on a point of construction when they explained technical terms or laid down general principles; and had referred to the judgment of Lord Wensleydale in—]

Grey v. Pearson, 6 H.L. Cas. 61; s. c. 26 Law J. Rep. (N.S.) Chanc. 473;

in support of that proposition. He held the present case to be within the first branch of the rule.]

THE MASTER OF THE ROLLS.—This is one of those cases in which I must come to my own conclusion on the meaning of the instrument I have before me, and ascertain as well as I can what the settlor meant by the expressions he has used. Evidently this is a legal document, prepared by some one with some knowledge of legal terms, and if the draftsman had meant executors, I think he would have said so. That is only a slight observation to make, but still it does happen that the words executors and administrators are sprinkled about the document in various places. The framer of the settlement knew, therefore, how to use the words if desired to do so. Now the property is limited to the daughter for life,

then to her husband for life—that is a matter of some importance—then to the children who attain twenty-one, or being daughters marry, with a gift over in default of such children, in the following words—“Unto the person or persons who shall happen to be the legal personal representative or representatives of the said Hannah Willington at the time of her decease.”

Now what would strike every lawyer would be that that is a very odd way to describe executors or administrators. It is both singular and plural; it says, “who shall happen to be,” and the most remarkable point is, it says, “who shall happen to be at the time of her decease.” That is not a possible description of an administrator, for there cannot be an administrator until the Court of Probate has appointed one, and that must necessarily be after an interval after the person's decease. But the words, at the time of her decease, are explicable enough if next-of-kin are intended, because there has been a great contest between the next-of-kin at the death of the person named, and the next-of-kin at the time of the interest falling into possession; and though that contest has now been decided, a lawyer would provide against any question being raised by using express words. Considering those words, and the fact that the husband takes a life interest, and would be administrator if he survived, it is extremely unlikely that the settlor intended the husband in that event to take the fund absolutely. I think then I have, within the reasoning of the case before Kindersley, V.C., *In re Crawford's Trusts* (*ubi supra*), sufficiently strong grounds for saying that the words were not used in their primary signification, and I hold that they mean the next-of-kin. It is settled then that when next-of-kin are described as legal representatives they take as tenants in common in the shares provided by the Statutes of Distribution.

Solicitors—Messrs. Sharpe & Ullithorne, agents for Messrs. Rutter, Neve & Rutter, Wolverhampton, for plaintiffs; Messrs. Wedlake & Letts and Messrs. Smith, Fawdon & Low, for defendants.

MALINS, V.C. }
 1873. } *In re BROWN'S TRUSTS.*
 May 30. }

Will — Construction — Bequest — "Children of my Daughter by her present putative Husband" — Illegitimate Child.

A testator bequeathed moneys in trust after the decease of his daughter for "all the children of his said daughter whether by her present putative husband or by any other person whom she might marry, who should attain the age of twenty-one years, their executors, administrators and assigns. But in case his said daughter should die leaving no issue either by her said putative husband or by any other person, who should attain the age of twenty-one years" then over. The testator at the date of his will knew that his daughter had an illegitimate son by J. B., with whom she was then living, and he recognised this son as his grandchild. After the testator's death, his daughter married J. B., but had no other child by him :—Held, that the illegitimate child was sufficiently designated by the will, and he having acquired a vested interest on attaining twenty-one, and his mother being sixty-seven years of age, that they were entitled to have the fund transferred to them.

This was a petition by Mrs. Mary Brown, a widow, and Mr. John Brown, her illegitimate son, for the transfer into their joint names of a sum of stock transferred into Court under the Trustee Relief Act under the following circumstances—

The father of Mrs. Brown, by his will, dated in 1835, directed the trustees thereof to invest a sum of 2,500*l.*, and to pay the dividends to his daughter, the petitioner, for her separate use for life, and after her death, "upon trust to pay, assign and transfer the said principal sum of 2,500*l.*, or the stocks, funds or securities upon which the same might be invested equally amongst all the children of his said daughter, whether by her present putative husband or any other person whom she might marry, who should attain the age of twenty-one years, their respective executors, administrators and assigns. But in case his said daughter should die leaving no issue,

either by her said putative husband or by any other person, who should attain the age of twenty-one years, then the testator declared that the said sum of 2,500*l.* should be paid and divided equally amongst all his other children who should be living at the time of his said daughter's decease and failure of issue as aforesaid, and the issue of such of his children as should be then dead, leaving issue;" and the testator bequeathed the residue of his personal estate and effects unto the respondent, Robert Brown, his executors, administrators and assigns.

It appeared that at the date of the will, and for some time prior thereto, the testator knew that his daughter had been, and still was, living with Mr. John Brown, sen., as his reputed wife, and had had by him one illegitimate son, the petitioner, John Brown, then four years of age, whom the testator recognised as his grandson.

The testator died in June, 1837. In 1841 his said daughter married John Brown, sen., but never had any child by him other than the petitioner, John Brown. John Brown, sen., died several years ago, and Mary Brown never having married again, and being now sixty-seven years of age, and her son having attained his age of twenty-one years in 1852, they applied to the trustee of the will to transfer the fund to them. The trustee however being advised that it was doubtful whether, under the circumstances, an illegitimate child took any interest under the will, transferred the fund, which had been invested in consols, into Court under the Trustee Relief Act in order to enable the rights of all parties to be ascertained; and the present petition was then presented.

Mr. Glasse and Mr. Haughton, in support of the petition.—Although a gift to "children" is generally held to be a gift to the lawful children of a lawful marriage, illegitimate children may be included either in express terms or by necessary implication. Here the testator knew all the facts, and the wording of his will clearly shews that he intended to include his daughter's son by the gentleman with whom she was living. The case is governed on this point by

Crook v. Hill, 38 Law J. Rep. (N.S.)
 Chanc. 579; s. c. on appeal, 40
 Law J. Rep. (N.S.) Chanc. 216;
 s. c. Law Rep. 6 Chanc. 311; s. c.
 (H.L.) 42 Law J. Rep. (N.S.)
 Chanc. 702.

Nor can there be any doubt that this son took a vested interest. "Without leaving issue," must be construed "without having issue"—

Ex parte Hooper, 1 Drew. 264;

White v. Hill, Law Rep. 4 Eq. 265;
 and the mother being sixty-seven years of age, she and her son are now entitled to a transfer of the fund.

Mr. Cotton and Mr. Vaughan Hawkins,
 for Robert Brown, the respondent.—In

Crook v. Hill (*ubi supra*)

there never could have been any lawful marriage between Mary and John Crook. But here there are neither express terms nor necessary implication. The intention of the testator as expressed by the words of his will would be satisfied by construing the gift as one to the children his daughter might have by her then putative husband after she was married to him, and she was in fact subsequently married to him, and might have had legitimate children; this being so, the illegitimate child cannot take. Moreover in this case no child can take who does not survive the mother.

MALINS, V.C., said that where there was a gift to children, whether of the testator or of any other person, the general rule was that none but legitimate children could take. That rule was however subject to exceptions, and where it could be clearly gathered that a testator must have intended illegitimate children to take, the Court would give effect to that intention. That principle was acted upon in *Sherratt v. Bentley* (1), and in the recent case of *Crook v. Hill* (*ubi supra*). The circumstances of the present case were peculiar. At the date of the will, the testator's daughter was with his full knowledge living with a gentleman whom she afterwards married (though at that time there was an impediment to the marriage), and had had a son by him of four years old recognised by the testator as his grandson. With a knowledge of these

facts the testator by his will directed his trustees after his daughter's death to pay and transfer the fund in question "equally amongst all the children of his said daughter, whether by her present putative husband or by any other person whom she may marry," who should attain twenty-one.

It had been contended that this meant the children the testator's daughter might have after she had been legally married to her then putative husband, and not this present child, but though the testator no doubt meant to include those children also, the words used could not be held to be confined to those children without stretching their meaning too far; and in fact there were no such children, so the question did not arise. His Honour was of opinion that any illegitimate children the testator's daughter might have by her putative husband were clearly designated as takers equally with any legitimate children she might have either by him or by any other husband.

As to the other point, that the son would not be entitled unless he survived his mother, he thought there was no doubt. It was a principle of the Court not to delay the vesting of property, but to vest it as early as possible, and the cited case of *White v. Hill* (*ubi supra*), as well as many other authorities, decided that the words, "without leaving any child or children," must be construed to mean "without having any child or children." Here the son had attained twenty-one, and took a vested interest, and there being only one son, and the mother being sixty-seven years of age, the mother and son were entitled to have the fund transferred to them according to the prayer of the petition.

Solicitors—Messrs. Lee, Pemberton & Reeves, for petitioner; Mr. R. H. Nettleship and Messrs. Williamson, Hill & Co., for respondent.

MALINS, V.C. }

1873. }

Nov. 18. }

BIDE v. HARRISON.

Will—"Money due at my Decease"—
Unliquidated Damages.

Bequest of "all and every sum or sums of money which may be due to me at my decease,"—Held, to pass a sum of money recovered by way of damages in an action by the testator's executor for a breach of covenant committed by a lessee of the testator in the testator's lifetime.

SPECIAL CASE.

John Bury Harrison, by his will dated the 12th of July, 1869, gave and bequeathed "all and every sum or sums of money which may be in my house, or about my person, or which may be due to me at the time of my decease," to the plaintiff, Harriet Elizabeth Bide, for her own exclusive use and benefit, and in case of her decease, to her child, the infant defendant, Louisa Emily Bide. The will contained no residuary bequest.

The testator died on the 19th of November, 1871, and his will was duly proved by his executrix, the plaintiff, H. E. Bide.

After the death of the testator, the plaintiff recovered damages to the amount of 229*l.* in an action in the Court of Exchequer, brought by her as his executrix against the executors of one John Lancaster, in respect of a breach of a covenant to repair, entered into by the said John Lancaster with the testator, and contained in a lease which expired in his lifetime, the damages being therefore existing unliquidated damages at the death of the testator.

The question submitted to the opinion of the Court was whether the 229*l.*, or the damages of which the same was the ascertained amount, passed under the above stated bequest, or whether there was an intestacy as to such sum.

Mr. Glasse and *Mr. Joliffe*, for the plaintiff.—We submit that the 229*l.* passed under the words "money which may be due to me at the time of my decease." It was as much the property of the testator as if it had been recovered by him during his lifetime, damages

being due to him in respect of a breach of covenant committed during his lifetime, although the precise amount was not ascertained until after his death.

Mr. Higgins and *Mr. E. Ford*, for the defendant, Louisa Emily Bide, took the same view.

Mr. North, for the other defendants, the testator's next-of-kin.—The words "money due to me at the time of my decease" cannot apply to unliquidated damages, which were not actually due until after the testator's death. The testator had at his death nothing more than the prospect of obtaining damages, as in

Stephenson v. Dawson, 3 Beav. 342 ;
s. c. 10 Law J. Rep. (N.S.) Chanc.
933,

where the freight earned by a ship belonging to the testator was held not to pass under a gift of "money due" to him at his decease. A demand in the nature of unliquidated damages was not fully recognised as a "debt" provable in bankruptcy until the Bankruptcy Act, 1869, which (section 31) for the first time allowed proof for unliquidated damages.

[MALINS, V.C., referred to

Booth v. Hutchinson, 42 Law J. Rep.
(N.S.) Chanc. 492 ; s. c. Law Rep.
15 Eq. 30.]

The subject of the bequest must be something which, at the testator's death, can be described as a "sum of money"—

Martin v. Hobson, 42 Law J. Rep.
(N.S.) Chanc. 342 ; s. c. Law Rep.
8 Chanc. App. 401.

Mr. Joliffe, in reply, was stopped by the Court.

MALINS, V.C.—The question is whether a sum of 229*l.*, which was recovered by the executrix of the testator after his death for the breach of a contract upon a lease to repair, where the breach had been committed in his lifetime, is money falling under the description of "all and every sum or sums of money which may be due to me at the time of my decease." I have had occasion to consider a similar question before in *Booth v. Hutchinson* (*ubi supra*), where I came to the conclusion that a sum of money was due from a bankrupt at the date of his creditors' deed, although

the precise amount was not ascertained until afterwards. What was recovered in the action here was not anything that accrued to the executrix after the death of the testator, but she recovered the 229*l*. because that was what the lessee owed to the testator in consequence of the breach of covenant, and I am of opinion that it must be considered as money due to him because the action merely ascertained the amount, and the executrix merely recovered it because it was due to the testator. I am of opinion that the 229*l*. did pass by this bequest.

Solicitors—Messrs. Bower & Cotton, agents for
Messrs. Swainson & Son, Lancaster.

SELBORNE, L.C.,
for
LORD ROMILLY, M.R. } In re TEAPE'S TRUSTS.
1873.
June 2.

Power of Appointment for Life—General Absolute Bequest to Object of the Power.

A testator, having a power to appoint the income of a fund to his wife for life, and no other power of appointment, by his will directed payment of his debts, and then, by a separate clause, devised all property, of whatever description, belonging to him, "or over which he might at his decease have any power, disposition or control," to his wife, her heirs and legal representatives, in full property for ever absolutely:—Held, that the will operated as an exercise of the power.

Clogstoun v. Walcott, 13 Sim. 523, not followed.

This was a petition by the widow of Theodore Teape, deceased, for payment to her for her life of the income of a sum of 5,000*l*. Consols, which had been paid into Court under the Trustee Relief Act, under the following circumstances—

Hananiah Teape, by his will, dated the 25th of March, 1865, gave the sum of 8,500*l*. Three per Cent. Consolidated Bank Annuities to his executors, upon trust, to

pay the income thereof to his son, Theodore Teape, for his life, and after his death upon trust to pay to any wife with whom his said son, Theodore Teape, might intermarry, who should survive him, so much of the income of 5,000*l*. Three per Cent. Consolidated Bank Annuities, part of the said sum of 8,500*l*. like Annuities for her life, as the said Theodore Teape should by any deed, or by his last will and testament, legally executed, direct or appoint, and subject to such appointment (if any), or, in case no such appointment should be made, the said testator declared trusts of part of the said sum of 8,500*l*. in favour of the children and issue of the said Theodore Teape, as therein mentioned; and he authorised his trustees to advance any part, not exceeding 3,000*l*. like Annuities, of the said sum of 8,500*l*. like Annuities, to the said Theodore Teape.

Hananiah Teape died in 1868.

Theodore Teape, on the 11th of May, 1871, married the petitioner, and died on the 22nd of November, 1871, without having had any issue, leaving a will duly made and executed, and dated the 14th of November, 1871, whereby he appointed his widow executrix, who duly proved the same will on the 31st of January, 1873, in the Principal Registry of her Majesty's Court of Probate.

The said will of the said Theodore Teape, so far as it is necessary to set the same forth, was as follows—

"Secondly, I will, order and direct, that as soon as possible after my decease my just debts and funeral expenses be first fully paid.

"Thirdly, after the payment of my just debts and funeral expenses, I give, devise and bequeath the rest, residue and remainder of my real and personal, moveable and immoveable properties and estate, of what kind, nature and description soever the same may be composed, to whatsoever the same may amount, and wheresoever situate lying and being the same may be found, to me belonging at the time of my decease, or to which I may be in anywise entitled, or over which I may have any power of disposition or control, unto my wife, Mrs. Mary Monaghan, of Tronholmville aforesaid, and to her heirs, assigns and legal representatives

in full property for ever, to have and to hold the same, and every part thereof, unto my said wife, the said Mary Monaghan, and to her heirs, assigns and legal representatives from the day of my decease, thenceforth for ever in full property, and the same to be by her or them received, recovered, used, enjoyed and disposed of as she or they may deem best, I, the said testator, hereby making my said wife my sole and universal devisee and legatee. And I do hereby nominate and appoint my said wife the sole executrix of this my last will and testament, with full power and absolute authority in the premises."

The petitioner claimed the income of the 5,000*l.* Consols, as having been appointed by the will of Theodore Teape.

The persons entitled in default of appointment opposed the petition.

Mr. F. Waller, with him *Mr. Fry*, for the petitioner, contended that the question was simply one of intention, to be gathered from the whole will, and that the testator had in this case used words sufficient to operate as an exercise of any power of appointment, in addition to words which passed all property of his own. And that as he had no power of appointment, except that over the 5,000*l.*, it was clear that his intention was to give to his wife as large an interest in that fund as was possible. He cited—

Bailey v. Lloyd, 5 Russ. 330;

Pidgely v. Pidgely, 1 Coll. C.O. 255;

Cox v. Foster, 1 Jo. & H. 30; s. c. 29 Law J. Rep. (N.S.) Chanc. 886.

Mr. Southgate and *Mr. L. Field*, for the persons who claimed in default of appointment, contended that there was no valid exercise of the power of appointment.

They relied on—

Ologstoun v. Walcott, 13 Sim. 523, as a case precisely similar to the present, and contended that, although Malins, V.C., had refused to follow that case in

Ferrier v. Jay, 32 Law J. Rep. (N.S.)

Chanc. 686; s. c. Law Rep. 10 Eq. 550,

there was no other case inconsistent with it. That

Elliott v. Elliott, 15 Sim. 321; s. c.

15 Law J. Rep. (N.S.) Chanc. 893,

was distinguishable from it, and

Hope v. Hope, 5 Giff. 13;

Cooke v. Ounliffe, 17 Q.B. Rep. 245;

s. c. 21 Law J. Rep. (N.S.) Q.B. 30, supported the principle on which

Ologstoun v. Walcott (*ubi supra*), was decided, and that there was a preponderance of authority against the decision of Malins, V.C., in

Ferrier v. Jay (*ubi supra*).

They also contended that on the words of the will, it was clear that the testator did not intend to exercise the power, as the words used applied only to an absolute interest, and not a limited power to appoint for life only.

Mr. Chamier, for the trustees.

Mr. Fry, in reply.

THE LORD CHANCELLOR.—I am of opinion that the petitioner is entitled to the income of the 5,000*l.* Consols during her life.

In the first place, it may be observed, that in this case there is a direction for payment of debts, which comes in a separate clause before the rest of the will, and is not connected with the subsequent gift under which the petitioner claims, so that no difficulty in construing the gift as an excess of the power of appointment arises from the direction to pay debts.

The only question is whether there is sufficient evidence of intention to exercise the power.

Now, there is nothing on which the words, "over which I may have any disposition or control," can operate, except the subject of the petition. I cannot reject these words when there is property to which they can apply. The prior words in the gift are large enough to include everything which was the property of the testator, in the ordinary sense of the word; and he then adds the words, "over which I have any power of disposition or control." These words are applicable to any power whatever. I cannot accede to the argument that they are not to be applied to the only power which he did possess.

The only difficulty is the circumstance that the power was to appoint a life interest only, and that here he has used words to define the *quantum* of interest, which seem to apply to an absolute interest. But,

after all, the reasonable view is that he meant to give the largest interest he could in everything he had to dispose of, which, in this case, was a life interest to his wife. If *Ologstoun v. Walcott* (*ubi supra*) were not in the way I should consider my decision consistent with the other authorities, and *Ologstoun v. Walcott* (*ubi supra*) is not precisely similar to this. And I do not think that case is consistent with *Elliott v. Elliott* (*ubi supra*), with *Cowx v. Foster* (*ubi supra*), or with *Ferrier v. Jay* (*ubi supra*). *Hope v. Hope* (*ubi supra*) creates no difficulty. There may be certain expressions in the judgment which favour the respondents' view; but, looking at the whole of the case, they appear to establish no proposition on which the respondents can rely. I therefore hold that the petitioner is entitled to the income of the 5,000*l.* Consols during her life.

Solicitors—Messrs. Deane & Chubb, agents for Messrs. Pridham, Woolcombe & Pridham, Plymouth, for petitioner; Messrs. Cowdell & Grundy, for respondents.

SELBORNE, L.C.	} WILLS v. BOURNE.
for	
LORD ROMILLY, M.R.	
1873.	
Aug. 4.	

Will—Marshalling Assets—Charity.

A testator devised real estate upon trust for sale and conversion, payment of debts and legacies; he also gave his personal estate, consisting of pure and impure personally, upon trust for payment of so much of his debts and legacies as the proceeds of sale of his real estate should be insufficient to pay, and directed his trustees to hold the residue upon trust for certain charities, and he declared that only such part of his estate should be comprised in the residue as might by law be given to charitable purposes.

The proceeds of the real estate being insufficient to pay the debts and legacies:—Held, that the debts and legacies must be paid out of the impure personally.

John Green, by his will, after giving an annuity to Elizabeth Harper, and making

NEW SERIES, 43.—CHANC.

several pecuniary and specific bequests, devised his freehold house at Halesowen and all other the real estate of which he might die seized unto Joseph Green Bourne and John Davis, upon trust that they and the survivor of them, his heirs and assigns, should, with all convenient speed after his decease, sell and convert the same hereditaments and premises into money, and should, from and out of the moneys or proceeds of sale, pay all the costs and expenses attending the sale and conversion, and subject thereto should thereout in the next place pay all his debts, funeral and testamentary expenses and the annuity and legacies and moneys thereinbefore bequeathed, and the legacy duties as far as the moneys or proceeds thereinbefore mentioned would extend to pay the same. And the testator gave and bequeathed unto the said Joseph Green Bourne and John Davis, their executors, administrators and assigns, all the moneys, stocks, funds, shares and securities for money, household goods, furniture and personal estate and effects of which he should die possessed, except such parts thereof as he had by his will or by any codicil thereto might specifically bequeath upon trust, that they the said Joseph Green Bourne and John Davis and the survivor of them, and the executors, administrators and assigns of such survivor should sell, dispose of, call in and convert into money all such parts of his said personal estate as should not consist of money, and should thereout and out of the money he might die possessed of, pay so much or such parts of his said debts, expenses and legacies as the proceeds of sale of his said messuage, real estate and hereditaments would not extend to pay, and should stand possessed of all the residue of his said personal estate, hereditaments and premises, after satisfying the purposes aforesaid, upon trust that they, his said trustees and trustee, should pay, transfer and divide the same unto and between the several hospitals, societies or charities thereafter mentioned, and for the benefit of the same respectively, or the several persons thereafter mentioned on behalf thereof in equal shares or proportions, the same to be considered as if divided into ten equal shares, and after enume-

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rating the charities the testator declared that the several shares of his said residuary personal estate were so bequeathed as aforesaid to be applied to and for the general purposes of the same charities, societies or hospitals aforesaid. And the testator declared that only such part or parts of his estate and premises should be comprised in the residue thereof, and be so divided, paid or transferred as aforesaid, as might by law be given or bequeathed for charitable purposes.

The testator made a codicil to his will and thereby substituted Robert Smart as executor and trustee of his will in the place of John Davis. He revoked the bequest of one tenth part of his residuary personal estate by his will made to the Church Pastoral Aid Society. He also revoked other legacies contained in his will and made certain new pecuniary and specific bequests, and he directed his trustees to postpone the division of his residuary personal estate until after the decease of his sister, Frances Wills, and to pay and apply the income and annual proceeds of his said residuary personal estate unto his said sister for her natural life, and after her decease to sell certain railway stock part thereof and divide it as therein was mentioned, and to stand possessed of the remainder of his residuary personal estate upon trust to divide the same among the several hospitals, societies or charities named in his will, except the Church Pastoral Aid Society. He made another codicil to his will which is unimportant.

The residuary personal estate of the testator consisted partly of pure and partly of impure personalty.

The real estate of the testator was not sufficient to pay his debts and the annuity and legacies bequeathed by his will and codicil. A bill having been filed by Frances Wills for the execution of the trusts of the will and codicils and for administration, the cause now came before the Court on further consideration, and the question arose whether the personal assets were to be marshalled in favour of the charities.

Mr. White, for the testator's next of kin, argued that the general rule applied, viz., that there was no marshalling in

favour of charities, and to shew that the testator's intention to the contrary was not sufficiently expressed he cited—

Miles v. Harrison, Law Rep. Weekly Notes, June 21, 1873.

Mr. Kingdon, Mr. Cust and Mr. Warrington, for different charities, asked that the impure personalty might be charged first. They cited—

Wigg v. Nicholl, 20 W.R. (M.R.) 738;

Sturge v. Dimesdale, 6 Beav. 462.

Mr. White, in reply.

THE LORD CHANCELLOR, after reading the words of the will, said that the case of *Miles v. Harrison* (*ubi supra*) was not reported so fully as to shew what the Vice-Chancellor (Sir J. Wickens) really said. The words used by the testator in *Miles v. Harrison* (*ubi supra*) were, however, not so strong as those used here, although they pointed in a similar direction. The intention here was clearly to throw the debts and legacies on the impure personalty, and nothing was to go to the charities except a residue of pure personalty.

Solicitors—Messrs. Wilkinson & Son, agents for Mr. R. H. Tarleton, Birmingham, for plaintiff; Mr. Needham, agent for Messrs. Bourne & Owen, Dudley, for defendant; Messrs. G. A. Crawley & Arnold and Messrs. Nicholl & Newman, for different charities.

MALINS, V.C. }

1873.

July 15. }

DAVIES v. FOWLER.

Legacies, General or Specific—Testamentary Appointment—Appointment of Residue—Charge of Testamentary Expenses—Probate Duty.

A married woman, having a testamentary power of appointment over a certain settled sum of stock, by her will appointed the said stock "or the stocks or funds which might at her death represent such trust funds" to trustees upon trust to pay out "of such trust funds" certain legacies:—Held, that the legacies were specific and not general.

The testatrix, not having exhausted the whole of the stock, appointed the "residue" thereof to trustees upon trust to sell and

divide the proceeds, after payment thereout of her debts and funeral and "testamentary expenses," between her nephews and nieces:—Held, that the gift of the residue was also specific, but that the probate duty was chargeable exclusively on the residue.

Samuel Salter, by his will, dated the 23rd of December, 1847, gave to trustees a sum of 40,000*l.* 3¼ per cent. stock (afterwards 3 per cent. stock) upon trust to continue the same invested in the same or other Government stocks or funds, or such other securities as therein mentioned, and to pay the dividends thereof to his wife, Mary Salter, during her life, and after her death upon trust to assign or transfer the said sum of 40,000*l.* 3¼ per cent. stock, or any part thereof, to any person or persons and under and subject to such conditions and restrictions, charges and limitations at such time or times, and in such manner or form as the said Mary Salter should by any deed or deeds, or by her last will or testament in writing, or any codicil or codicils thereto, direct or appoint, give or dispose of the same.

The testator died on the 9th of October, 1850.

His widow, Mary Salter, in 1858, married William Rees, and the settlement executed on such marriage reserved to her a power of exercising the power of appointment during coverture.

Mrs. Rees during coverture executed two appointments by deed of parts of the 40,000*l.* stock to the amount altogether of about 10,000*l.*, and by her will she confirmed these appointments and appointed to William Fowler and Geo. Hicks Davies, "All the rest, residue and remainder of the said sum of 40,000*l.* 3 per cent. annuities, or the stocks or funds which may at the time of my death represent such annuities and trust funds, which said sum of annuities, stocks, funds and securities are hereinafter referred to under the expression 'trust funds,' upon trust to pay or transfer thereout 100*l.* of such trust funds for my nephew, Philip Henry Dicker, of Oswestry, surgeon; 200*l.* of such trust funds I give to his daughter, Catherine Darnacott Dicker;" and so the testator proceeded, giving various legacies in exactly

the same terms, and uniformly expressed to be so much of "such trust funds." The testatrix then having exhausted the whole of the fund with the exception of a sum of about 3,900*l.*, she, in further exercise of her power, made a residuary gift as follows—"I give all the residue of the said sum of 40,000*l.* new 3 per cent. annuities, not hereinbefore disposed of, or the stocks, funds and securities which shall at the time of my death represent such trust funds, and all the residue of my other estates and effects whatsoever and wheresoever to the said William Fowler and George Hicks Davies, their executors, administrators and assigns, upon trust to sell such portion of the said trust funds as shall remain undisposed of, and to divide the proceeds of such sale, after payment thereout of all debts which may be due from me at my decease, and my funeral and testamentary expenses, and to divide the residue of my estates and effects between my nephews and nieces following."

The testatrix died on the 22nd of February, 1870.

The will had no operation except as an appointment of the trust funds.

The suit, which was instituted by two of the residuary legatees against the trustees of the will, now came on upon further consideration.

On the 27th of January, 1872, an order was made in the suit, on an application by one of the legatees for payment of his legacy, together with interest from a year after the testatrix's death.

Mr. Cotton and Mr. E. S. Ford, for the plaintiffs.—The question is, are these legacies general or specific? We submit that they are general, and consequently the legatees are only entitled to interest from a year after the testatrix's death. This rule is applicable to general legacies under the testamentary appointment of a *feme covert*—

Tatham v. Drummond, 2 Hem. & M. 262.

The mere gift of a stock legacy does not make the legacy specific so as to entitle the legatee to the dividend of the first year. Your Honour appears by the order of the 27th of January, 1872, to have, in fact, treated the legacies as general. At

all events if the legacies are specific, they must bear a rateable proportion of probate duty under the Act 23 Vict. c. 15. ss. 4 and 5.

Mr. Charles Hall, for two persons claiming as specific legatees.

Mr. Jackson and *Mr. Charles Stewart*, for other persons in the same interest.—These are gifts of so much stock, and are therefore specific—

Mullins v. Smith, 1 Dr. & S. 204;

Hosking v. Nicholls, 1 You. & C.C.C. 478; s. c. 11 Law J. Rep. (n.s.) Chanc. 230.

As to the probate duty, the testatrix has expressly said that the residue is to bear her testamentary expenses.

Mr. Cotton, in reply, contended that the testatrix had not shewn a sufficiently clear intention that the legacies should be specific, and cited

Auther v. Auther, 13 Sim. 422;

Kirby v. Potter, 4 Ves. 748.

MALINS, V.C.—The question is whether the testatrix has meted out the 40,000*l.* stock—or the sum which remains—amongst the various legatees as part of the stock, or whether she has given general legacies. Now, if she has meted out or divided the stock amongst the legatees in certain proportions, then the legacies are specific, and being specific must be appropriated as from the death of the testatrix, and carry the dividends from that time. If, on the other hand, the property is to be converted into money and out of the produce of the stock the legacies are to be provided, then they are general legacies, and do not carry interest until the expiration of one year from the death of the testatrix. The real question then is, has or has not the testatrix meted out the stock amongst the legatees? That must be determined by the words of her will.

[The Vice-Chancellor then read the will, observing that the testatrix described the stock as “trust funds,” and gave each legacy as part “of such trust funds.” He then proceeded]—I understand the testatrix to say she has divided and meted out amongst the legatees “parts of the trust funds.”

Now, with regard to specific legacies,

the doctrines of this Court are very minute—very fine distinctions are drawn, and no doubt the general inclination of the Court is to treat a legacy as general rather than as specific, and to construe it rather in favour of the legatees; because, although a specific legatee has many advantages he is exposed to many perils. He has the advantage of taking the very thing that is given, although the general assets may be insufficient, and he has the advantage of taking the dividends or interest from the death of the testator. But, on the other hand, he is exposed to the very great peril of ademption, and therefore, in one view of the case, if I hold the legacies to be specific, the legatees might be exposed to the peril of losing their legacies by the change of the fund; but that is anxiously provided for by the testatrix, because she says, “I give all the residue of the said sum of 40,000*l.* new 3 per cent. annuities, not hereinbefore disposed of, or the stocks, funds and securities which shall at the time of my death represent such annuities.” Now that falls exactly within the distinction drawn by Knight Bruce, V.C., in the case of *Hosking v. Nicholls* (*ubi supra*). The same thing is to be found in *Mullins v. Smith* (*ubi supra*), which were both cited by Mr. Jackson. The case of *Hosking v. Nicholls* (*ubi supra*) is an excellent illustration of it. [The Vice-Chancellor then referred to that case, and continued]—On this question whether a legacy is or is not specific, the refinements are very great; for instance, there is the case of *Kirby v. Potter* (*ubi supra*), where Lord Alvanley says, “If the legacy given by the codicil had been ‘of my stock,’ or ‘in my stock’ or ‘part of my stock,’ I should have held it clearly a specific gift of an aliquot part of the stock.” Now this case falls within that very definition, and in my opinion each legacy is a specific legacy; it is a meting out or dividing amongst the legatees the very thing over which the testatrix had a power of appointment. In fact it is very probable that such was the intention of the testatrix. She knew perfectly well that she was tenant for life in possession of 30,000*l.* stock. She knew that that was the fund she had to divide. Nothing can be more natural,

therefore, than that she should proceed to divide it amongst her legatees in such proportions as she thought fit; and accordingly she does divide it amongst them in a manner which I can only read, I repeat, as "part of the trust funds." The result therefore is that in my opinion the legacies are specific, and the fund is divisible amongst the legatees in the proportions in which it is divided. Then having given legacies amounting to 26,100*l.*, and there being 3,900*l.* left, instead of going through the form of giving that the testatrix gives what remains in the form of residue. Therefore, although it is given in the form of residue, it is just as much a specific legacy as the others. I may mention the case of *Newbold v. Road-knight* (1), where there was a gift of a sum of money to one to be paid out of the produce of a real estate directed to be sold, followed by a gift to others of the residue of that produce; and it was held to be substantially a gift of the whole estate and not a gift of legacies collaterally charged upon the estate; so that these gifts were deemed if the testator sold the estate in his lifetime. Therefore the gift of the residue is also specific, and if the will had stopped there, I should have held, in conformity with Mr. Cotton's argument, that there must be a rateable contribution to the probate duty. But, unfortunately for the residuary legatees, the testatrix casts a burden upon them which is not cast upon the others; for she gives "the proceeds of such sale after payment thereof of all debts which may be due from me at my decease and my funeral and testamentary expenses, and to divide the residue of my estate and effects between my nephews and nieces." That is, the residue which remains after paying the funeral and testamentary expenses; the testamentary expenses including the probate duty. Now the only observation I have to make further is this: it is said that on the 27th of July last year I decided this point in a manner different to what I am now deciding it. If I did, it is quite open to me to decide it differently, but I did not decide it because the application was by

one legatee who wanted his money, it being admitted that the money was ready. Therefore, all I decided was that the legatee should take the 3,000*l.* that was given to him with interest from one year from the death of the testatrix. That was the least he could be entitled to, and therefore what I intended was to give him that sum without prejudice to any question. I am certain I never intended, in the absence of the parties interested, to decide the question that these were not specific legacies. I gave the legatee the least that he was entitled to, and now he, in common with the rest, is entitled to the dividends upon the stock from the death of the testatrix.

Solicitors—Messrs. Merriman, Powell & Co., for plaintiffs and defendants; Messrs. Gregory, Rowcliffes & Rawle and Messrs. Walker, Sons & Field, for the other parties interested.

JESSEL, M.R. }
1873.
Dec. 2. }

TILLET V. PEARSON.

Judgment Creditor—Elegit—Equitable Life Estate—Receiver.

A judgment creditor who has sued out an elegit, and got a return from the sheriff that the debtor was entitled to a life estate in realty of the debtor, and registered the writ, may file a bill in the Court of Chancery for a receiver of that estate.

This was a bill by judgment creditors against their debtor and the trustees of some real estate of which the debtor was equitable tenant for life. The date of the judgment was the 2nd of August, 1873.

The plaintiffs had sued out an *elegit*, and got a return from the sheriff that the debtor was entitled to a life estate in the land in question, and registered the writ; but the land was subject to a lease granted by the settlor who had devised the legal estate to the trustees, and the plaintiffs were therefore unable to recover the rent from the tenant. They therefore filed this bill and moved at once for a receiver. The bill contained

(1) 1 Russ. & M. 677.

a further prayer for sale of the life estate of the debtor.

Mr. Fry and Mr. Cozens-Hardy, for the plaintiffs, said that the plaintiffs might no doubt petition for a sale of the debtor's interest, under the Act 27 & 28 Vict. c. 112. s. 4 (1864), but submitted that that did not take away their remedy by receiver. The tenant for life might die before a sale could be effected. A similar conclusion under the Act 1 & 2 Vict. c. 110 (1838) was arrived at in

Yescombe v. Landor, 28 Beav. 80; s. c. 28 Law J. Rep. (N.S.) Chanc. 876 (1859).

The defendant did not appear.

THE MASTER OF THE ROLLS made the order asked for.

Solicitors—Messrs. Sharpe, Parkers, Pritchard & Sharpe, agents for Messrs. Coaks & Rackham, Norwich, for plaintiffs; Messrs. Walkin & Clift, for defendant Pearson; Mr. E. F. Fraser, for the other defendants.

SELBORNE, L.O.	} HARTLAND v. MURRELL.
for	
LORD ROMILLY, M.R.	
1873.	
June 20.	

Solicitor and Client—Advances to his Client—Interest—Costs—33 & 34 Vict. c. 28. s. 17.

The 17th section of the Act of 33 & 34 Vict. c. 28, authorising in taxation the allowance of interest on moneys disbursed by a solicitor for his client only applies to costs between a solicitor and his own client, not to a case where costs are to be paid out of a fund in Court not belonging wholly to the client.

A foreclosure suit had been instituted many years before by mortgagees of two undivided shares of certain real estate.

A decree was made for sale of the entire estate, the parties interested in the remaining undivided third part undertaking to concur therein. Under this decree several sales of parts of the property had taken place, some more than ten years before this application. All the proceeds of sale

in each case were paid into Court and invested in a single account. Part of the investments were applied in paying off the principal and interest due on the mortgage, and by an order made on further consideration it was referred to the taxing master to tax the costs of all parties as between solicitor and client, including in the costs of the plaintiffs any costs, charges and expenses properly incurred by them as mortgagees in relation to the mortgaged property or the sale thereof or otherwise beyond the costs of the suit, and it was ordered that these costs should be raised and paid out of the stock then representing the proceeds of sale, and that the residue should be divided among the persons beneficially entitled to the property in manner mentioned.

The solicitors for the plaintiffs included in their bill of costs charges for interest on disbursements made by them in carrying out the sales "as moneys disbursed for their clients."

The taxing-master disallowed the claim on the ground that the 17th section of the Act 33 & 34 Vict. c. 28 only authorised him to allow interest as between a solicitor and his client, not where the interest was in fact claimed on behalf of the client out of a fund belonging to others.

An application was now made by summons for an order that the taxing master might be directed to review his taxation.

Mr. Buchanan, for the summons, contended that the Act was wide enough to include the case, and that as the fund out of which the money advanced by the solicitor should have been paid had been invested and produced interest, it was reasonable that interest should be allowed on the disbursements in the benefit of which all parties had shared. He referred to section 27 of 23 & 24 Vict. c. 127 as an analogous provision, and said that under it the Court in directing payment out of the proceeds of sale of mortgaged property of the mortgagees, principal, interest and costs, had allowed interest on the costs—

Whitfield v. Roberts, 9 W.R. 844.

[THE LORD CHANCELLOR.—That was a case of a judgment debt.]

Mr. Goren and Mr. Terrell, for defendant, was only heard on the question whether this summons should be dis-

missed without costs. They contended that the Act not being retrospective could not apply to this case, and that therefore the summons ought to be dismissed with costs.

THE LORD CHANCELLOR.—The Act appears to me to apply only to a claim of a solicitor and his own client. Before the Act solicitors were not able to charge interest on advances made to their clients. The Act of 1870 enabled them to do so as against their own clients, but there is nothing in it enabling them to charge any other persons with such interest, as would be the effect in this case if the application were granted. The summons must be dismissed, but the question was a proper one to bring before the Court, and it will be dismissed without costs.

Solicitors—Messrs. Morley & Shirreff, for plaintiffs; Mr. Goren and Mr. Cowlard, for defendant.

MALINS, V.C. } *In re* **WYNN'S DEVISED**
1873. **ESTATES.**
May 26. }

Petition—Sale and Exchange—Selling Surface and Minerals separately—Confirmation of Sales Act (25 & 26 Vict. c. 108).

The trustees of a will devising real estate in strict settlement had mere general powers of sale and exchange. Upon a petition presented by the trustees and the tenant for life under the Confirmation of Sales Act (25 & 26 Vict. c. 108), for authority to exercise the powers by selling the minerals and surface separately, the Court gave a general direction that the powers might be so exercised.

Sir Watkin Williams Wynn, by his will, dated the 19th of July, 1822, devised all his real estate (except as therein mentioned) to trustees to uses in strict settlement, and empowered his trustees, with the consent of the tenant for life for the time being, to sell or exchange the same; but the will contained no special power to sell the surface and minerals separately.

A petition was presented under the

Confirmation of Sales Act (25 & 26 Vict. c. 108), by the trustees and the tenant for life, praying that the trustees might be at liberty to exercise the powers of sale and exchange, so as to dispose of the lands, subject to the uses of the will, with a reservation of the mines and minerals thereunder, and also to sell the mines and minerals separately from the surface.

It did not appear that the trustees had entered into any specific contracts for the sale of the surface or minerals. The remaindermen were not served with the petition.

Mr. E. Harrison, for the petitioners, cited in support of the prayer,

In re Brown's Trust Estate, 32 Law J. Rep. (N.S.) Chanc. 275; s. c. 11 W.R. 19;

Service on the remaindermen was unnecessary—

In re Pryse's Estates, 39 Law J. Rep. (N.S.) Chanc. 760; s. c. Law Rep. 10 Eq. 531.

MALINS, V.C., said that if the power of sale had been properly framed according to the forms now generally used by conveyancers, there would have been power to sell the minerals separately from the surface, and the surface separately from the minerals. There seemed no objection to making the order asked for.

Solicitors—Messrs. Dean & Taylor, for the petitioners.

BACON, V.C. }
1873. **HARVEY v. HALL.**
June 13. }

Contempt—Imprisonment for Debt—Compromise.

A solicitor was ordered to pay money to a receiver of the Court on pain of sequestration and imprisonment. His property was seized on a fi. fa. under the order, but possession was given up under an agreement:—Held, on breach of the agreement by him that he could not be attached under the order.

In December, 1870, Mr. Hall, the solicitor for the defendant in the cause, was

ordered to pay J. J. Saffery, the receiver, the sum of 181*l.* 6*s.* 11*d.* and costs of the then application. On the order was the following indorsement—"If you, the within named J. C. Hall, neglect to obey this order by the time therein limited, you will be liable to have your property sequestered for the purpose of compelling you to obey the same order, and you may also be liable to be arrested and committed to prison."

The sheriff, under a writ of *fi. fa.* issued for the purpose of recovering the money ordered to be paid, took possession of goods of J. C. Hall. An arrangement was then made under which he withdrew from possession on terms that Mr. Hall should pay instalments of 15*l.* every month till the whole amount ordered to be paid, with costs and interest, should have been satisfied, and in default the sheriff should re-enter under the same warrant and proceed with the execution just in the same manner as if he had not withdrawn. Before the whole money agreed had been paid default was made.

Mr. W. J. Lawrance now moved to attach Mr. Hall for non-compliance with the order.

BACON, V.C., said there had been such an interference with the terms of the original order that an attachment could not now be issued upon it, and he refused to make any order on the motion.

Solicitors—Messrs. Lawrance, Plews, Boyer & Co., for the applicant.

BACON, V.C. } BLOOMER v. THE UNION
1873. } COAL AND IRON COM-
July 9. } PANY.

Company—Mortgage—Book-debts—
Directors—Power—Construction.

A charge on future book-debts, under a power to mortgage the property of a company, was upheld.

This was a suit to enforce a mortgage made by a company, which included book-debts. The mortgage was made by the

directors under a clause contained in the articles of association, which gave them power, among other things, to borrow, "by way of mortgage (with or without a power of sale), of any of the property of the company."

The plaintiffs advanced 3,000*l.* to the company, which was secured by debentures, on which the principal was payable on the 1st of January, 1874, and bore interest at the rate of 7½ per cent. per annum. The company also assigned, by way of additional security, "all the lands, mines, works, plant, machinery, stock-in-trade, book-debts, rents, profits and other property, of every description, which the company then had, or might, during the continuance of that security, acquire, except that part of the capital of the company which was not then paid up, and except such leasehold property as the company were prohibited from assigning without license. The mortgage was duly registered, under the Companies Act, 1862. The company was put into voluntary liquidation, and this bill was filed to enforce the security on the book-debts of the company, their only available property. A demurrer was put in by the liquidator.

Mr. Plumptre, for the demurrer, contended that as it had been held that, under a general power, the proceeds of a future call could not be charged—

Re The Sankey Brook Coal Company,
39 Law J. Rep. (N.S.) Chanc. 223;
s. c. Law Rep. 9 Eq. 721; see also
Law Rep. 10 Eq. 381;

Ex parte Stanley, 33 Law J. Rep.
(N.S.) Chanc. 535;

on the same principle, future book-debts could not, in this case, be validly charged.

Mr. Underhill, for the bill.

BACON, V.C., said book-debts were within the description, "property of the company," and overruled the demurrer.

Solicitors—Mr. H. G. Field, agent for Messrs. Underhill, Wolverhampton, for plaintiffs; Mr W. H. Bishop, for defendants.

JESSEL, M.R. }
1873.
Nov. 21. }

ROWSSELL v. MORRIS.

Administration of Estate — Necessary Parties — Executor de son Tort — Absence of Legal Personal Representative — Costs — Objection for want of Parties not taken by Answer or Demurrer.

A bill for administration of the estate of or execution of the trusts of the will of a deceased testator cannot be sustained against the executor de son tort without the legal personal representative — Rayner v. Koehler (41 Law J. Rep. (N.S.) Chanc. 697; s. c. Law Rep. 14 Eq. 262) and Coote v. Whittington (42 Law J. Rep. (N.S.) Chanc. 846) dissented from.

Where it appears on the bill that the suit is defective for want of parties, a defendant who takes the objection at the hearing is entitled to the costs of the day, though he has not taken the objection by his answer.

J. Rowsell, by will dated the 6th of December, 1864, devised and bequeathed all his real and personal estate to his wife Joanna, subject, as to his personal estate, to the payment of his simple contract debts and funeral expenses, to hold the same to his wife for her own use during her life; and after her death he gave the same to William Morris and W. P. Morris, their heirs, executors and administrators, upon trust, to sell and divide the proceeds of sale equally between all his children who should survive his wife and attain twenty-one, and the issue living at the death of his said wife of any child or children of his who should die in the lifetime of his wife leaving issue, such issue to take the share or respective shares of his or their deceased parent or parents only in equal shares if more than one; and he appointed his wife executrix of his will. The testator died in December, 1864, leaving his wife and four children him surviving, the three plaintiffs and the defendant, Mary Bartlett.

The testator's widow, Joanna Rowsell, never proved the will, but possessed herself of the personal estate of the testator, and entered into the receipt of the rents and profits of the real estate.

NEW SERIES, 43.—CHANC.

She died on the 27th of August, 1867, intestate. On the 6th of April, 1868, letters of administration to her estate were granted to the defendant, Mary Bartlett.

After her death a bill was filed by the sons of the testator against W. Morris and W. P. Morris and Mary Bartlett and her husband. It stated that Joanna Rowsell had never proved the will; that she had entered into possession of the real and personal estate, and that the defendant, Mary Bartlett, was her legal personal representative; it alleged that upon the death of Joanna Rowsell, W. Morris, and W. P. Morris entered into possession of the personal estate, and entered into the receipt of the rents and profits of the real estate, and that a considerable balance was in their hands.

It appeared on the face of the bill that no legal personal representative of the testator was party to the suit. The bill prayed that the trusts of the will might be carried into execution, and the rights of all parties under it ascertained; that the defendants and the trustees might be ordered to pay into Court the moneys belonging to the testator's estate, which were in their hands; that new trustees of the will might be appointed, and a receiver of the rents and profits; and that all necessary accounts might be taken.

Answers had been put in by the defendants, but no objection had been taken on the ground that no legal personal representative of the testator was before the Court.

On the suit coming on for hearing, Mr. Mackeson and Mr. Badcock, for Mrs. Bartlett, took the preliminary objection that the suit was defective, because no legal personal representative of the testator was a party. They said that there had been two recent decisions of Malins, V.C., to the effect that such a suit could proceed in the absence of a legal personal representative, but that those decisions were contrary to the settled practice of the Court as laid down by Lord Cottenham, L.C., in the case of

Penny v. Watts, 2 Ph. 149; s. c. 16 Law J. Rep. (N.S.) Chanc. 146, and by Lord Hatherley, when Vice-Chancellor, in the case of

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Beardmore v. Gregory, 2 Hem. & M.
491; s. c. 34 Law J. Rep. (N.S.)
Chanc. 392,

and that Lord Romilly had followed those cases in

Cary v. Hills, 42 Law J. Rep. (N.S.)
Chanc. 100; s. c. Law Rep. 15
Eq. 79,

after his attention had been called to the decision of Malins, V.C., in

Rayner v. Koshler (*ubi supra*).

They asked for the costs of the day, and contended that, although a preliminary objection for want of parties was not taken by demurrer or the answer, the defendants, taking it at the hearing, were entitled to the costs of the day if the objection appeared in the bill, and on this point cited—

Lowry v. Fulton, 9 Sim. 104; s. c. 8
Law J. Rep. (N.S.) Chanc. 314;

Furze v. Sharwood, 5 Myl. & Cr.
96;

The Attorney-General v. Hill, 3 Myl.
& Cr. 247.

That the rule was settled by the above cited decisions of the Court of Appeal, and is still law, notwithstanding the decisions in

Court v. Jeffery, 1 Sim. & S. 105;

Mitchell v. Bailey, 3 Madd. 61;

Wilson v. Broughton, 7 Law J. Rep.
(N.S.) Chanc. 120;

and

Coz v. Stephens, 9 Jur. N.S. 1144;
s. c. 33 Law J. Rep. (N.S.) Chanc.
62.

Mr. Fry and *Mr. Willis Bund*, for the plaintiffs, cited

Coots v. Whittington (*ubi supra*), in which Malins, V.C., in a careful judgment, after having his attention called to the decision of Lord Romilly in

Cary v. Hills (*ubi supra*), had adhered to his own decision in

Rayner v. Koshler (*ubi supra*), and that this, as the most recent decision, established that a suit could proceed against an executor *de son tort* in the absence of any properly constituted legal personal representative; and that at any rate, having regard to these decisions, it could not be contended that defendants, who did not take the objection by answer or demurrer, were entitled to the costs of

the day, on the ground that the objection clearly appeared on the bill; they further contended that the present practice of the Court was correctly stated by Kindersley, V.C., in the case of

Coz v. Stephens (*ubi supra*), and that the costs of the day were never given if the objection were not taken by demurrer or answer.

THE MASTER OF THE ROLLS.—Though it is only a small sum of money, which has given rise to an elaborate argument as to costs, the main question at issue is one of considerable importance, whether the Court can administer the estate of a testator without having his legal personal representative a party to the suit, but only an executor *de son tort*, or, as in this case, the legal personal representative of an executor *de son tort*. Had it not been for the decisions of Malins, V.C., which were cited in argument, I should have thought the matter clear; I have always understood it to be the practice to require the presence of the legal personal representative. But it appears that Malins, V.C., has decided the contrary. His first decision may not have been carefully considered, but in the later case he had the decision of Lord Romilly, in *Cary v. Hills* (*ubi supra*), before him, and in an elaborate judgment declared his adherence to his former decision. Under these circumstances, although in my own opinion Lord Romilly's view is the correct one, I should have hesitated before I decided in opposition to the later decision of the learned Vice-Chancellor, had it not been for the decision of Lord Cottenham in *Penny v. Watts* (*ubi supra*), and the decision of Lord Hatherley, when Vice-Chancellor, in the case of *Beardmore v. Gregory* (*ubi supra*). The first of those decisions, being that of a Court of Appeal, is binding upon me; the second, though not a judgment of the Court of Appeal, is entitled to great weight, and I prefer to follow it as being more in accordance with principle than those of Malins, V.C. I consider that the practice of the Court was settled by those decisions, and hold accordingly that this suit cannot proceed in the absence of a legal personal representative. I shall allow the objection,

but direct the cause to stand over, with liberty for the plaintiffs to amend.

With regard to the question whether the defendants, who did not take the objection either by demurrer or answer, are entitled to the costs of the day, my own impression was that, according to the practice of the Court, the defendants would not be entitled to costs, and I see from the cases cited that Kindersley, V.C., has so decided; but I consider that I am bound by the decisions of Lord Cottenham cited by Mr. Mackeson, which lay down the rule that where the objection appears on the bill the defendants are entitled to the costs of the day, although they do not take the objection by their answer, and I shall hold accordingly that all the defendants who take the objection are entitled to the usual sum of 10*l.* between them for the costs of the day.

Solicitors—Mr. A. A. Silberberg, for plaintiffs;
Messrs. Starr & Gribble and Messrs. Whitakers
& Woolbert, for defendants.

HALL, V.C. { *Re* THE COMMONWEALTH
1873. LAND, BUILDING, ESTATE
Nov. 15, 16, AND AUCTION COMPANY (LI-
19. MITED).
Ex parte HOLLINGTON.

Solicitor and Client—Authority—Undertaking not to issue Writ.

A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of fieri facias against the client's debtor, in consideration of the acceleration of the payment of the debt.

A breach of such an undertaking, by the issue of writs against the debtor, was held to be contrary to good faith, and the solicitor was ordered to pay the expenses of issuing such writs, and of an application to recover them.

In this case the question how far a solicitor has authority, on behalf of his client, to undertake not to issue a writ of fieri facias against such client's debtor, arose under the following circumstances—

Mr. Hollington was a debtor of the Commonwealth Company, under an order,

by which he and other persons were ordered to pay the costs of an unsuccessful petition, which he and such other persons had presented to wind up the company.

The costs were taxed on the 4th of April, 1873, and on that day the company's solicitor, Mr. King, wrote to Mr. Shearman, the solicitor of Mr. Hollington, and the other petitioners, demanding payment of the costs immediately.

Mr. Shearman, whose clients (as stated in the judgment of the Vice-Chancellor) were not obliged to pay the costs for fourteen days at least, offered immediate payment to Mr. King, the solicitor of the company, if he would obtain an authority to receive such costs from all his clients who appeared in opposition to Mr. Hollington's petition.

In the view taken of the facts by the Vice-Chancellor, Mr. King agreed and undertook to receive the costs as proposed, and to get the required authority; and, for this purpose sent a form of authority to Mr. Shearman, which Mr. Shearman approved of, and Mr. Shearman only delayed payment until the form was signed; but notwithstanding such undertaking, through a misunderstanding, for which the Vice-Chancellor considered Mr. Shearman was not to blame, two writs of *fi. fa.* were issued against the private property of Mr. and Mrs. Hollington, who paid the costs and sheriff's expenses under protest, and they now moved to have the writs set aside, or, in the alternative, to have the expenses repaid to them by the solicitor of the company.

Mr. Dickinson, Mr. Finlay, and Mr. C. H. Turner, for the motion.—The solicitor of the company had authority to undertake to accept the costs as he did, and it was a breach of good faith to issue the writs after such undertaking, and the Court has authority, in its general jurisdiction over solicitors, to make him pay the costs and damages caused to Mr. Hollington—

Levi v. Abbott, 4 Exch. Rep. 588;
s. c. 19 Law J. Rep. (N.S.) Exch.
62.

Mr. De Gez and Mr. Ingle Joyce, for the solicitor, Mr. King.—The alleged undertaking not to issue execution was not within the solicitor's powers—

Lovegrove v. White, 40 Law J. Rep. (N.S.) C.P. 253; s. c. 6 Law Rep. C.P. 440.

The Court cannot make Mr. King pay costs or damages, except at the instance of his client.

Mr. Lindley and *Mr. Brooksbank*, for the company, supported the motion.

Mr. Dickinson, in reply, cited on the liability of the solicitor to pay costs personally—

Aubrey v. Aspinall, Jac. 441;

Bromage v. Davies, 4 Jur. N.S. 683.

HALL, V.C. (on November 19th), gave judgment to the effect that the expenses caused to Mr. Hollington by the issue of the writs must be repaid him by the solicitor of the company, together with his costs of this application; and, in reference to the authority of Mr. King to enter into the undertaking, on behalf of his clients, which he held had been duly entered into, viz., not to issue the writs of *fi. facias*, he said—

The order directed payment by the petitioners to the company and the opposing shareholders, who were sixty-six in number, of their costs of the petition. The costs were taxed at 144*l.* 18*s.* 3*d.*, the taxing master's certificate being dated the 4th of April. On that day Mr. King, the solicitor of the company, and of the shareholders who had opposed the petition, wrote to Mr. Shearman, the solicitor of the petitioners, a letter, in which he said, "The Master certifies that he has taxed my client's costs at 144*l.* 18*s.* 3*d.*; unless I receive the amount in the course of Monday I shall proceed to enforce payment."

This demand of payment was a demand which Mr. King was not entitled to make, the practice not enabling him to enforce payment until either the 17th of April or some later period.

It was said in argument that what took place did not amount to an agreement or undertaking not to issue execution at the time when it could, according to the practice of the Court, be issued, but at most amounted only to a statement that the signatures would be procured if they could be procured, so as to allow of payment being made under the authority to

Mr. King instead of to the parties; that payment to Mr. King would have been a good payment without the authority; and that Mr. King could not, as solicitor of the company, bind the company not to issue execution, when the writ could be executed. As to the construction thus put upon what passed at the interview, I think it is not correct. It is to be observed that Mr. King's clients were interested in obtaining payment before the time when a writ could be executed, and that what took place provided for and contemplated such earlier payment, Mrs. Hollington and Mr. Hollington thus making a concession in favour of Mr. King's clients. Whether or not payment could without the authority have been properly and effectually made to Mr. King I do not think it necessary to determine, seeing that Mr. King and Mr. Shearman acted upon the view that the authority was necessary.

If Mr. King had not, as solicitor of his clients, authority to contract with the debtor, after judgment, that his client would not enforce payment of his demand until a specified time, he had, I think, authority to arrange on their behalf for acceleration of payment. In *Lovegrove v. White* (*ubi supra*), Smith, J., says—"The attorney has, no doubt, control over the process of execution, so far as such purpose is concerned, but that he has not complete control over it is shewn by the decision that if the debtor has been taken on a *ca. sa.* he cannot consent to his discharge; though, in the case of a *fi. fa.*, he can consent to the withdrawal of it, as in *Levi v. Abbott* (*ubi supra*). If it is for the advantage of the client, he may accept payment of the debt by instalments; but he cannot, I think, enter into a binding agreement that execution shall not issue for a given period of time."

The Vice-Chancellor went on to say, that owing to a misapprehension on the part of Mr. King's clerk, execution had been issued, notwithstanding the agreement, and that such execution was (though no blame attached to Mr. King) contrary to good faith; and as to Mr. Shearman's right to rely on the undertaking, he said—Mr. Shearman was, I think, led by Mr. King, acting through his clerk, to be-



lieve that payment was to be made to Mr. King after he had obtained the authority. Mr. Shearman therefore, I consider, properly abstained from paying the costs, even after the time when execution could issue for non-payment thereof. As to Mr. King, I consider I have jurisdiction to make him pay the costs occasioned by his having issued execution under the circumstances.

Solicitors—Messrs. T. W. Ratcliff & Son, for Mr. King; Mr. G. J. Nutt, for Mr. Shearman.

LORD SELBORNE, L.C.

for

LORD ROMILLY, M.R.

1873.

July 24.

Aug. 1.

SLOPER v. OLIVER.

*Set-off—Malins Act (20 & 21 Vict. c. 57).
Married Woman—Reversionary Personalty
—Husband's Interest.*

A testator by a codicil made in 1861 directed that after the death of his widow a legacy of 350l. should be paid to one of his daughters, who was then a married woman. The daughter's husband being indebted to the testator's estate, the daughter and her husband, during the widow's life, assigned the legacy to a purchaser for value by a deed executed under 20 & 21 Vict. c. 57. On the death of the widow, the testator's executors claimed to set off the debt due from the husband against the legacy to his wife:—Held, that under the Act, the purchaser got a good title clear from any set-off in respect of the husband's debt.

Seemle, if the husband had previously assigned his interest the case would have been different.

In this case his Lordship delivered a written judgment, which is set out in full below. It will be seen that the facts were those shortly stated in the head-note, the date of the codicil being 1861, and the purchaser a Mr. Lucas.

Mr. Fry and Mr. Locock Webb appeared for the married woman who was the plaintiff in the suit.

Mr. Solomon appeared for her husband.

Mr. Southgate and Mr. Speed, for the executors.—The assignee of the husband and wife cannot stand in any better position than the husband and wife themselves. Now, if no assignment had been executed, this legacy would have been payable to the husband, and the right of the executors to set off the debt due from him would be clear. The only object of the Act 20 & 21 Vict. c. 57 was to enable a married woman to make an assignment good against herself. Before that Act, the title of the assignee was liable to be defeated by the death of the husband before the reversion fell in. The Act then saves the assignee from that danger. But if the husband survives the period at which the reversion falls in he becomes entitled to receive it, and the help of the Act becomes unnecessary. The Act gives the assignee the wife's interest if she survives; he takes the husband's interest independently of the Act. In the events which have happened, therefore, he is a mere assignee of a chose in action and takes, subject to all equities affecting it.

Mr. Fischer and Mr. J. O. Wood, for the purchaser.—In any case the right of the executors to set off is subject to the wife's equity to a settlement, and we can claim as assignees of that. We submit, however, that on the words of the statute the wife has power to assign her husband's interest as well as her own.

They cited

Prole v. Soady, 37 Law J. Rep. (N.S.) Chanc. 246; s. c. Law Rep. 3 Chanc. 220;

Cherry v. Boulbee, 2 Keen. 319; 4 M. & Cr. 442; s. c. 7 Law J. Rep. (N.S.) Chanc. 178; 9 *ibid.* 118.

Mr. Southgate, in reply.—When the Act gives the wife power to assign the interest of her husband in her right, it must mean that only which he could himself assign, that is, his interest after deducting all rights of set-off or other rights of other persons.

THE LORD CHANCELLOR.—The question on which I reserved my judgment was, whether the executors of the testator are

entitled to retain out of a legacy of 350*l.* given by the second codicil to the plaintiff, Mrs. Sloper, a sum of 325*l.* 15*s.* 0*d.* due from Mrs. Sloper's husband to the testator's estate in priority to the right of Mr. Lucas, her assignee for value of the legacy. By the codicil, this legacy was made payable to Mrs. Sloper (not for her separate use, though another legacy of larger amount was given to her by the will for her separate use) after the death of the testator's widow, who died on the 19th of May, 1871. It was therefore reversionary when the assignment to Mr. Lucas, dated the 22nd of August, 1870, was made. That assignment was duly executed by Mrs. Sloper with the concurrence of her husband under the provisions of the statute 20 & 21 Vict. c. 57, and it is not disputed that the legacy was effectually assigned by her subject only to this question, whether the claim of the executors in respect of the husband's debt ought or ought not to prevail against the title of the assignee.

The general law of the Court is, that a legatee who is also a debtor to the testator's estate cannot (unless an intention that he should do so is manifested by the will) claim payment of his legacy without paying the debt, and therefore that the executors may in such a case retain the debt out of the legacy when payable. "It may be observed" (says Sir E. V. Williams in his work on the law of executors, p. 1,805, 7th edition), "that the term 'set-off' is somewhat inaccurately used in cases of this kind. The proper use of that expression seems applicable only to the mutual demand of debtor and creditor. A right of this nature is rather a right to pay out of the fund in hand, than a right of set-off. And such a right of payment can only arise where there is a right to receive the debt so to be paid, and the legacy or fund, so to be applied in payment of the debt, must be payable by the person entitled to receive the debt." A legacy given to a married woman, but payable by law to her husband, is in the same position, for this purpose, as a legacy to the husband himself. Inasmuch, however, as the husband's right is subject to the wife's chance of survivorship, as long as the legacy is reversionary, and to

her equity to a settlement when it becomes vested in possession during the marriage, the right of retainer for the husband's debt is also subject to those rights; and it would seem to be most consistent with the sound principle that every right and power of the wife as distinct from her husband ought in such a case to prevail over the claim of retainer for the husband's debt.

As long as the fund is reversionary, the conditions necessary for the application of the legacy towards payment of the husband's debt to the testator (whether the term "set-off" or the term "retainer" ought to be used) do not exist. Nevertheless, I take it to be clear law, that the assignee of a contingent or reversionary legacy would, when the legacy became payable, be subject to this right, if the legatee would himself have been subject to it in the absence of any assignment.

The first point to be determined is, whether Mr. Lucas ought in this case to be regarded as being, on the true construction of the statute 20 & 21 Vict. c. 57, the assignee of both the husband and the wife according to their respective interests, or whether he is the assignee of the wife only, discharged from the *jus mariti* by her deed under the statute. If the latter, it must be further determined whether he takes the legacy discharged from all right of retainer which the executors might have asserted against the husband, or only from such beneficial interest as, subject to that right of retainer, might have been now remaining in the husband himself.

The statute says, that "it shall be lawful for every married woman, by deed, to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband, in her right in personal estate" (under any instrument, not being a marriage settlement, made after the 31st of December, 1857), "as fully and effectually as she could do if she were a *feme sole*; and also to release and extinguish her right or equity to a settlement out of any personal estate, to which she or her husband in her right may be entitled under any such instrument as aforesaid." Property

as to which she is restrained from anticipation, by the terms of the instrument creating her title, is excepted; and "no such disposition, release, or extinguishment, shall be valid, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as after directed" (i.e., in the manner prescribed by the Act for the Abolition of Fines and Recoveries for the Acknowledgment and Perfecting of Deeds disposing of Interests of Married Women in Law).

I am of opinion, that by an assignment duly made under this statute, the wife is enabled to pass and transfer personal property to which she is entitled in reversion discharged from her husband's right, as fully and effectually as if she were a *feme sole*, and that the assignment ought not to be regarded as that of the husband and the wife according to their respective interests. This is apparent from three things—First, Though the husband must concur in the deed, the power of disposing, not only of her own interest, but of that of her husband in her right, is in terms attributed to the wife. Secondly, The words, "as fully and effectually as if she were a *feme sole*," manifestly relate to the operation and not to the formalities of the deed, in respect of which latter, the assignor is treated not as a *feme sole*, but as a married woman; and, Thirdly, the equity to a settlement is released and extinguished, manifestly not in favour of the husband or of his creditors, but so as to give to the assignee, immediately on the execution of an assignment, an absolute title.

Unless, therefore, the concurrence of the husband in such a deed ought to be regarded as against equity, when the subject of the assignment is a legacy out of which if the husband had been entitled to reduce it into possession, the executors would have been entitled to retain a debt due from him to the testator's estate, the statute would appear to give Mrs. Sloper's assignee in this case as good a title as if that lady had been unmarried or a widow at the date of the assignment, in which case (of course) the husband's debt could not have been retained.

I am of opinion that the executor's

future and contingent right of retainer as against the husband, if he should eventually have become entitled to reduce this legacy into possession, did not stop the husband in equity from concurring with his wife in such a deed executed by her under this statute. It would doubtless have been otherwise, if he had himself previously dealt with his *jus mariti* in this legacy, by any deed or contract for value; but the right claimed by the executors exists (if at all) by operation of law only, and not by any manner of contract.

It was, however, said that the words of the statute enabling a married woman to dispose of the future or reversionary interest "of such married woman or her husband in her right," must be understood, as to the husband's interest in her right, under the deduction of all claims, which as against the husband would have operated to reduce the *quantum* of his interest. This suggestion struck me at the time as very ingenious, but it is (in my opinion) unsound. It is not accurate to say, that claims which follow and attach themselves upon the husband's interest in the wife's right, operate by way of deduction from it. They are derivative from or they may be adverse to it, but the existence of the *quantum* of the *jus mariti* itself are prior to and in fact constitute the foundation of all such claims. The construction suggested cannot, in my opinion, be reconciled either with the express declaration that the wife's disposition is to operate "as fully and effectually as if she were a *feme sole*," or with the absolute and unqualified extinguishment of her equity to a settlement.

If, before the statute, a testator had given such a reversionary legacy to a married woman whose husband was indebted to him, with a power to her to dispose of it while reversionary in the very words of this statute, and under the same condition so far as relates to the husband's concurrence, it cannot, I think, be doubtful that he would have created a power paramount to (and in case of its exercise) exclusive of any right of his executors to retain the husband's debt out of the wife's legacy. The effect of the statute is in my opinion the same.

The decree will therefore direct pay-

ment of the 350*l.* legacy to Mr. Lucas without any deduction on account of Mr. Sloper's debt to the testator's estate. As to the costs, I think that Mr. Lucas ought to be allowed the costs of his appearance to defend his title here and in chambers, and that they ought not to be deducted from the plaintiff's general costs of the suit.

Solicitors—Messrs. Chappell & Son, for the plaintiff; Mr. J. B. Smith, for the executors; Messrs. Webb, Stock & Burt, for the purchaser.

MALINS, V.C. }
 1873. } WHITE v. WHITE.
 Nov. 15. }

Will — Construction — Two Codicils — Identical Gift in each — Legacies Cumulative or Non-cumulative.

*A testator having executed his will in duplicate, subsequently executed on the same day two codicils, almost in identical words, giving by each a legacy of 5,000*l.* to D. for life, remainder to her children, with remainder over. He then deposited one codicil with D., the other with his solicitor. A short time afterwards he executed a further codicil, whereby he confirmed his will, "except so far as the same is altered by a codicil thereto, dated the 2nd day of April, 1868, which last mentioned codicil" he thereby confirmed. In 1871 he took away from his solicitor the codicil he had deposited with him and handed it to D., and, at his death, D. was in possession of both. Both were admitted to probate:—Held, that the codicils were merely duplicates of each other, and that D. was only entitled to one legacy of 5,000*l.**

The late Sir John Henniker by his will, dated the 7th of February, 1860, bequeathed his residuary estate to Mrs. Whyte. The will was executed in duplicate, one copy was given into the hands of the lady herself, and the other into the hands of the testator's solicitor.

On the 2nd of April, 1868, the testator executed two codicils, which, though

not exactly in the same words, were substantially identical; by each of them he gave to Mrs. Dymocke a legacy of 5,000*l.* for her life, with remainder to her children, with remainder over to the lady of the manor of Compton Martin.

To one of these codicils was added a direction that the 5,000*l.* should be invested in the funds. Both the codicils were executed at the same time, and in the presence of, and attested by, the same witnesses.

One of these codicils he sent to Mrs. Dymocke, and the other to his solicitor. Shortly before his death he obtained from his solicitor the codicil he had sent to him, and sent that to Mrs. Dymocke, and at his death both codicils were in her possession.

The testator made another codicil, dated the 21st of September, 1869, the latter and material part of which was as follows—"I confirm my said will, dated the 7th day of February, 1860, except so far as the same is altered by a codicil thereto, dated the 2nd day of April, 1868, which last-mentioned codicil I hereby confirm."

The testator died on the 8th of August, 1872, and his will, together with the three codicils, were duly proved.

A suit having been instituted by the administrator of the estate of Sir J. Henniker, a question arose whether, under these circumstances, the legacies of 5,000*l.* were cumulative, or whether the codicils by which these legacies were given were merely duplicates one of the other; and a summons was taken out in the administration suit by the executors to raise the question. This summons was now adjourned into Court.

Mr. Glasse and Mr. Freeman, for Mrs. Whyte, contended that it was clear that the testator did not intend to give two legacies of 5,000*l.* each. It appeared to have been his habit to make duplicates of his testamentary instruments, and he had only done with his codicil as he had done previously with his will. The two codicils being of the same date, almost identically the same in words, and the legacy being of the same amount in each, it was impossible to hold that they were cumulative. If the legacies had been of different amounts, it would then have been very

difficult to argue that both were not intended to be given. It was also clear that the testator when he executed the codicil of the 21st of September, 1869, had only one previous codicil in his mind or he would not have said, "except so far as the same is altered by a codicil made," but would have referred to two codicils.

Mr. Pearson and *Mr. Rigby*, for the children of *Mrs. Whyte*, supported the same view.

Mr. Cotton and *Mr. Bowcliffe*, for *Mrs. Dymocke* and her children, contended that the legacies were cumulative. It was clear, from the fact of the testator having obtained the codicil from his solicitor, and sent it to *Mrs. Dymocke*, and from both being in her possession at his death, that he intended her to have both legacies; and, moreover, both codicils were admitted to probate. The plain rule of construction was that gifts by two testamentary instruments to the same individual were to be construed cumulatively—

Lee v. Pain, 4 Hare, 201; s. c. 14

Law J. Rep. (N.S.) Chanc. 346;

Wilson v. O'Leary, 41 Law J. Rep.

(N.S.) Chanc. 342; s. c. 7 Chanc.

App. 448.

One reason for his executing two codicils may have been that he wished to retain the power at some future time to cancel or destroy one, without shewing to the object of his bounty an intention to alter the amount of the gift, or a desire to revoke it altogether. As a matter of construction, she is entitled to both legacies.

When once the codicils were admitted to probate as two testamentary instruments, the fact that they were executed at the same time is immaterial; and although there is only the repetition of the same legatee, and a legacy of the same amount in each, the legatee takes both legacies.

Mr. Glasse, in reply.—The fact of the two codicils being admitted to probate amounts to nothing, and cannot be taken into account in coming to a decision on the case; it does not follow that in every case in which legacies are given by different instruments the legatee would be entitled to claim as many legacies as there were instruments—

NEW SERIES, 43.—CHANC.

Coote v. Boyd, 2 Bro. C.C. 521;
Ridges v. Morrison, 1 Bro. C.C. 389;
Fraser v. Byng, 1 Russ. & M. 90;
Russell v. Dickson, 4 H.L. Cas. 293;
Barclay v. Wainwright, 3 Ves. 462;
Hemming v. Clutterbuck, 1 Bligh,
N.S. 479.

Mr. Cotton, in rejoinder, on the cases which had been cited by *Mr. Glasse* in his reply.

MALINS, V.C.—A number of cases have been cited, but they all proceed on the same principle. The rule of law is clear, that where there are separate instruments, giving legacies to the same person, the *prima facie* presumption is that being by different instruments different legacies are given; that is, if the testator makes two instruments, he must be presumed to have intended to give twice; but this *prima facie* presumption is liable to be rebutted, and there are numerous cases, some of which have been cited, in which, by the internal evidence of the instruments themselves, and looking at all the surrounding circumstances, the Court has arrived at the conclusion that double or cumulative legacies could not be intended. No case has been cited in which it has been decided that legacies given by two instruments, executed at identically the same time, have been held to be cumulative.

Now what are the probabilities in this case? The testator executed two instruments at the same time, each containing a legacy of precisely the same amount to the same individual; for the case is the same as if *Mrs. Dymocke's* legacy had been given to her solely. Now if his object had been to give 10,000*l.* he would have saved himself trouble by executing one instrument only. It has been suggested, on behalf of *Mrs. Dymocke*, that his motive for executing two instruments, giving 5,000*l.* by each, may have been to enable him to destroy one without hurting the feelings of *Mrs. Dymocke*, by shewing her that his feelings of affection had diminished towards her when he lessened the amount of her legacy; but I think that argument is too subtle for me to act upon.

As a general rule, I should presume that when a testator executes at the same time two codicils, as he has done here,

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giving to the same person, or the same set of persons, legacies of precisely the same amount, it was not his intention to give cumulative or different legacies; but that his object in executing the instrument in duplicate was, that if one should be lost the other might be forthcoming. That, I think, in this case is distinctly shewn to have been the object of the testator, by his sending one of the instruments to the lady, the object of his bounty, and the other to his solicitor, for safe keeping. If, therefore, it is possible to arrive at the conclusion that repetition and not cumulation was the object, I am clearly of opinion that it was repetition; that is, that one legacy only was intended, and that the instrument was executed in duplicate solely for the object to which I have referred.

I should have arrived at this conclusion if matters had stood upon the transaction of the 2nd of April, 1868, and in doing so I think I should have been acting in accordance with the principles laid down in all the cases which have been cited; but I am relieved from any difficulty upon the subject, for matters did not stop there. On the 21st of September, 1869, nearly a year and a half afterwards, the testator executed another codicil [the Vice-Chancellor read this codicil, the latter portion of which is set out above, and continued]—Now, it has been suggested, that although the testator uses the word “codicil,” he might have meant “codicils;” but I am bound to take the words of the testator, and to presume that the testator knew exactly what words he was using (for I cannot attend to the suggestion that he did not observe the difference between codicil and codicils), and that he deliberately intended to state that he had executed one codicil to his will, and that one codicil, and one codicil only, he thereby confirmed. Therefore, if I take it as a matter of intention, I am perfectly satisfied that the intention of the testator was to give one legacy only; and I come to this conclusion from the internal contents of the instruments, and I am corroborated by all that took place, and by all the surrounding circumstances.

There is one other circumstance to which I have to advert, as somewhat in-

explicable. The testator having, in 1868, placed one codicil in the hands of his solicitor, afterwards took it away from him, and in 1871 gave it to Mrs. Dymocke. Why he did this it is impossible to say, but the fact can have no weight in deciding this case, for I must determine the question before me upon what took place in 1868, as interpreted by the testator in the codicil of September, 1869. No act he did after that date could alter the testamentary disposition he had made. Therefore, if I am right in my conclusion that the effect of what he did on the 2nd of April, 1868, as declared by himself in the codicil of the 21st of September, 1869, was to give one legacy only, it is perfectly clear that nothing he did afterwards could give another. Whether he gave the second instrument to her for safe custody, or to produce an impression upon her, it is impossible to say.

Upon every ground I come to the conclusion that one legacy only was intended to be given by the testator, and that the executrix must pay into Court, to the use of Eliza Dymocke and her children, £5,000L., with interest from the end of the year from testator's death. The costs to be costs in the cause.

Solicitors—Messrs. Kingsford & Dorn, plaintiffs and first defendant; Messrs. Rowcliffe, Rowcliffe & Rawle, agents for W. Rees Mogg, Cholwell, for other defendants.

BACON, V.C. }
1873. } LAMBERT v. LAMBERT
June 3. }

Administration — Interest — Costs of Profits of Business.

In administering an estate a proportionate amount of capital and the income made in the first year are to be set aside in payment of debts, legacies, funeral and testamentary expenses, and costs as made in a business are to be treated as coming out of the capital.

This was an adjourned summons for the purpose of determining the mode of charging debts, legacies, funeral and testamentary expenses.

administration suit as between income and capital.

The testator in the cause, C. F. Lambert, bequeathed his personal property, including his share in a silversmith's business, to trustees, on trust to convert the same, and out of the proceeds to pay his testamentary expenses and debts, and to invest the residue. He authorised his trustees, with the consent of his wife during her life, and at their discretion afterwards, to employ any part of his personal estate in his business. The testator gave his wife a life interest in the trust funds.

The testator died in December, 1869, and this suit was soon afterwards instituted to administer his estate. The testator's personal estate used in his business was continued to be so used under the direction of the Court. In July, 1872, on further consideration an enquiry was directed of what amount of capital with the income for one year on the amount of such capital was required for payment of the funeral and testamentary expenses, including the costs of the suit, debts and legacies of the testator and interest until time of payment.

The evidence on the enquiry proved that the total amount of capital was 10,209*l.* 17*s.* 11*d.*, and the income of the first year, including profits, was 1,571*l.* 8*s.* 5*d.* There was paid for funeral and testamentary expenses and debts 4,729*l.* 2*s.* 5*d.* The debts and expenses were paid within a year from the death of the testator. The chief clerk certified that 4,098*l.* 6*s.* 3*d.* was the amount of capital, which, together with 630*l.* 16*s.* 2*d.*, the proportionate amount of income, was required for payment of the debts, expenses, costs and legacies of the testator. The defendant, the tenant for life, contended that the interest on the capital required for payment ought for the purpose of such payment only to be reckoned at five per cent, and that therefore 4,463*l.* 12*s.* 10*d.* ought to be paid out of capital, and 265*l.* 9*s.* 7*d.* only out of income, and on that footing took out this summons to vary the certificate.

Mr. Kay and Mr. O. Hall, in support of the summons, contended that in administration everything ought to be paid out

of capital except so far as by postponing the payment of debts the executors should incur a payment of interest out of the estate, which interest ought properly to be paid out of the accruing interest belonging to the estate. This interest was only at five per cent., and in this case had been paid within the year, therefore in strict right the tenant for life ought to have the whole profit less what was actually paid for interest. And this was in accordance with the spirit of

Allhusen v. Whittell, 36 Law J. Rep. (N.S.) Chanc. 929; s.c. Law Rep. 4 Eq. 295.

Mr. Amphlett and Mr. Rowcliffe, for the plaintiffs, who were entitled in remainder, were not called upon.

BACON, V.C., said he saw no difference between a sum producing income by being invested in consols and a sum producing a much larger income by being invested in a goldsmith's business. The principle enunciated in *Allhusen v. Whittell* (*ubi supra*) must govern if applicable to this case, and he was unable to draw any distinction. The summons must be dismissed.

Solicitors—Messrs. Gregory, Rowcliffes & Rawle, for all parties.

JESSEL, M.R. }
1873. }
Nov. 10. }

LINE v. HALL.

Appointment—Excessive Exercise of Power—Estate Tail—Term of Years—Cyprus.

A testator having power to appoint an estate to any one or more of his children by will, gave it with other property of which he was owner in fee, to trustees for a term of 1,000 years, to raise portions for grandchildren (not objects of power), with usual proviso for cesser in case the term should be incapable of taking effect, with remainder after the expiration of the term, and in the meantime subject thereto, to G. K. Hall, one of his sons (an object of the power) for life, remainder to his issue in tail. The objects of the term were not satisfied:—

Held, that the will operated as an execution of the power, and that G. K. Hall took under the cyprès doctrine an estate tail.

G. Kilworth, by will, dated in 1805, gave and devised all his messuages, lands, tenements and hereditaments situate at Napton-on-the-Hill, in the county of Warwick, unto his daughter, Elizabeth, the wife of E. E. Hall, of Hanslop, in the county of Bucks, for her life, and after her decease he gave and devised the same premises to the said E. E. Hall during his life, and after his decease he gave and devised the same premises "to all or such one or more of the children or grandchildren of his said daughter, Elizabeth, which should be living at the time of her decease, and in such shares and proportions and for such estate and estates, manner and form, as the survivor of them, the said E. E. Hall and his said daughter, Elizabeth, should by any deed or deeds in writing under his or her hand and seal, to be executed in the presence of and attested by two or more credible witnesses or by his or her last will to be by him or her signed, sealed and published in the presence of and attested by three or more credible witnesses, direct, limit, appoint, give or devise the same. And in default or for want of such limitation, appointment, gift or devise, or as to all such parts of his said hereditaments and premises as should not be disposed of by his said daughter or son-in-law, the said testator gave and devised all such of the same premises as should not be so disposed of as aforesaid to all and every the children of his said daughter, Elizabeth Hall, that should be living at her decease, and to their heirs and assigns equally, share and share alike to take as tenants in common and not as joint tenants."

E. E. Hall was owner in fee of an estate at Napworth, called the Home Farm, and also of a small piece of land adjoining the estate of the testator Kilworth, and which, with such estate, were occupied together and called Fox's Farm.

Mrs. E. E. Hall (the testator's daughter, Elizabeth) died in 1820, leaving surviving her, her husband and four sons, Thomas Hall, G. K. Hall, E. E. Hall (the son) and

William Hall, neither of whom had, at the date of her death, any children; and such sons were therefore the only objects of the power.

E. E. Hall (the husband of Elizabeth), by his will in 1846, gave the Home estate to his son, Thomas Hall, for life, with remainder to trustees for a term of 2,000 years, remainder to William Hall for life, remainder to his sons successively in tail, remainder to his daughters successively in tail. He devised Fox's Farm to trustees for a term of 1,000 years, remainder to G. K. Hall for life, remainder to his first and other sons successively in tail, remainder to his daughter in tail, with remainder to Thomas Hall for life, with remainder, with like limitations, to his sons and daughters successively in tail, as in the devise of the Home Farm.

He provided by a shifting-clause that the Home Farm and Fox's Farm should not come to the same person. He declared the trusts of the term of 1,000 years to be to raise portions for his grandchildren, children of E. E. Hall (the son), and for the children of Thomas Hall and G. K. Hall, with a proviso for cesser of the term in case the trusts should be performed or become incapable of taking effect.

This proviso was in the following terms—"And he thereby provided and declared his will to be that when the trusts thereinbefore declared of the said term of 1,000 years should have been fully performed or satisfied, or have become unnecessary or incapable of taking effect, and the said John Alsop, James Goodman and William Savage Poole [the trustees] and every of them, their, and every of their executors and administrators, should have been fully reimbursed and satisfied, all costs, charges and expenses, if any, to be occasioned by or relating to the trusts thereby in them reposed as aforesaid (and which they were thereby authorised and empowered to levy and raise by all or any of the ways and means aforesaid, or by any other reasonable ways or means aforesaid and to retain accordingly) the said term of 1,000 years should subject, and without prejudice to any disposition which should have been made of the premises comprised therein or any part thereof, in pursuance of the

trusts aforesaid, absolutely cease and determine."

E. E. Hall, the father (husband of Elizabeth Kilworth), died on the 7th of January, 1847.

Thomas Hall died in May, 1863, leaving four sons.

G. K. Hall on the 2nd of February, 1864, executed a disentailing deed of Fox's Farm.

G. K. Hall died in 1870, having devised all his real estate to the plaintiffs in the suit in trust to sell.

The portions to be raised by the term of 1,000 years had not been raised, and the object of the term had not been satisfied.

The question among others was now raised whether the gift by will of E. E. Hall (the father) of Fox's Farm operated as an exercise of the power of appointment given by G. Kilworth's will as to the part of Fox's Farm which formed the Kilworth estate, and whether under the doctrine of *cypres* G. K. Hall took an estate tail under it.

The bill had been filed by the devisees of G. K. Hall against the other persons interested under his will or the will of G. Kilworth in order to obtain a decision on that point. A partition was prayed for and sale.

Mr. Fry and Mr. Batten, for the plaintiffs, the devisees of G. K. Hall.—We contend that the will of E. E. Hall shews a clear intention to execute the power. If so, as the gift to the grandchildren is void, the Court will according to the doctrine of *cypres* give an estate tail to the father in order as nearly as possible to carry out the general intention of benefiting the descendants of the son.

The rule is thus stated without any qualification in

Sugden on Powers, p. 498.

There are, however, two objections that will be raised in this case—

First. That the testator has given the estate to trustees for a term of years prior to the estate to G. K. Hall. It is said you cannot give effect to the gift because you cannot bar the term, but see

East v. Twyford, 4 H.L. 517.

[THE MASTER OF THE ROLLS.—Here, however, the subsequent gift is to take effect immediately if the term becomes

incapable of taking effect, which has happened.]

That disposes of the first objection. The second is that G. K. Hall has included in the gift property of which he is absolute owner, and therefore the words will have, according to our contention, two different effects, they will give an estate for life to G. K. Hall, in the part of which E. E. Hall was absolute owner, with remainder in tail to his issue, and an estate tail to G. K. Hall in the property, the subject of the power.

This objection is not sound. It was raised in

Robinson v. Hardcastle, 2 Term Rep. 241;

and overruled. All that the Court has to consider is whether there was an intention to exercise the power. The jurisdiction of the Court to remedy defective and excessive execution of powers proceeds on the presumption that the execution cannot operate according to the terms of the gift, but that the Court must modify them.

They also cited

Stackpole v. Stackpole, 4 Dr. & W. 320;

Mr. Roxburgh and Mr. Doughty, for E. E. Hall, the heir-at-law, contended that the will did not operate as an execution of the power, or, if it did, that it only gave a life estate to G. K. Hall.

Mr. Speed, Mr. L. Field and Mr. W. Barber, for other defendants.

THE MASTER OF THE ROLLS.—I think that if ever there was a case where the doctrine of *cypres* should be applied, this is one. The testator, E. E. Hall, has evinced a clear intention that one child and his descendants should take, and the way to carry out that intention as nearly as possible is to give the child an estate tail. I shall hold accordingly that G. K. Hall took an estate tail, and that it was duly barred by the disentailing assurance of 1864, and therefore that the property passed to the plaintiffs under the will of G. K. Hall.

Solicitors—Messrs. Peacock & Goddard, agents for Mr. Davies, Southam, for plaintiffs; Messrs. Pownall, Son, Cross & Knott, for heir-at-law; Messrs. Rickards & Walker, for other defendants.

MALINS, V.C.
1873.
Nov. 7, 21, 25.
Dec. 12.

In re THE EXMOUTH
DOCKS COMPANY.

Company—Winding-up—Special Act—Companies Act, 1862—Exception in section 199—"Railway Company"—Dock Company with Power to make Branch Railway—Jurisdiction—Debenture-holder—Receiver—Statutory Remedy—Plea of Illegality of Debentures—Estoppel—Costs.

A "dock company" incorporated by a special Act, with power to construct a short subsidiary "branch railway," is not a "railway company" within the exception in section 199 of the Companies Act, 1862.

A company cannot, on a winding-up petition presented by a debenture-holder, plead informality on the part of their directors in issuing the debentures as a valid objection to a winding-up order.

Where a company is empowered by its special Act to raise money by debentures, and the Act provides that the debenture-holders may enforce payment of their debts by the appointment of a receiver, the Court will not make a winding-up order on a petition by a debenture-holder who has not first tried the remedy provided by the special Act.

Observations as to costs of opposing winding-up petitions.

This was a petition to wind up the Exmouth Docks Company, presented by Mr. Richard Turnor as the holder of debentures for 15,000*l.*, being the whole amount of debentures which the company were by their special Act authorised to issue.

The company was incorporated by "The Exmouth Docks Act, 1864," entitled, "An Act to authorise the construction of docks and a branch railway, and other works at Exmouth, in the county of Devon, and for other purposes;" and reciting that "the making of docks and a branch railway at Exmouth, in the county of Devon, would be attended with local and public advantage." By the interpretation clause (section 2) the expression, "the works," was defined to mean, "the docks, railway and works of the company to be constructed under the

powers of this Act in connection with the said docks."

By section 3 various public Acts were incorporated with the special Act, including Part I. of "The Companies Clauses Act, 1863;" "The Lands Clauses Consolidation Act, 1845;" "The Lands Clauses Consolidation Acts Amendment Act, 1860;" "The Railways Clauses Consolidation Act, 1845," and Parts I. & III. of "The Railways Clauses Act, 1863."

Section 5 fixed the capital of the company at 60,000*l.* in 12,000 shares of 5*l.* each.

Section 8 authorised the company to borrow on mortgage the sum of 15,000*l.*, but provided that no part of such sum should be borrowed until the whole of the capital should have been subscribed for *bona fide*.

Section 9 then provided, so far as is material, as follows—"The mortgagees of the company may enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages by the appointment of a receiver."

By section 21, the works authorised by the Act were described as, first, "A dock or docks," with works connected therewith; and secondly, "A railway," about half-a-mile in length, to connect the docks with a line of railway, now forming part of the main line of the London and South-Western Railway. The Act then went on to prescribe, as in ordinary railway Acts, the tolls to be taken for first, second and third class passengers, and for goods conveyed "upon the railway."

Shortly after the passing of the Act, the company commenced the construction of the works, and they subsequently completed a considerable part of them, including the branch railway, at a cost of about 20,000*l.*, and opened the same for public use.

The works were executed by Mr. Jackson, a contractor, under an agreement by which he agreed to accept payment of the contract price, partly in paid up shares, and partly in debentures. The petitioner had, with the knowledge of the directors of the company, advanced large sums of money to Mr. Jackson to enable him to

carry on the works, and as a security for such advances, debentures to the extent of the 15,000*l.* authorised by the special Act, were, at Mr. Jackson's request, issued and delivered by the company to the petitioner. The debenture debt and interest having fallen into arrear, and the affairs of the company having become involved, Mr. Turnor presented this petition, praying the usual compulsory winding-up order.

In an affidavit filed in opposition to the petition by the company's secretary, who was also their solicitor, he stated that some of the debentures were informal, as they were originally issued partly in blank, and without having been signed by any of the directors, but that they were subsequently signed by two directors only, and even then not at one of their meetings at which, under the special Act, three were necessary to form a quorum. The company's seal was, however, affixed to all the debentures, and they were also countersigned by the secretary.

Upon the petition first coming on for hearing a preliminary objection was taken on behalf of the company, that the Court had no jurisdiction to entertain the petition, inasmuch as the company, being incorporated for the purpose of making "a railway," was a "railway company," and therefore within the exception contained in section 199 of the Companies Act, 1862, which enacts that any company may be wound up under the Act, "except railway companies incorporated by Act of Parliament."

Malins, V.C., accordingly desired the preliminary objection to be argued before going into the merits of the petition.

Mr. Higgins and *Mr. W. W. Karlake* (on Nov. 7, 21), in support of the objection.—One of the objects, though we admit it was not the principal object, of the company's incorporation, was the construction of a railway; therefore it is in fact a "railway company," and within the exception in section 199 of the Companies Act, 1862. Moreover, the special Act incorporates all the public Acts relating to railways, and contains all the provisions, such as those relating to tolls, applicable to a railway company. The

company, having been incorporated for making a railway, can only be wound up under the provisions of The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), and The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), by section 31 of which the former Act is extended, section 3 defining a railway company to mean "a company constituted by Act of Parliament, for the purpose of constructing, maintaining or working a railway either alone or in conjunction with any other purpose." That definition applies precisely to this company. They also referred to 3 & 4 Vict. c. 97 (an Act for regulating Railways).

Mr. Jackson, for seventy-seven shareholders, and

Mr. Langworthy, for twenty-one shareholders, also supported the objection.

Mr. Glasse and *Mr. Chitty*, for the petitioner.—This company cannot with propriety be called a "railway company;" it is a dock company. This short line of railway is merely subsidiary to the docks, and without them would be useless. The special Act is not styled a "railway" Act, but a "dock" Act, and the company is in fact to all intents and purposes a dock company. Section 29 of The Abandonment of Railways Act, 1850, and section 4 of The Railway Companies Act, 1867, shew that those Acts are applicable only to railway companies, properly so called. Although the company is incorporated by a special Act, this Court has jurisdiction to make a winding-up order just as in the case of a canal company—

In re Wey and Arun Junction Canal Company, 36 Law J. Rep. (N.S.) Chanc. 509; s. c. Law Rep. 4 Eq. 197;

In re Basingstoke Canal Company, 14 W. R. 956;

In re Bradford Navigation Company, 39 Law J. Rep. (N.S.) Chanc. 161, 733; s. c. Law Rep. 10 Eq. 331; s. c. Law Rep. 5 Chanc. App. 600.

MALINS, V.C., said the case was open to very great doubt. The question was whether this company was a "railway company," and as such came within the

exception of the 199th section of the Act of 1862, and whether the Court had power under that Act of making a winding up order. Was this then a "railway company incorporated by Act of Parliament"? Ordinarily speaking, a railway company was a company incorporated by Act of Parliament for making a railway; but looking at the object of this special Act, this company was a dock company, the railway being a mere subordinate part of the works authorised by the Act. There was considerable force in the argument that the railway could not exist without the docks. The legislature might have made the 199th section clearer by inserting after the exception of "railway companies" some such words as "the principal part of whose undertakings consists of railways." Here the railway was a very small part of the undertaking; still it was a railway, and the special Act incorporated all the railway Acts and prescribed the tolls that were to be taken for the use of the railway. If it were not a railway it would not be necessary to prescribe these tolls. The clauses of the Act, in prescribing what tolls were to be taken for first, second and third class passengers, seemed to him to be inconsistent with the real facts of the case; for it was absurd to suppose that there was any intention of using this little bit of line as a regular railway. Probably these clauses were put in because they were usually inserted in all railway Acts, but they were inapplicable to such a case as this. However he must take the Act as he found it, and he found this—that its object was the construction of a dock and a railway; there was authority to take distinct and separate tolls for the railway, and every provision was inserted applicable to a railway. This, therefore, was a company incorporated by Act of Parliament, and it might be said it was a company for the construction of a railway: it had all the *indicia* of a railway company. The reason why railway companies were excepted from the 199th section was because they came within the Railways Abandonment Act, 1850; and by the Railway Companies Act, 1867, also passed for enabling railway companies to be

wound up, a railway company was defined to mean a company formed for the purpose of constructing "a railway either alone or in conjunction with any other purpose." It seemed to him, therefore, on the plain language of the 199th section, that he must come to the conclusion that a railway company was a company authorised by Act of Parliament to make a railway. At the same time he was satisfied that it was not the intention of the legislature that such a case as this should come within the exception. Although the special Act was only called "the Exmouth Docks Act," he could not reject the object for which it was incorporated, namely, to make a dock and a branch railway. He must therefore decide, that this was a "railway company incorporated by Act of Parliament." He had great difficulty in coming to that conclusion, but, at present, he was unable to come to any other conclusion than that this was a case within the exception of the 199th section. If he was right in his conclusion the petition, having been presented in a matter in which the Court had no jurisdiction must be dismissed with costs, but he would reconsider the point and mention the matter again.

MALINS, V.C. (on Nov. 25), said that although he had decided on the former occasion that the company was within the exception of the 199th section, he felt so much doubt upon the subject that at the close of the case he desired the registrar not to draw up the order until the matter should be mentioned again. He had said that any company incorporated for the purpose of making a railway was a "railway company incorporated by Act of Parliament." Mr. Glasse and Mr. Chitty, on behalf of the petitioner, had argued that the railway was merely subsidiary to the docks; that the construction of docks was the principal object of the company's special Act; and that, therefore, it was not a railway but a dock company. Having felt, as he had said, great doubt upon the subject, he had further considered it, and he now came to the conclusion that the arguments of Mr. Glasse and Mr. Chitty were well founded, and that he must consider this

company as a dock company simply. There was much to be said on both sides of the question, but that was the conclusion at which he now arrived. Therefore, the preliminary objection must be overruled and the petition must be heard on its merits. The point was one of so much doubt that he thought it desirable that the opinion of the Court of Appeal should be taken upon it before going into the merits of the whole case.

Dec. 12.—The Vice-Chancellor's decision not having been appealed from, the petition now came on to be heard upon the merits.

Mr. Glasse and Mr. Chitty, for the petitioner.—We submit that this company ought to be wound up. They intend to dispute the validity of these debentures, but on unsubstantial grounds which do not preclude the Court from making a winding up order—

Re The Imperial Silver Quarries Company, Limited, 16 W.R. 1220;

In re King's Cross Industrial Dwellings Company, Law Rep. 11 Eq. 149.

Mr. Higgins (Mr. W. W. Karslake with him), for the company.—The company are not liable on these debentures inasmuch as they were issued without due authority—

D'Arcy v. The Tamar, &c., Railway Company, 36 Law J. Rep. (N.S.) Exch. 37; s. c. Law Rep. 2 Exch. 158;

Chambers v. The Manchester and Milford Railway Company, 5 B. & S. 588; s. c. 33 Law J. Rep. (N.S.) Q.B. 268;

In re Cork and Youghal Railway Company, 39 Law J. Rep. (N.S.) Chanc. 277; s. c. Law Rep. 4 Chanc. App. 748;

A winding up petition is not a legitimate mode for obtaining payment of a debt which is *bona fide* disputed by the company—

Buckley on the Companies Acts, p. 131,

and cases collected in note (f).

Moreover, the petitioner has his remedy provided by the Act, namely, the appointment of a receiver. The legislature has said that this undertaking is of public

advantage; it has been created by the legislature, and there is every prospect, under proper management, of its being carried on with success: it is out of the earnings that the debenture debt ought to be satisfied, as provided by the special Act, but if a winding up order is made the company's earning power will be destroyed—

Gardner v. The London, Chatham and Dover Railway Company (No. 1), 36 Law J. Rep. (N.S.) Chanc. 323; s. c. Law Rep. 2 Chanc. App. 201.

Mr. Jackson and Mr. Langworthy, for shareholders, as above mentioned, followed on the same side.

Mr. Glasse in reply.—The petitioner was the innocent assignee of these debentures; they were issued by persons who had the management of the affairs of the company, who are therefore estopped from alleging illegality in their issue—

Webb v. Herne Bay Commissioners, 39 Law J. Rep. (N.S.) Q.B. 221; s. c. Law Rep. 5 Q.B. 642;

In re Barned's Banking Company, ex parte The Contract Corporation, 36 Law J. Rep. (N.S.) Chanc. 732 (L.J.J.); 37 Ibid. 81; s. c. Law Rep. 3 Chanc. App. 105.

The only mode in which we can get relief is by a winding up order. The concern is insolvent; a receiver would be useless, for there would be nothing for him to receive.

MALINS, V.C.—The first and main objection made to the winding up of this company is founded on an objection to the validity of the debentures held by Mr. Turnor. I can only regard that as a defence most discreditable to everybody concerned in raising it, for it is perfectly plain, upon the evidence before me—and I have heard no imputation on the nature of the transactions between Mr. Turnor and Mr. Jackson—that some persons joining together to have these docks constructed at Exmouth, entered into a contract with Mr. Jackson to construct the works: Mr. Jackson then applied to Mr. Turnor to aid him; the company had full knowledge of this from the beginning to

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the end ; every step was taken with their concurrence, as is shewn by their writings ; they knew that every debenture was to be handed over to Mr. Turnor ; and upon the application of Jackson for Turnor those debentures were issued. I am sorry to find that the solicitor and secretary of the company who issued these debentures—and if they were irregular the company were bound to know the irregularity at the time—did not leave such a defence to other hands instead of undertaking it himself. I cannot allow such things to pass without expressing my disapprobation. The debentures are perfectly valid debentures ; and in my opinion it would be a gross denial of justice if I were to listen to such an objection, and treat debentures issued under such circumstances as being any impediment in the way of the order. The debentures, in my opinion, constitute a valid debt against the company ; and if there were no other objection to the winding up order I should certainly have made it and overruled the objection. But there is another consideration, which I will now enter into. I have here a company constituted by an Act of Parliament passed in the year 1864. That Act of Parliament recites that the making of docks and a branch railway at Exmouth would be attended with local and public advantage. It then prescribes what capital is to be raised, the proportion of it which is to be raised by debentures, and the remedy of the mortgagees or debenture holders in case of their not being paid. The remedy given by the Act of Parliament is this : [His Honour then read the 9th section of the special Act, and continued.] It appears by the accounts that this concern is a signal failure. Under such circumstances I should have expected that, inasmuch as Jackson's money had unquestionably constructed the works, and Jackson's interest is now vested in Turnor, the persons employed in this undertaking would at least give the person who advanced the money every facility for making what he could of this disastrous undertaking. Instead of that Mr. Turnor has been met by every technical objection, as to which I express the greatest disapprobation. Instead of being fairly dealt with as a

man who has made an unfortunate venture, those who have known every step that was taken raise these objections, and do their best to make him lose every farthing of the money he has advanced. I should be very sorry that this state of things should continue ; but the legislature has said that the construction of these works is of public advantage ; and after the experience of so short a period as nine years, I do not feel that I can properly make an order to wind up, unless it is positively shewn to me that there is no prospect of any other remedy being efficacious. With regard to winding up this company, although the case has been argued with great zeal by Mr. Glasse and with his usual ability, he has entirely failed to prove to me that, if an order to wind up were made, it could be of any practical advantage to his client. I have had the cases of the *Wey and Arun Canal (ubi supra)* and the *Bradford Canal (ubi supra)* before me, in each of which I made orders to wind up ; but they could not—at least in the latter case—be carried into effect without the authority of Parliament. An Act of Parliament was obtained to authorise the sale of the land and works and to carry out the winding up. So in this case, if I were to make an order to wind up, it could only be carried into effect by an Act of Parliament. When I consider the expenses that would be incurred and the various disadvantages that would arise from such proceedings, I cannot see the advantage to Mr. Turnor. The expenses that would be incurred would not be reimbursed to him by what he would get by the sale of the works. But beyond that, I must take Mr. Turnor as having advanced his money with full knowledge of this Act of Parliament. He is a debenture-holder, and the Act of Parliament in question to which I have referred, prescribes the remedy of debenture holders, that is, by the appointment of a receiver. Mr. Glasse says, what would be the use of appointing a receiver when there is nothing to receive ? I have heard it suggested on the other side that this may be an improving property ; and I proceed partly on the ground that I believe—I am rather impressed with that—that

if it were in different hands I think it is not improbable, Exmouth being the shipping port of the city of Exeter and the neighbourhood, that there may be at least some prospect of this concern being more profitable than it is now. Mr. Turnor has advanced his money with the knowledge that his remedy is the appointment of a receiver. I could not, therefore, with propriety make an order to wind up this concern, involving all the consequences referred to, without having the experiment of appointing a receiver (who would, in point of fact, be a manager) tried. I am well aware that in this form of proceeding I cannot do any thing of the kind. I should have expected that the parties who got Mr. Turnor into this difficulty would have done their best to get him out of it, and to take steps to reimburse him the large sums of money which he has embarked in this wretched concern. That, however, is not the spirit which actuates the company. It is a farce to say it is the company; it is the solicitor and secretary who raises all this opposition, and the gentlemen for whom Mr. Jackson and Mr. Langworthy appear: it is a combination between those persons, who are all represented by the same solicitors, to see how they can best defeat the just claims of Mr. Turnor. The opposition of the shareholders is a mere sham. It is ridiculous for them to come here and argue as if they had an interest in the question. Here is a concern that has been in operation for nine years and not produced 20l. a year profit, that can hardly pay its working expenses, and yet a double set of counsel are instructed on the former technical objection and on this occasion. To those shareholders I can give no costs. Now what am I to do under these circumstances? The company is not a railway company, but I cannot agree with what Mr. Glasse said as to Lord Cairns' judgment in *Gardner v. The London, Chatham and Dover Railway Company* (*ubi supra*). There the company could not be wound up because it was a railway company, but the principle of that case is applicable to this, and the Act of Parliament having given the remedy by the appointment of a receiver only, I repeat that the

person who lends money must be taken to do so with the knowledge of that fact, and must rely on that remedy which the Act of Parliament gives him. [His Honour then read part of Lord Cairns' judgment in that case, Law Rep. 2 Chanc. App. 217, and continued:] Those observations appear to me to apply to the present case. I cannot, therefore, wind up this company on two grounds; first, because the legislature has declared the undertaking to be a work of public advantage, and the subsequent experience has not been, in my opinion, sufficient, considering in whose hands this property has been, to pronounce it absolutely worthless; and secondly, because the special Act has given a distinct remedy, and not the remedy of winding up. Therefore on these grounds I come to the conclusion that I cannot accede to the application to wind up this company. Consequently the petition must be dismissed; but considering the defence that has been raised, the unbecoming conduct of those who are endeavouring to defeat Mr. Turnor's claim, I give no costs—not to the company for the reasons I have stated; and even if I were to give them the costs, I should not give any to the shareholders, for considering the wretched and impoverished condition of this concern, I would not hold out any encouragement for solicitors to multiply briefs and to instruct two Queen's counsel and juniors in the hope that the unfortunate petitioner would have to pay the costs. I simply dismiss the petition without costs.

Solicitors—Messrs. Sydney and Son, for petitioner; Messrs. Whitakers and Woolbert, for all respondents.

SELBORNE, L.C. for LORD ROMILLY, M.R. 1873. June 24.	}	<i>In re</i> THE ACCIDENTAL DEATH INSURANCE COMPANY. ALLIN'S CASE.
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Amalgamation of Companies—Transfer of Shares after Amalgamation—Resuscitation of Company—Transfer to avoid Liability.

A company with the consent of all the shareholders made over its business and all its assets to another company. Afterwards an arrangement was made between the second company and the directors of the first company for rescinding the amalgamation, and the directors of the first company thereupon elected several new directors of whom A. was one, and at a meeting of directors at which A. was present a transfer of 200 shares out of A.'s name was sanctioned. The transfer was registered, and the company was now being wound up. The articles only gave the directors power to refuse to sanction a transfer on condition of their getting some other transferees to take the shares at the market price. But at the time of A.'s transfer the shares were worse than valueless:—Held, that the transfer by A. was invalid, and he was properly placed on the list of contributories for the 200 shares.

This was an adjourned summons to remove the name of Mr. George Allin from the list of contributories of the company, where it had been placed in respect of 200 shares. The company was formed in 1854 by a deed of settlement which contained provisions as follows—

19. "That the person appearing in the company's register of shareholders to be the holder of any share or shares, and no other person shall be entitled (subject to the regulations and in manner hereinafter expressed) to sell and transfer any such share or shares to any person whomsoever (not being an infant, lunatic, married woman or under legal disabilities), and to any body politic or corporate, legally capable of holding any such share.

20. "That when any person entitled to any share in the company, whether in his own right or otherwise, shall have procured some other person willing to become

a shareholder in respect of all or any of the shares to which he shall be so entitled, he shall propose such other person as a shareholder by leaving at the principal office or place of business of the company a notice in writing to that effect, under his hand, which shall state the name and residence of the proposed shareholder, and the number of each share intended to be transferred to such proposed shareholder.

21. "That whenever any such proposal as hereinbefore mentioned shall have been made, the directors shall forthwith take the same into consideration, and shall, under the hands of two of their number, or of the managing director or secretary of the company, notify to the person making such proposal their acceptance or refusal thereof, and whether as to all or some part only of the shares intended to be transferred, and in the latter case, as to how many and which of the shares intended to be transferred such acceptance shall extend, and the person so proposed shall (if accepted as to any share intended to be transferred) be thenceforth considered as approved by the directors, and entitled upon the transfer to him of the same share, and upon the execution of the instrument of transfer, to be registered in manner aforesaid as a shareholder in respect of the shares for which he shall be so accepted; and if any person who shall have been proposed to become a shareholder shall be rejected as aforesaid, and the directors shall not within fourteen days procure some other person or persons to take the share or shares proposed to be transferred, at the market price for the time being, in such case the person or persons so proposed shall be considered as approved by them, and be entitled to take such transfer accordingly and in manner aforesaid.

22. "That any transfer or pretended transfer of the shares, not being approved of by the directors under the last preceding clause, shall be absolutely void, and the then registered holder of the shares therein expressed to be transferred, shall continue to be the holder in respect thereof to all intents and purposes."

In July, 1865, an agreement was entered into for the transfer of the business and assets of the company to the Acciden-

tal and Marine Insurance Corporation, limited, and the shareholders were to be entitled to shares in the corporation in exchange for their shares in the company. This amalgamation was carried into effect with the assent of all the shareholders of the company, and the corporation was registered in August, 1865, under the Companies Act, 1862.

On the 9th of October, 1866, a deed was executed by the former directors of the company in the name of the company, and by the corporation, by which the agreement of July, 1865, was rescinded, and the company authorised to resume its business as to insurance for accidental deaths, and a circular was issued to the shareholders announcing the resumption of business.

The company accordingly resumed business, but no general meeting was held after the date of the agreement for amalgamation.

In the same month of October a resolution was passed for winding up the corporation voluntarily, and on the 3rd of November a supervision order was made.

At a meeting of the former directors of the company, held on the 23rd of October, 1866, a transfer of 2,145 shares belonging to Mr. Chappell, the solicitor of the company, to one Montgomery for a nominal consideration, was passed. At a meeting held on the 27th of March, 1867, the directors of the company purported to elect the applicant, George Allin, and three other persons directors. On the 28th of March a petition for winding up was presented by W. G. Lankester and other shareholders, but withdrawn in consequence of an arrangement, called the "Southampton Compromise," by which the petitioning shareholders were allowed to transfer their shares to a person who received 10*l.* per share for accepting them.

On the 1st of April, 1867, the applicant executed a transfer of 200 shares to one R. Pocock for a nominal consideration, having on the same day given the directors written notice of his intention.

At a meeting of the directors, held on the 31st of May, 1867, at which the applicant appeared from the minute book to have been present, the transfer to Pocock

was ordered to be registered along with the transfers made under the Southampton compromise. Allin stated in his affidavit that he did not recollect whether he was present at the meeting of the 31st of May, 1867, but he certainly never acted as a director of the company, and knew nothing at that time of the Southampton compromise.

On the 30th of March, 1868, a petition to wind up the company was presented, but on the 3rd of April following a resolution for voluntarily winding up was passed, and a supervision order was made on the 15th of April, 1868. In

Lankester's Case, Law Rep. 6 Chanc. 905, note,

the transfers under the Southampton compromise were held invalid, and in

Chappell's Case, Law Rep. 6 Chanc. 902,

the Master of the Rolls ordered that Chappell's name should remain on the list of contributories, and this order was affirmed by the Lords Justices (Lord Justice Mellish dissenting), on the ground that the company had ceased to exist in 1865, by virtue of the agreement for amalgamation.

Allin's name was placed on the list of contributories, and he now applied by adjourned summons to have it removed.

Mr. Cookson (Sir R. Baggeallay with him) asked the Court to follow the judgment of Lord Justice Mellish in

Chappell's Case (*ubi supra*).

He contended that in this case the liquidator must be regarded as representing, not creditors, but shareholders, and that the shareholders could not take advantage of a state of the company which had been brought about with their assent. He also contended that this case was distinguishable from

Chappell's Case (*ubi supra*), on the ground that Allin had no knowledge of the state of the company.

He referred to

Sichell's Case, 36 Law J. Rep. (N.S.) Chanc. 814; on app. 37 Ibid. 373; s. c. Law Rep. 3 Chanc. 119;

Weston's Case, 37 Law J. Rep. (N.S.) Chanc. 559; 38 Ibid. 49; s. c. Law Rep. 6 Eq. 238; Ibid. 4 Chanc. 20;

Fyfe's Case, 38 Law J. Rep. (N.S.)
Chanc. 725; s. c. Law Rep. 4
Chanc. 768;

Nation's Case, 36 Law J. Rep. (N.S.)
Chanc. 112; s. c. Law Rep. 3 Eq.
77;

Shepherd's Case, 35 Law J. Rep.
(N.S.) Chanc. 626; s. c. Law Rep.
2 Eq. 564 (on app.); *In re Joint
Stock Discount Company*, 36 Law
J. Rep. (N.S.) Chanc. 32; s. c.
Law Rep. 2 Chanc. 16;

*Southall v. The British Insurance
Company*, 40 Law J. Rep. (N.S.)
Chanc. 97, 698; s. c. Law Rep.
11 Eq. 65; 6 Chanc. 614.

*Mr. Southgate and Mr. Graham Hast-
ings*, for the liquidator, were not called on.

THE LORD CHANCELLOR.—As far as my opinion goes I agree with the decision in *Chappell's Case* (*ubi supra*). The position of Mr. Chappell was that of a man who knew everything that had happened in the company. He was the solicitor of the company and he transferred a great number of shares at a meeting constituted by persons taking upon themselves to act and to allow transfers at a time when, not under resolutions of general meetings but under arrangements made by the directors and assented to by every individual shareholder, the company had ceased to carry on business and was no longer a going concern for the purposes contemplated by the deed of settlement. My opinion being in that respect with Lord Justice James, though I have the misfortune to differ from Lord Justice Mellish, I think the transfer clauses of this deed of settlement were intended to be in operation with the other clauses of the deed of settlement, and while the company was carried on as a going concern for the purposes of the common agreement, and they were not intended to be in operation for the purpose of enabling individuals to escape from liability when the company ceased to be a going concern, and when the general clauses of the deed, the clauses of management, and the other powers of the directors to make calls for the purposes of a going concern and so forth,—were no longer capable of being acted upon. Although there was no regular dissolution

yet in *Brotherhood's Case* (1), it was held, distinguishing that case from *Spackman's Case* (2) and others in the same company, that where the evidence warranted the conclusion that every individual shareholder assented to an arrangement not otherwise binding, then it became a binding arrangement. Here every individual *prima facie* is shown to have assented, and the effect of that assent was, it appears to me, inconsistent with the subsequent arrangement for again carrying on the company as a going concern, because the agreement for amalgamation provides not merely that the purchasing company should have the benefit of all the assets of every kind and description including books, and so forth, and undertake all the liabilities, but also that they should have the business and the good will, and the benefit of the name of the company. It is quite clear that to go on with the business under those circumstances would have been inconsistent with the agreement to which every individual had assented; and the point upon which I respectfully find a difficulty in agreeing with Lord Justice Mellish is this, that Lord Justice Mellish seems to have thought that the transfer clauses could remain in operation when they were severed from the rest of the deeds and when the rest of the deed became inoperative by the agreement of every individual shareholder of the company. I look upon the transfer clauses as part of the general arrangement and not to be separated from it. Furthermore it appears to me that Mr. Allin must be taken to have intentionally abstained from offering to the Court any explanation of these circumstances, that is, that upon the 27th of March, 1867, the persons then acting as directors at a meeting purported to elect him as a new director, that on the 4th day after that he gave this notice to transfer his share, and that on the 31st of May the next Board meeting was held after that election, and whatever its effect would have been, he appears by the minute-book to have been present as a

(1) 31 Beav. 365; s. c. 31 Law J. Rep. (N.S.) Chanc. 861.

(2) 37 Law J. Rep. (N.S.) Chanc. 752; s. c. Law Rep. 3 E. & I. App. 171.

director; and as it was a meeting of the directors, that is the acting directors, I know of no other character in which he could be present. The book by the Act of Parliament is made *prima facie* evidence, nor does he venture to deny his presence although he says he did not act as director. That may mean that he took no active part in the business done, but a part of the business was the transfer of a large number of shares. I lay no stress upon the fact that most of them had reference to what is called the "Southampton Compromise," his own shares being among the number transferred. He offers no explanation of the fact that he is made nominally a director four days before the notice to assign his shares, and attends as a director at the meeting held for the purpose, among other things, of assenting to the assignment of his own shares. I must attribute to him at least full knowledge of the fact that the board of directors was subject to this exception, that it had not been kept up and constituted in the manner contemplated by the deed, and particularly, among other things, for the purpose of approving of transfers; because the deed did not intend to leave to the acting directors for the time being the sole power of filling up the directors according to their own will and pleasure but contemplated that at least once in every year a general meeting should be held for the purpose of appointing at least a certain proportion of the body of directors. That had not been done after the agreement of 1865. In 1866 there had been no such meeting held and no such directors appointed. The reason is manifest, because the company had ceased to be a going concern; and upon this evidence I think myself not only warranted but obliged to impute to Mr. Allin knowledge in that respect of the actual position and constitution of the board of directors as well as of the company.

Then I think that these clauses do not give an absolute and unlimited power of transfer, but that they give a limited power of transfer. I should not like to lay stress upon the expression which is found in the clause which in terms gives the power of transfer, but I cannot help

noticing that the power is given in these words—"that the person appearing on the Company's register of shareholders to be the holder of shares, and no other person, shall be entitled, subject to the regulations and in the manner hereinafter expressed to sell and transfer." It does not speak there of transfer apart from sale, but of the transfer on the occasion of sale. I think that goes very far to negative the idea that it was expressly intended and contemplated by the parties to the contract that there should be transfers for the sole and mere purpose of getting rid of liability, although it certainly was contemplated that when there was a regular transfer liability should cease. Then it goes on to provide that notice should be given of the intended transferee and then it says that the directors may accept or refuse. That is in the earlier part of the 21st section, and then if there had been nothing more than that in the 21st section it would have been manifest that they might have arbitrarily refused: but it is qualified in favour of the shareholder by what follows; and I think the qualification must be strictly construed—that is, that if a person proposed as a shareholder shall be rejected and the directors shall not within the fourteen days procure some other person or persons to take the shares at the market price then it shall be considered as approved. Supposing (it is not what actually happened in this case) that there had been a regular board of directors and that this transfer by Mr. Allin to Pocock, in the circumstances in which it was made and being such as it is, was proposed to the board of directors and that they had refused it, could it be said that they were bound to propose a person to take the shares instead of a man admitted to be a man of straw, and who had paid no market price unless there was a market price at which a purchaser could be found? I am not disposed to think that they would have been held to have approved in that state of things. The answer would be, if there be a market price he is not to lose it; and the clause contemplates a right of the directors, to substitute a shareholder of their own selection who is willing to

give the market price; but where that state of things is not possible, the company being in a known condition of ruin and insolvency, I am by no means prepared to agree with the proposition that the words, "at the market price," are mere surplusage, or mere directory matter. It seems to me to indicate the terms and conditions on which, if the substitution does not take place, a constructive approval shall be imputed to the board of directors, and if these terms and conditions are, from the nature of the case, the company no longer going on for profitable purposes, incapable of being complied with, I find nothing in that clause which says that under those different circumstances a transfer refused shall be deemed to be approved. The next clause expressly says that unless the transfer is actually approved, under the preceding clause it shall be absolutely void. I make those observations merely for this purpose—that the clauses appear to me to be very different from those which would be found in a deed giving an unlimited and unqualified power of transfer. There is a duty to be performed by the directors, and for this purpose a meeting of the board of directors is to be held as the deed contemplated; and in this case, although there was no refusal and no substitution, there was no such board. I therefore not only think myself bound in this case to follow the decision in *Chappell's Case* (*ubi supra*), but I also agree with it.

Solicitors—Mr. A. Beddall, for applicant; Messrs. Harper, Broad & Battecock, for liquidator.

BACON, V.C. } THE LONDON AND PROVINCIAL
1873. } MARINE INSURANCE COM-
Dec. 10. } PANY v. SEYMOUR.

Fraud—Misrepresentation—Cancellation of Policies of Insurance—Concurrent Jurisdiction—Proceedings to restrain Action at Law—Costs.

The plaintiffs in this suit were defendants in two actions at law in respect of certain policies of insurance. An order was made at law staying the proceedings in one action

till the other had been tried. The defendants at law agreed to be bound by the result of the first action, but the plaintiffs at law were to be at liberty to proceed with the second action if they failed in the first. The bill in this suit was filed to restrain both actions, but proceedings in the suit were stayed till verdict was given in the first action. Ultimately the Court of Law decided the first action in favour of the defendants at law. This suit was then proceeded with to restrain the plaintiffs at law from proceeding with the second action, and for the delivery up of the policies, which were the subject of both actions:—Held, that, as the plaintiffs were liable to have the second action brought against them, they were entitled to come to this Court and to have the proceedings at law restrained; and that as they were clearly right with respect to the subject matter of the suit, the whole of the costs of the suit must be paid by the defendants.

This suit was instituted to obtain a declaration that two policies of insurance were obtained from the plaintiffs by misrepresentation and concealment, and the bill prayed that the policies might be delivered up and cancelled, and that certain actions at law which had been brought by the defendant in the suit might be restrained. After the cause had been set down the defendants delivered up the policies to the plaintiffs, and the only practical point undisposed of was the payment of the costs of the suit.

In the year 1862 two policies were effected on behalf of the defendants, with the plaintiffs, to cover a large shipment of goods by the *Peterhoff*. Before the policies were effected the plaintiffs were assured that under no circumstances would goods contraband of war be carried by the *Peterhoff*, which was represented as about to be sent to Matamoras, a neutral port in Mexico, on the borders of Texas, which was one of the then Confederate States. In consequence of these representations the goods were insured at a simple peace premium of from one to three per cent. instead of at war premiums of from forty to eighty per cent. which were then ruling for contraband and blockade running risks.

The *Peterhoff* with the goods on board was captured by a Federal cruiser on her outward voyage. The goods were condemned in the prize Court of New York as contraband of war and sold.

The defendants then commenced an action at law on each of the policies, and these actions were resisted by the present plaintiffs on the ground of fraudulent concealment and misrepresentation.

In 1866 the Court of Common Pleas ordered that one only of these actions should be proceeded with, but the assured were to be at liberty in case that action went against them to proceed on the other action.

The present plaintiffs desiring to have the matter disposed of once for all, and fearing that if at some distance of time the second action were proceeded with they might not be able again to produce the necessary evidence, in the year 1866 filed the bill in this suit. The bill prayed for a declaration that the policies were obtained from the plaintiffs by means of misrepresentation and concealment of material facts, and that the policies might be set aside and cancelled, and also that the defendants might be restrained from proceeding with the actions at law. The proceedings in the suit were however restrained till the first action was disposed of.

The action came on for hearing in November, 1866, but the matter was referred in order that a special case might be settled by an arbitrator, and it was not till August, 1871, that the case was argued in the Common Pleas upon the facts found by the arbitrator, when it was decided in favour of the present plaintiffs on the ground of concealment, misrepresentation and breach of warranty. The defendants appealed to the Court of Error against this decision. They also refused to accept the decision (in the event of its not being over-ruled) as to one policy as conclusive as to the other policy, and the plaintiffs therefore determined to proceed with the present suit.

Notwithstanding the decision in the Court of law the defendants continued in this suit the denial that the goods in the *Peterhoff* were contraband of war and did not abandon the contention till

NEW SERIES, 43.—CHANC.

after the cause was set down for hearing. It appeared from the correspondence, and particularly from a letter written in September, 1872, that the plaintiffs in the suit were willing to come to an arrangement as to the costs if the plaintiffs at law would abandon the second action.

Mr. Kay and Mr. A. G. Marten, for the plaintiffs.—The insurance was fraudulent and we are therefore entitled to relief—

De Costa v. Scandret, 2 P. Wms. 169;

The British Equitable Insurance Company v. The Great Western Railway Company, 38 Law J. Rep. (N.S.) Chanc. 132; s. c. on app. *ibid.* 314;

Traill v. Baring, 4 Giff. 485; s. c. 33 Law J. Rep. (N.S.) Chanc. 521.

There is clearly a concurrent jurisdiction, for in all the cases we have cited the plaintiffs might have proceeded at law.

The bill was absolutely necessary, because the defendants never abandoned their right to sue at some future date on the second policy, and the bill is to restrain both actions. The circumstances under which suits may be brought in equity when there is concurrent jurisdiction at common law have recently been commented on in

Hoare v. Brembridge, 42 Law J. Rep. (N.S.) Chanc. 1; s. c. Law Rep. 8 Chanc. 22.

As the claims of the defendants were only abandoned after the cause was set down for hearing we are entitled to the costs of the suit.

Mr. Little and Mr. W. B. Heath, for some of the defendants.—The cases cited for the plaintiffs do not apply. If the evidence was only adduced in order that it might be made use of at the trial at law it was unnecessary.

There was a constituted litigation at law, and one in which the facts in dispute could have been better determined than in this Court; this suit was therefore unnecessary and vexatious, and we ought not to be saddled with the two sets of costs and with the heavy expenses which have been incurred. We are supported in this contention by the judgments of the Lord Chancellor in both

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Hoare v. Brembridge (*ubi supra*)
and

Ochsenbein v. Papelier, 42 Law J.
Rep. (N.S.) Chanc. 861; s. c. Law
Rep. 8 Chanc. 695.

Mr. De Gez and *Mr. Gardiner*, for
Seymour and other defendants.

Mr. Westlake and *Mr. Linklater*, for
other defendants.

BACON, V.C.—I wholly disclaim the imputation that I have any intention of acting in the face of the decision of *Hoare v. Brembridge* (*ubi supra*). I have heard what is to me a great novelty in the course of this argument. I had thought that a man who had been defrauded had a right to come to a Court of Equity, to be relieved from the consequences of that fraud. The plaintiffs in this suit filed their bill, and state in plain terms—"We have been cheated by misrepresentation made to us by or on behalf of the defendants, they have got from us two instruments called policies of insurance; they can sue upon them, they are suing upon them, and, for the reasons we allege in our bill, we ask the Court to decree that those policies shall be delivered up to be cancelled." That is about as plain an equity as can be stated. There has been an attempt to confuse the plainness of that equity by referring to what took place at law. When that is referred to it only makes the plaintiff's case the stronger. There were two actions pending at law, there were proceedings, in the result of which (there having been a commission asked for and intended to be given, but not, as I understand, actually issued) it was agreed that the facts between the parties should be turned into a special case, and the judgment at law delivered on the facts so found. The facts so found are, that as gross and deliberate a fraud was committed on the insurers as can well be expressed in words, and that the shippers had contracted with the Confederate Government to send articles, contraband of war, in the ship. The facts are plain and clear. There was a proceeding in the Court of Common Law, by which the special case was arrived at, and the result was that the plaintiffs at law were to be bound as to one action, but

free as to the other, while the defendants were to be bound as to both. What is the consequence of that? That leaves them, whatever may be done at law, liable to have an action brought against them upon the other policy, and I am told there is a concurrent jurisdiction at law, and that the effect of that is to oust the jurisdiction of this Court. No case which has been referred to has ever said so yet, and anything more repugnant to the principles of this Court cannot be conceived. The plaintiffs were driven to proceed with their suit. They would most willingly have dropped it; in fact, the correspondence shews they desired to drop it, and that there was no question between the parties but the question of costs, and that the plaintiffs, who were desirous of getting back their policies, said that this was a matter of very little importance; and if the demand contained in the letter of September, 1872, among others, had been acceded to, it is possible that the good sense of the parties might have made any further application to this Court unnecessary. The defendant is asked, "Will you be prepared to cancel both policies in the plaintiffs' company? The question of costs, which you raised, is of comparatively little importance, and might be arranged." That being the real substance of the case, is it equitable that the plaintiffs in this suit should be left to the chances, whatever they are, however remote, however improbable, that one of the policies for which the judgment has not been pronounced should be put in suit against them; and, whatever be the result, that it should lead to a prolonged litigation? Is that consistent with the practice of the Court? The cases that have been referred to do not touch the only question I have to decide; for, in *Hoare v. Brembridge* (*ubi supra*), it is perfectly plain that, although the Lord Chancellor declined to interfere to restrain the proceedings at law, because their being decided by a Common Law tribunal was more convenient, still, in every part of his judgment, he shews that he should adopt and act on it, and leave all the rest of the case (that relating to the cancellation of the policy, among others), to be the subject of future consideration. What

application it can have to this case I am at a loss to see.

Then another case was cited—*Ochsenbein v. Papelier* (*ubi supra*), where the plaintiff in Equity complained he was being wrongfully sued by a plaintiff at law, because the ground of the suit there was a judgment which had been fraudulently obtained—a case which may be decided from beginning to end in a Court of Common Law, there being no necessity whatever for approaching this Court. The distinction is perfectly obvious, for the Court of Common Law has no jurisdiction to order the cancellation of these policies. Under the judgment of the Court of Common Law, the shippers' and brokers' right of action under the second of these policies remained. I cannot hesitate for a moment in making the only decree I am asked for now, namely, that the policies which have been delivered up shall now be cancelled, and the possession not only retained by the plaintiffs, to whom they have been delivered, but they are entitled to a decree of the Court that these policies should be cancelled.

The costs of the suit are the only thing that remains. From what I have said, it is apparent that the plaintiffs never could obtain the relief I am now about to give, unless they had brought their case to a hearing, or the parties' good sense had suggested some other way of dealing with the case. What have they done? They are accused of having acted vexatiously and unnecessarily. Of vexation I do not find a trace anywhere. As to its being unnecessary, I have disposed of that point, for I think it was absolutely necessary for their protection and their plain right, that the policies should be delivered up and cancelled. But if those words, "vexation" and "want of necessity," are to be applied to any part of this case, without hesitation I apply them to the defendants, and the conduct they have pursued has been, in my judgment, eminently unsatisfactory, vexatious and unnecessary, for, on the facts found in the special case, it is plainly manifest that they, one and all of them, committed a fraud, which fraud they dispute in their answer, and justify the dispute they make in their answer by

swearing to the truth of the statements in their answer. I never saw a plainer case in which, in my opinion, the necessity of bringing a cause to a hearing was forced on a reasonable and willing plaintiff, and I cannot hesitate for a moment to make the decree I have stated, and direct the defendants to pay all the costs of the suit.

Solicitors—Messrs. Waltons, Bubb & Walton, for the plaintiffs; Messrs. Phelps & Sidgwick; Messrs. Travers, Smith & De Gex; Messrs. Elmslie, Forsyth & Sedgwick; and Messrs. Linklater, Hackwood, Addison & Brown, for the various defendants.

LOARDS JUSTICES. }
1873.
Aug. 3, 4. }

WESTON v. ARNOLD.

Bristol Improvement Acts (3 Vict. c. *laxia*. and 10 & 11 Vict. c. *caxia*., *Local*)—*Party Walls*—*Windows in Party Walls*—*Practice*—*Ex parte Application*—*Costs*.

A wall may be a party-wall, within the meaning of the Bristol Improvement Acts, 1840 and 1847, for part of its length or height, and an external wall for the remainder of its length or height.

A wall in Bristol separating buildings below, but having in it, above, windows enjoying rights of light, was condemned as a party-wall under the Local Acts, on proceedings taken by the owner of the lights, and ordered to be rebuilt. The Acts contain provisions that there shall be no openings in the party-walls of new or re-erected buildings, except iron doors for communication between the separate buildings:—Held, that the Acts did not apply to these windows, and that the owner of the lights could maintain a suit to restrain the erection of a building that would interfere with them.

This suit was instituted to restrain interference with ancient lights. The answer raised the defence that the windows were situated in the side of the plaintiff's house, the White Lion Inn, at Bristol, which was now being pulled

down, and that the plaintiff had obtained an order under the Bristol Improvement Acts, 1840 and 1847, for the re-building of the wall as a party-wall, at the equal expense of the plaintiff and the adjoining owners, and that by those Acts, no openings could be inserted in a party-wall (1).

(1) The most material provisions of the Acts are as follows—

The Bristol Improvement Act, 1840 (3 Vict. c. lxxvii. Local)—

Sec. 14. "And for the regulation of buildings, and the better prevention of injury by fire within the said city and county, be it further enacted that all the buildings within the said city and county, not being buildings underground or bridges, or walls not being connected with or adjoining to buildings but to be used as fences only, whether upon old or new foundations, or foundations partly new and partly old, shall for the purposes of this Act be divided into, and be distinguished by the several classes of buildings described in the second schedule to this Act annexed, and all external walls, party-walls, separate side walls, and chimney backs of all buildings to be erected or rebuilt within the said city and county, shall be erected or rebuilt according to the directions specified and contained in the said classes described in the said second schedule. . . ."

Section 23 provided for the mode of construction of external walls; and section 24 provided that every party-wall, party-fence wall and separate side wall should be constructed of like good materials, and as therein mentioned.

Sec. 25. "And be it further enacted that no opening shall be cut or made through any party-wall, party fence-wall or separate side wall for any purpose whatever, other than and except for communication from one building to another, and in such cases such opening shall be properly secured with iron doors and frames, each of which shall be surrounded with a stone door case, into which the iron frame shall be inserted. . . ."

Section 26 (afterwards repealed by the second Act) provided that for the purposes of that Act every party-wall, party arch, party fence-wall or partition between separate houses, buildings or other premises within the said city and county, should be deemed to be respectively a party-wall, party arch, party fence-wall or partition belonging to such houses, buildings or other premises respectively.

Section 28 enacted (among other things) that the person at whose expense any party-wall or party arch should be built, agreeably to the directions of that Act, should be reimbursed by the owner entitled to the improved rent of the adjoining building or ground, and who should at any time make use of such wall or arch, in such proportion as the rate or class of such adjoining building should be to the rate or class of the building belonging to the person at whose expense the said wall or arch should have been built, according to the description of such rates or classes

The plaintiff's house extended backwards beyond the house next door; and the defendant's house, which it was proposed to raise, was next door but one, and

of buildings in the schedule; and in such proportion, also, as so much of the said wall or arch as the owners of such adjoining building should make use of, should bear to the whole of such wall or arch.

Sec. 30. "And be it further enacted that it shall be lawful for the owner or part owner of any external or party-wall to raise the same, provided that the wall when raised will be of the substance by this Act required, according to the increased height of such wall when completed, but no such raising shall take place between any existing gable ends or on any timber sides or fronts of houses, and in case the buildings so raised shall be of greater height than the adjoining buildings, and the flues or chimneys of such adjoining buildings are in the party-walls or separate side wall adjoining such building so raised, the party raising such building shall, at his own expense, build up such flues and chimneys belonging to the adjoining property, so that the top thereof may be carried up to the same height as regards the buildings so raised, as before the same had been raised. But if the wall between the said building so raised and the adjoining buildings shall be a party-wall common to both buildings, then in the event of the owner of such adjoining property making use of any portion of such party-wall as shall have been raised, the party raising such party-wall shall be paid by the owner of such adjoining property a fair proportion of the expense of so much of the said party-wall as he may make use of at any time after the erection thereof, but in no case shall any demand be made for raising such wall, or such chimney or flues, if no other use is made of them than before the same were raised. . . ."

Sec. 32. "And be it further enacted that if the fore front and rear front of any building now built shall after the passing of this Act be rebuilt as low as the bressummer, or one pair of stairs floor, the party-walls of every such building shall from thenceforth be in all respects subject to the several regulations hereinbefore contained, concerning the party-walls of houses to be built in accordance with the provisions of this Act."

The Bristol Improvement Act, 1847 (11 & 12 Vict. c. cxxix.), repealed various sections of the Act of 1840 (including section 26 above referred to), and contained amongst other enactments the following—

Sec. 24. "And be it enacted that for the purposes of this and the said recited Act, every wall, arch, fence-wall or partition between separate houses, warehouses or other buildings within the said city and county shall be deemed to be respectively a party-wall, party arch, party fence-wall or partition belonging to such houses, warehouses or other buildings respectively, and that no timbers inserted in any party-wall, party arch, party fence-wall or partition shall be nearer to each other than four inches. .

also extended backwards down a side street.

For thirteen feet beyond the point to which the house adjoining the plaintiff's house extended, there was no building against the plaintiff's house, and then for the remaining distance, a low building, seven feet high, rested on corbels in the wall. There were twelve windows in the side wall, and it was not disputed that the proposed new building would obscure the lights.

Some question was raised as to whether the plaintiff had a right to the lights as against the defendants, who had been the former owners of the plaintiff's premises, and had conveyed them to the local board for improvement purposes. But it appeared that the building was conveyed to the board as "The White Lion Inn," and with its "rights, members and appurtenances," and that though part had been

and that the end of all girders and breassummers in any party-wall, party arch, party fence-wall or partition shall be cased with iron."

Sec. 27. "And be it enacted that if any owner or part owner of any houses, warehouses or other buildings within the said city and county, or of any adjoining property, shall apprehend that any party-wall, party arch, party fence-wall or partition between any of such houses, warehouses or other buildings is insufficient in thickness, or that the same or such house, warehouse or other building is defective, or so far out of repair or insufficient in thickness, as to render it necessary to have the same taken down, or that the same or some part thereof should be rebuilt, or if any such party-wall, party arch, party fence-wall or partition is composed wholly or in part of timber, and the part owner or owner of the same or of the adjoining property is not willing, or is not by reason of some legal disability or otherwise able to join in such taking down and rebuilding, it shall be lawful for such first-mentioned owner or part owner to give notice in writing to the part owner or owner of the same or the adjoining property as therein mentioned to have the wall surveyed and condemned."

Section 28 provided for the certificate of the surveyor or surveyors as to the work to be done, and to "ascertain and award what (if any) compensation should be made and paid by either or any of the said parties in lieu of the lessening either of the said houses or buildings, or as a satisfaction for other injury done or occasioned thereby; and shall also ascertain and award what proportion of the expense of building such party-wall or party arch shall, when the same are so rebuilt, be repaid by either or any of the parties in difference."

pulled down, the plaintiff had bought the remainder as a building, and was intending to reconstruct it for its former purposes.

The Vice-Chancellor Malins granted an *ex parte* injunction, and refused a motion to dissolve it. The defendants appealed, and the case was now, by special leave, heard on the appeal, and as an original motion for a decree.

Mr. Higgins and *Mr. Wm. Barber*, for the plaintiff.—We say that the provisions of the Improvement Acts, that no openings shall be made in party walls, only apply to walls between buildings. Can it be, that if a shed was made against the wall of a large house, that would make the whole side of the house a party wall, and prevent any windows being replaced in it if it was rebuilt?

A party wall does not extend beyond the limits of the smaller building—

Titterton v. Conyers, 5 Taunt. 465.

Acts of Parliament like these are not intended to interfere with private rights—

Crofts v. Haldane, 8 B. & S. 194;

s. c. 36 Law J. Rep. (N.S.)

Q.B. 85; s. c. Law Rep. 2 Q.B. 194.

It was contended that we are now estopped from saying that this is not a party wall by the order we have obtained, condemning the wall and ordering it to be rebuilt at the equal expense of ourselves and the next owners; but even if we could be so bound as against the defendants, we never intended to require equal contribution except for the part of the wall used in common.

Mr. Glasse and *Mr. Ingle Joyce*, for the defendants.—The decision in

Titterton v. Conyers (*ubi supra*)

went on the ground that the wall had there been re-erected with the windows for more than ten years. A party wall is not simply a wall separating buildings. At Common Law a party wall means a wall enjoyed in part. In more than one Act of Parliament, windows in a party wall are spoken of—

7 Anne, c. 17, ss. 7 and 8;

11 Geo. 1. c. 28. s. 3.

In the Acts now under discussion, we contend that the term external wall means the front and back walls, and that

the side walls are either party walls, party fence-walls, or separate side walls.

[JAMES, L.J.—Do you mean to say that if a cottage is built against a park wall, all the wall becomes a party wall?]

Section 16 of the Act of 1840 excludes simple fence walls from the operation of the Act, but in every other case the Act says that if the walls are pulled down they shall have no openings again made in them. The object is to prevent the spread of fire, and it can as readily spread through a window above a building on fire as through any other opening. Here the wall has been absolutely condemned, and the openings must be closed.

They referred to various sections of the Acts, and desired to read evidence that theirs was the construction put upon them by the local surveyors, but the Lords Justices refused to hear it, the question being one of law.

On the question of costs they contended that the *ex parte* injunction ought to be dissolved, on the ground that the plaintiff had not, when obtaining it, called attention to the Acts. It was no excuse to say he was unaware of their importance—

Dalglish v. Jarvie, 2 Mac. & G. 231 ;

Harbottle v. Pooley, 20 Law Times N.S. 436 ;

Phillips v. Prichard, 1 Jur. N.S. 750 ; nor to say that they were an insufficient defence, for that must always be the case where the rule applies, since otherwise the application would be refused on the merits.

LORD JUSTICE JAMES.—We need not trouble you to reply, Mr. Higgins. I am of opinion that this is one of the plainest cases that ever came before a Court. A gentleman has got a house in which there were some ancient windows. He bought the house from the Local Board of Bristol, who bought it from the then owners, who are the present defendants. The house was conveyed to the board as a house with windows in it, and the board conveyed it as a house with windows in it to the plaintiff. In consequence of the alteration made in that neighbourhood, it was determined to pull down the house, with a view of rebuilding it, and rebuild-

ing it in such a way as to have windows exactly in the same position as before. Thereupon the plaintiff's neighbour—on whose behalf, apparently, some Bristol surveyor has been exercising very perverse ingenuity in misreading the Act of Parliament—is advised that the right to the windows is gone. It is a strong thing to say, but so it is said. The plaintiff says, I have had the windows, they are 100 years old, and all I want is to rebuild with those windows. Then it is said that the Bristol Local Act contains provisions as to party walls, and that this was a party wall at one time, and if so you cannot have any openings in it. First of all, a party wall is a thing which exists *in rerum natura*, it is a thing which belongs to two persons as part owners, or divides two buildings one from another. It is a party wall in one of those senses. It is beyond even the power of the legislature to make that a party wall which is not a party wall, just as it is beyond the power of the legislature to make a square a circle. No doubt the legislature might have made provisions which say that that which is not a party wall shall, for the purposes of a particular Act of Parliament, be deemed to be, and be subject to the same restrictions as a party wall, but they cannot make what is not a party wall a party wall any more than they can make a square a circle.

Now in this case, this was a wall which for part of its height did divide the property of one person from the property of another. Apparently, also, the two were joint owners of it, or jointly entitled to it. It was a party wall in one sense, and may have been a party wall in another. I do not know how that may be, but it only divided the two houses for a few feet in height, and above the few feet there was a wall which, beyond all question, was the separate and undisputed property of the plaintiff. Unless there is something in the Act of Parliament which makes it very clear the other way, it appears to me that a wall may be in part of its length a party wall, and in part of its length an external wall, and there is no distinction between height and length, so that a wall may be a party wall up to part of its height, and may be an

external wall for the rest of its height. Of course the rights in it may be very different with regard to different planes and levels. One has known in this Court cases in which house property in London is intermixed in such a way that one man's basement and cellar go under another man's shop, and the first-floor again goes over the other man's shop. Of course the rights in that case would be very different. You might have between the two buildings below a party wall which above would be only a private partition between two rooms belonging to the same building. There is nothing in fact or in law to make it impossible or improbable that there should be a party wall up to a certain height, and then a separate property above that. It is clear in this there was a party wall, and there was a separate wall, and that separate wall the plaintiff has got his windows in. He has got a right to those windows, and there is nothing in the Act of Parliament that can deprive the one man of his right to the windows for the benefit of the other man, or that has given the latter a right to raise his buildings so as to darken those windows. There is nothing in the Act of Parliament, in words or spirit, which can justify such transfer of a valuable property from one person to another without any reference to a question of public good in the city of Bristol or any other place.

That being so, I am of opinion the plaintiff has clearly made out his case, and that he is entitled to the injunction he obtained from the Vice-Chancellor. Then it is said, that at all events he is to pay some of the costs, because he applied for the injunction *ex parte* without stating the facts which have raised the contention before us. In my opinion, those facts are so very irrelevant to any real question between the parties, that I think the plaintiff was quite justified and quite right in not introducing them at all,—that to do so would only have been encumbering the bill with things which had no bearing on the case. It never had been the question in dispute between them. They had communication about the arrangements to be made, but no communication was ever made by the

surveyor—who seems to have found out this notable point—or anybody else, to the plaintiff, that he had lost his rights by reason of this construction to be put on the Bristol Act. I think the rule in question would be extravagantly extended if it were extended to a case in which the plaintiff has left out something which, as relied on by the defendants as raising some point of law in their favour, is utterly without foundation in the words or spirit of the Act of Parliament.

LORD JUSTICE MELLISH.—I am of the same opinion. It is quite clear, in this case, that the plaintiffs have, independently of a question under the Bristol Act, a right to the lights. They have a right to the lights as against the immediately adjoining owner by prescription, the lights having existed a much longer period than twenty years, in fact for 100 years. As against the defendants, as the owners, not of the next immediate house, but of the house beyond, they have, in my opinion, also a right by the terms of the conveyance from the owners of that house to the Bristol Improvement Commissioners, who sold to the plaintiff. That right is of this nature. A part of the wall in which the windows are, separates the building of the plaintiff from the adjoining building, but a large part of it, namely, the part in which the windows are, does not separate the one building from the other. It is obviously impossible that a wall in which there are windows opening to the external air can separate one building from another. The simple question to be determined is whether that is a party wall. The Act mentions as the walls of houses and buildings, external walls, party walls, party fence-walls and separate side walls; and having regard to the 23rd, 24th and 25th sections of the Act of 1840, I think there can be no doubt that party walls, party fence-walls, and separate side walls are the different descriptions of walls which separate one building from another, and that an external wall is a wall which does not separate one building from another, and that an external wall may have windows in it; whereas, of course, party walls, party fence-walls, and separate side walls, cannot have windows which open to

the external air and admit light and air. The only real question to be decided is if there is a wall which in part is unquestionably a party wall, because it separates one building from another, and in part is an external wall, because it does not separate one building from another; is the whole of that wall to be considered a party wall, or is only that which separates one building from another to be considered a party wall, and that which does not separate one building from another to be considered an external wall? We only have to decide that with reference to a case where a right to light has been gained, because I think it is unnecessary to say what the case would be if a person, who is the owner of a house to which there is a house adjoining in the ordinary way, raised the party wall—which under one section of the Act he may do, for the purpose of making a story higher than the story of his neighbour—it is obvious that when he does that, his neighbour has the same right, any time he pleases, to raise his house to the same height as the first man, and then, whether that was so or not before, it would become a party wall. Whether the Act would apply to that in the first instance or not, when the party begins raising his house, I do not think it necessary to consider, but in a case where lights have been gained, the man who owns the adjoining house has no right to raise his wall, and therefore the wall which is above that part which separates the one building from the other, not only is not a party wall, but cannot become a party wall without the consent of both parties. I am unable to see that it comes within the principle of the 25th section, which says that "no opening shall be cut or made through any party wall, party fence wall, or separate side wall, for any purpose whatever other than and except for communication from one building to another, and in such cases such openings shall be properly secured with iron doors and frames, each of which shall be surrounded with a stone door case, into which the iron frame shall be inserted." Can that section possibly apply to a case where there are windows in the wall which is above the other house, and where the person who owns the adjoining

house has no right to raise his wall so as to block it up? It appears to me, the words of that section, if there were no other, plainly shew that party wall, party fence-wall, and separate side wall are all used in the sense of walls which do actually separate one building from another. It is perfectly plain that the provision is to prevent fire spreading from one building to another, and has nothing to do with the case of one building overtopping the other. Then the 26th section, which is the only section in the first Act which gives a definition of party walls, is quite consistent with this. It says—"That for the purposes of this Act, every party wall, party arch, party fence-wall, or partition between separate houses, buildings or other premises within the said city and county, shall be deemed to be respectively a party wall, party arch, party fence-wall or partition, belonging to such houses, buildings or other premises respectively." That simply enacts what one would have considered to be the law if it had not been enacted. It is little more than saying that a party wall shall be a party wall. Then section 24 in the Act of 1847, as it appears to me, is equally consistent with the natural construction, namely, that for the purposes of this Act, and the said recited Act, every wall, arch, fence-wall, or partition between separate houses, warehouses or other buildings shall be deemed to be a party wall, that is, plainly enough, every wall between two houses shall be deemed to be a party wall. The wall in this case is not a wall between two houses. What is wanted, in order that the defendant may make out his construction, is a section which says that where any party wall continues in height after it ceases to separate the two buildings, then the whole of that wall shall be a party wall. I do not think that was intended to be inserted, or that that was the meaning of the Act. At any rate it is not in the Act, and of course when the contention is that the private rights of an individual have been taken away from him and given to somebody else by a public Act of Parliament, and without compensation—for the compensation clause here clearly does not apply to this case—it ought to appear in

perfectly clear and plain terms. Here it does not so appear. On the contrary, the construction of the Act supports the plaintiff's case and not the defendant's.

Decree for perpetual injunction according to the prayer of the bill.

Solicitors—Messrs. Thos. White & Sons, agents for Messrs. M. Brittan & Sons, Bristol, for plaintiff; Messrs. Meredith, Roberts & Mills, agents for Mr. Thos. Hamlin, Bristol, for defendant.

HALL, V.C. }

1873.

Nov. 22. }

PRITCHARD v. ROBERTS.

Solicitor and Client—Infant—Fund in Court—Charge on, for auxiliary Costs—Jurisdiction—23 & 24 Vict. c. 127. s. 28.

A solicitor who claims a charge or lien for his costs on property which he has "recovered or preserved in any suit or proceeding" for an infant, cannot enforce that claim under the Attorneys and Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28; but must establish it on a bill filed under the general jurisdiction of the Court. If such claim be allowed, it may include other costs auxiliary to those incurred for the preservation or recovery of the infant's property.

Motion for decree.

The plaintiff in this suit was a solicitor of this Court, and the defendant an infant and a client of the plaintiff.

The plaintiff had acted as solicitor for the defendant in a suit of *Proger v. Roberts*, in the matter of the presentation of a petition under the Declaration of Title Act, 1862, and in certain other proceedings hereinafter mentioned.

The question was whether the plaintiff was entitled to a lien or charge for all his costs, on a sum of 598*l.* 17*s.* 6*d.* in Court, the realised property of the defendant?

The facts of the case were shortly these—

Robert Hendy died in 1806, having by his will devised a freehold house, No. 41, Great Windmill Street, Haymarket, to James Badham for life, with remainder to his daughters, Elizabeth and Caroline

Badham, as tenants in common in fee; but with a gift over in case either of them died under twenty-one and without issue. James Badham died in 1818. Elizabeth Badham attained twenty-one in 1819, and then married Mr. John Charles Adrian Du Vall. Caroline Badham married Mr. John Roberts in 1820, and attained twenty-one in 1822. In 1829 Mr. and Mrs. Du Vall and Mr. and Mrs. Roberts demised their respective moieties of the house to a Mr. Howell for twenty-one years.

In 1836 Mr. Howell assigned his interest in the property to a Mr. Stradling. Mr. Roberts died in September, 1839, and Mrs. Du Vall in November of that year. In 1850 Mr. Du Vall and Mrs. Roberts joined in demising the house to one David Plews, at a rent of 40*l.* per annum. In 1863 Plews assigned the premises for the remainder of his term to one John Proger, who then took possession of them. Mr. Roberts left his widow (who died in 1868 intestate) and five children, of whom John Roberts was the eldest. John Roberts died on the 24th of May, 1865, intestate, leaving five children, of whom the defendant, Thomas Roberts, then and still an infant, was the eldest. In February, 1870, the defendant presented a petition in this Court, in the matter of "The Declaration of Title Act, 1862," praying that it might be thereunder declared that he was entitled to one undivided moiety of the house in fee, subject only to the lease of it to John Proger; and on the 9th of December, 1870, a declaration was made in accordance with the prayer of the petition. In 1871 the defendant, by Mark Dale, his next friend, filed a bill against John Proger for a sale or partition of the house, and for other relief; and on the 16th of April, 1872, a decree, at the request of the defendant, by his counsel, and on the undertaking of John Proger to purchase the house, was pronounced for the sale of it to him. The infant was declared to be a trustee of the premises within the Trustee Act, 1850, for the purchaser, and the next friend was ordered to convey the house to him. On the 26th of July, 1872, the Chief Clerk made his certificate, finding (*inter alia*) that the lease assigned to John Proger had expired

on the 6th of January, 1871; that since that time he had been in possession of the premises; that there was, therefore, due from him to the infant 40*l.* for his share of the occupation rent, and that the value of the infant's moiety of the house was 500*l.* The infant's interest in the house had been since duly conveyed to John Proger. All the money due to the infant in respect of the above transactions amounted to the sum of 593*l.* 17*s.* 6*d.*, and that had been paid into Court.

The bill in this suit then stated that the plaintiff was the solicitor employed to prosecute the said suit, matter and proceedings; and as such solicitor insisted that he was entitled to a charge on the 593*l.* 17*s.* 6*d.*, being the property so recovered or preserved by him as above stated, for the taxed costs, charges and expenses of or in reference to the said suit, matter or proceedings; that the defendant, by his next friend, had become and now was indebted to the plaintiff in a considerable sum of money for the costs, charges and expenses in relation to and concerning the said suit, matter and other proceedings, and the plaintiff submitted that he was entitled to have the same raised and paid by and out of the said sum of 593*l.* 17*s.* 6*d.*

The bill then prayed a declaration that he was entitled to a lien or charge on the said sum of 593*l.* 17*s.* 6*d.*, being the property recovered or preserved under the circumstances and in the manner herein appearing, and to a right to payment out of the property so recovered or preserved through his instrumentality, of the taxed costs, charges and expenses of or in reference to such suit, matter and proceedings; and that such order might be made for the taxation, and for the raising and payment of such costs, charges and expenses out of the said property, and the costs of this suit, as should appear just and proper.

The defendant was an orphan. Mark Dale, the husband of his paternal aunt, had acted throughout the transactions as his next friend, and was, on the 7th of December, 1872, duly appointed his guardian to defend this suit.

The cause at first came on to be heard as short, on the 21st of December, 1872, and again on the 13th of January, 1873,

but ultimately it stood over for the present hearing. It is unnecessary now to go into the details of the circumstances which rendered all the above proceedings necessary; but it was stated that if the plaintiff had not taken the various steps which he did on the defendant's behalf, the property never could have been realised, and the defendant (for whom maintenance had been ordered out of the fund in Court) would have derived no benefit whatever from it.

Mr. Lindley and Mr. S. Dickinson, for the plaintiff.—The 22 & 23 Vict. c. 127. s. 28 (The Attorneys and Solicitors Act), does not apply to infants (per Wickens, V.C., in *In re Keane*, *infra*, p. 119), who cannot "employ" a solicitor to act for them. The plaintiff was, therefore, obliged to institute this suit under the general jurisdiction of the Court—

In re Keane, 40 Law J. Rep. (N.S.) Chanc. 617; s. c. Law Rep. 12 Eq. 115, and *ibid.* 119.

They also referred to—

Bonser v. Bradshaw, 30 Law J. Rep. Chanc. 159; s. c. 7 Jur. N.S. 231;

Twynnam v. Porter, 40 Law J. Rep. (N.S.) Chanc. 30; s. c. Law Rep. 11 Eq. 181;

Baile v. Baile, 41 Law J. Rep. (N.S.) Chanc. 300; s. c. Law Rep. 13 Eq. 497;

In re Howarth, 42 Law J. Rep. (N.S.) Chanc. 316; s. c. Law Rep. 8 Chanc. 415;

and

25 & 26 Vict. c. 67 (The Declaration of Title Act, 1862).

Mr. E. K. Karslake was for the defendant.

HALL, V.C.—I think I may consider the proceedings under the Declaration of Title Act, 1862, as auxiliary to the others. The fund in Court represents real estate; and if the costs of the partition are, as I conceive they are, properly payable out of it, those of the other proceedings stand in a similar position. The decree which ought now to be pronounced appears to me to be this: Declare the plaintiff entitled to a lien on the fund for his costs, charges and expenses properly incurred in recovering the fund, including

the costs, charges and expenses properly incurred of the proceedings under the Declaration of Title Act, and the costs, charges and expenses properly incurred of the suit of *Roberts v. Proger*, and for the costs of this suit. Tax all such costs, and costs, charges and expenses, as between solicitor and client; and tax the defendant's costs of this suit as between solicitor and client; order the payment of all such costs, charges and expenses, when taxed and certified, out of the fund in Court, and reserve liberty to apply by summons in this suit for such payment, together with liberty to apply generally.

Solicitor—Mr. C. P. Pritchard, for both parties.

SILBOENE, L.C. { THE WOLVERHAMPTON
for { AND WALSALL RAILWAY
LORD ROMILLY, M.R. { COMPANY v. THE LONDON
1873. { AND NORTH WESTERN
May 29. { RAILWAY COMPANY.

Demurrer—Injunction—Specific Performance—Negative Words—Substance of Agreement—Lease of Railway—Carriage of particular Traffic.

In considering whether to grant or refuse an injunction to restrain a breach of a particular clause of an agreement the Court will look to the substance of the act to be performed, and not merely to the presence or absence of negative words.

A lease of a line of railway contained an agreement by the lessee company to carry over it all traffic between certain places and to pay the lessor company one-half the receipts in respect of such traffic. The lease contained other provisions on which no relief could have been obtained in equity, and it contained no negative stipulation restricting the lessee company from carrying the traffic in question over other lines. On demurrer to a bill by the lessor company alleging that the lessee company were carrying the traffic mentioned in the agreement over other lines of their own, and praying for an injunction

to restrain them,—Held, that relief could be granted in such a case, and the demurrer must be overruled.

Demurrer. The bill alleged an agreement, dated the 26th of February, 1866, and made between the plaintiff company and the defendant company, which recited that the plaintiff company were authorised by their Act of Parliament to construct a line between Wolverhampton and Walsall, and that they were promoting a bill to authorise them to make certain deviations, one which was called the North Western Spur. The agreement contained the following clauses in its operative part—

Clause 5. The Wolverhampton and Walsall Company shall forthwith, at their own cost and to the reasonable satisfaction of the engineer of the North Western Company, construct and complete as a double line of railway on the narrow gauge with the proper junctions, stations, sidings, signals, electric telegraph, and all other matters necessarily or usually incident to the construction and completion of similar lines of railway, the railway authorised by the said company's said Act, as varied by the Deviations Bill (if passed) and by these presents.

Clause 8 contained some special provisions respecting the North Western Spur, and clause 9 was in the following words—

“The railways, branch or branches, and other works to be constructed under the foregoing clauses and completed as aforesaid, shall, as from the certificate of the Board of Trade of the completion thereof respectively fit for public traffic being obtained, and thenceforth during the continuance of this agreement, be occupied, worked and managed, and the traffic thereon, and the tolls, rates and charges in respect thereof, be fixed, regulated and received, subject to the following clauses, exclusively by the North Western Company, who shall at all times during the continuance of this agreement, at their own costs, maintain the same and all works and constructions required by the Wolverhampton and Walsall Company's said Act in reference to the railway thereby authorised in good condition and repair, and (as regards the works and construc-

tions required as last aforesaid) observe and discharge all liabilities and damages under the said Act or otherwise in reference to the working and maintaining the said railway and works, and shall at the like cost forthwith, upon the completion of the said railways, branch or branches, and other works respectively, stock and provide with all persons and things necessary or usually provided for the occupation, working and management of railways and for the effective carrying of the traffic thereof, and shall at all times during the continuance of this agreement properly and efficiently develop and accommodate both the local and through traffic, whether in passengers, animals, goods, parcels, minerals or otherwise on the said railways, branch and branches, and carry over the Wolverhampton and Walsall Company's said authorised railway (varied as aforesaid), first, all such traffic as aforesaid arising between Walsall and Wolverhampton, and the places between; secondly, all such through traffic as aforesaid destined for Walsall, and passing through Wolverhampton, and all such through traffic as aforesaid, destined for Wolverhampton, and passing through Walsall; and thirdly, all such through traffic as aforesaid arising at Walsall or Wolverhampton or intermediate places for which the same railway will form the shortest route, so far as public convenience will permit, and shall at all times during the continuance of this agreement regulate the mileage, terminal and other tolls, rates and charges in respect of the said railways, branch and branches, and other works to be constructed as aforesaid, so as to produce the utmost practicable amount of revenue, and shall at all times during the continuance of this agreement (whether the fifty per centum of gross receipts to be retained by them under the subsequent clauses shall or shall not be sufficient for that purpose) at their own cost, discharge, pay and keep the Wolverhampton and Walsall Company indemnified against all outgoings chargeable to the working and maintaining the railways, branch or branches, and works to be constructed as aforesaid or the traffic thereof, and also all expenses of or incident to the working

of the same railways and branch or branches, and the traffic thereof. Provided, first, that the North Western Company shall not by virtue of the foregoing stipulations in regard to traffic be bound to send small exceptional quantities; secondly, that the foregoing stipulations as to through traffic shall apply to any traffic interchanged at Wolverhampton between the North Western Company and the Great Western Railway Company which passes by the line of either of the last mentioned companies through Wolverhampton or which passes through Walsall, so far as such traffic can be controlled by the North Western Company; thirdly, that nothing in this clause contained shall prejudice the stipulations hereinbefore contained in reference to the North Western Spur; fourthly, that the North Western Company shall not be obliged to commence working or maintaining any portion of the railways or branches aforesaid, until the line is completed as a through line between the North Western system at Wolverhampton and Walsall."

The 11th clause provided that fifty per cent. of the gross receipts of the traffic over the plaintiff company's line should be retained by the defendant company and the other half paid to the plaintiff company. And the 19th clause provided that the agreement should continue for 999 years.

The bill further stated that an Act of Parliament was subsequently passed confirming the agreement and sanctioning the deviations contemplated by it; and that the plaintiff company completed their line in accordance with the terms of the agreement, and the defendant company entered into possession of it. It then alleged that the defendant company carried over certain lines of their own much of the traffic which according to the agreement they ought to have carried over the plaintiffs' line. And it prayed that the defendant company might be restrained from carrying over any line or lines of railway other than the plaintiffs' said Wolverhampton and Walsall railway, first, any local or through traffic, whether in passengers, animals, goods, parcels, minerals or otherwise, arising between Walsall and Wolverhampton; or, secondly, any

such through traffic as aforesaid destined for Walsall and passing through Wolverhampton, or any such through traffic as aforesaid destined for Wolverhampton and passing through Walsall; or, thirdly, any such through traffic as aforesaid arising at Walsall or Wolverhampton or intermediate places, for which the plaintiffs' said Wolverhampton and Walsall railway formed the shortest route, so far as public convenience would permit.

The ground of demurrer was that as the agreement was not one which could be specifically enforced in a Court of Equity the Court would not interfere to restrain a breach of a particular clause in it, which contained no negative words. Some reliance was also placed on the fact that the agreement contained a provision for referring all disputes under it to a standing arbitrator to be named at certain fixed times, but as no such arbitrator was alleged to have been named in accordance with the agreement that objection was held to be untenable.

Sir R. Baggallay and Mr. H. A. Giffard, for the demurrer, cited, on the question of the arbitration clause,

The Watford and Rickmansworth Railway Company v. The London and North-Western Railway Company, 38 Law J. Rep. (N.S.) Chanc. 449; s. c. Law Rep. 8 Eq. 231.

And on the question as to the agreement being of such a nature that the Court would not interfere,

Johnson v. the Shrewsbury and Birmingham Railway Company, 3 De Gex, M. & G. 914; s. c. 22 Law J. Rep. (N.S.) Chanc. 291;

Lumley v. Wagner, 1 De Gex, M. & G. 604; 5 De Gex & S. 485; s. c. 21 Law J. Rep. (N.S.) Chanc. 898;

Brett v. The East India and London Shipping Company, 2 Hem. & M. 404;

Pollard v. Olafson, 1 Kay & J. 462; *Blackett v. Bates*, 35 Law J. Rep. (N.S.) Chanc. 324; s. c. Law Rep. 1 Chanc. 117;

Kemble v. Kean, 6 Sim. 333;

The Solicitor-General (Sir G. Jessel), Mr. Fry and Mr. Speed, for the bill, were not called upon.

THE LORD CHANCELLOR, after stating that the arbitration clause formed no bar to the jurisdiction of the Court, seeing that the appointment or existence of an arbitrator under it was not alleged, continued—Then on the question of specific performance the defendants say that no part of the relief asked by the bill can be granted because the Court cannot superintend the performance of the matters included in the agreement in every particular. The fact is the words, specific performance, are used very loosely. Executory agreements are the proper subjects of it when the contract is not intended to be the final arrangement between the parties. Then in the execution of the agreement the acts are done which will finally determine their positions. The common expression, specific performance, applies only to an executory agreement, when there is something to be done in order to put the parties in the position in which by the preliminary agreement they were intended to be placed. That is the technical meaning of the words, but popularly they may be applied to the doing of any act specifically. And in these cases sometimes confusion has arisen from that use of the word. Now there is a principal class of cases, such as hiring servants and things of that sort, which are not in the proper sense cases for specific performance. The nature of the contract is not one which requires the performance of some further act such as this Court is in the habit of ordering to be done rather than leaving the parties to their rights at law. If the notion of specific performance were applied to such contracts it would be the performance of a series of acts not of one act. And for that reason the parties are left to law.

Lumley v. Wagner (ubi supra) was not a case which sought to restrain the ordinary jurisdiction of this Court to do justice but which sought to enlarge the jurisdiction on technical grounds, and to extend it to an ordinary case of hiring which is not properly one for specific performance. It was said that if you find the word "not" expressed, where it would be clearly implied; then, though the Court would refuse if it was implied to act upon it, still it will act on the

expression of it. In my opinion the Court had better in all such cases look to the substance and not to the form. Then the question arises whether this is a case for equity. If on the other hand it is such that the remedy may be sought elsewhere, I do not think that it ought to be changed by a negative expression. But that has no application to a case like this where there is an agreement for a lease of a line to a railway company. This is not like *Johnson v. The Shrewsbury and Birmingham Railway Company (ubi supra)*, which was merely a contract by a railway company with a contractor to supply the materials necessary for his works; nor like *Blackett v. Bates (ubi supra)*, where there was a lease executed of a wayleave without any covenants concerning that on which the dispute arose; and a further provision, not part of the terms on which the wayleave was granted, for the supply of engine power and the repair of the line by the licensee, the line belonging to the party who was to make the repairs. Those were not matters for specific performance, for this Court could not give a better remedy than Courts of law.

Here the line is leased on certain terms to the defendants. They are in possession. Nothing remains to be done to complete their right. The question is whether being in possession they are or are not at liberty to depart from the terms on which it was stipulated they were to have possession. If they are not using the line as they promised to use it, the other party may come to this Court and ask that they may be compelled so to use the line as they promised, provided the Court sees its way to define what they ought to do.

Solicitors—Messrs. Baxter, Rose and Norton, for the plaintiffs; Mr. R. F. Roberts, for the defendants.

BACON, V.C. }
1873. } STEVENSON v. MASSON.
Dec. 3.

Domicile—Abandonment of Domicile of Origin—Covenant in Settlement whether in Satisfaction of Bequest of Residue.

In 1858 M. left Canada, which was his domicile of origin, sold his house and burial-ground there, and came to Paris to educate his children. He lived in Paris ten years but went over several times to Montreal, and amongst other things made his will there, describing himself as of Montreal. In 1868 he came to England and took a lease of a house in London. His daughter married and settled in London, and he purchased for his son a share in a business in London. M. died in 1871:—Held, that M. had acquired and shewn an intention to retain an English domicile.

M. on the marriage of his daughter covenanted to settle 8,500l. and advanced 2,000l. to purchase a share in a business for his son; by his will he gave the residue of his property equally between his daughter and son:—Held, that these advances were both *pro tanto* in satisfaction of the children's shares.

This was a suit to administer the estate of Joseph Wilfrid Antoine Raymond Masson. It now came on as a cause on further consideration and also on a summons to vary the chief clerk's certificate, by which it was decided that the domicile of the testator was Canadian.

The testator was born in 1819 at Montreal, of Canadian parents. In 1848 he married a Canadian lady, and he resided in Montreal, carrying on business as a merchant there till the year 1858. In that year he went with his wife and his two only children, the plaintiff, Marie Girardine Raymond Masson, and the defendant, Joseph Armand Chabonillez Masson, to reside at Paris for the sake of his children's education. Before leaving Canada he sold the house in Montreal which he had built, and in which he lived, and also sold a small piece of freehold land in the burial ground there.

He continued to reside in Paris till 1868, but in the meantime paid several visits to Montreal.

In 1863 he made his will. He was then in Canada and he therein described himself "of the city of Montreal." The will was written in the French language, and, subject to certain bequests and annuities to his wife, he gave the whole of his property to be equally divided between his two children. One of his executors was a Frenchman and they were residents in Montreal.

In the year 1865 he was again in Canada, and he then made a codicil to his will in which he was described as "residing in the city of Montreal." The only part of the codicil important to this case was that "if I should have more than one piece of ground in the Roman Catholic cemetery of the parish of Montreal, such piece or pieces of ground shall be sold by my testamentary executors."

In July, 1866, the testator whilst in Paris made a further short testamentary disposition. The testator's wife died whilst he was in Paris, and in the year 1868 he left Paris and came to London. In March of that year he purchased the unexpired residue of a lease for twenty-one years from 1860, determinable at the end of the first seven or fourteen years, of the house No. 5, Langford place, St. John's Wood, where he resided till his death.

In November, 1869, the testator's daughter married the plaintiff William Prince Stevenson, and by a settlement made on the 11th of November, 1869, the testator covenanted to pay to the trustees of the settlement the sum of 8,500*l.*, and in the meantime to pay the annual sum of 525*l.* as interest on this sum. About this time also the testator placed his son, the defendant, as an apprentice with a commission merchant in London. In the following summer of 1870, he again went to Canada for some months. On the 6th of October, 1870, his son came of age, and the testator then arranged for his son to join the commission merchant as a partner and advanced on his account, including the apprenticeship fees, about 2,000*l.*, and from this time also gave his son 300*l.* a year.

On the 17th of May, 1871, the testator died at his house in St. John's Wood. His will and codicil were proved in the

principal registry of the Court of Probate, but the document signed in Paris was not admitted to probate.

In August, 1871, the bill in this suit was filed by the testator's daughter and her husband and the trustees of their marriage settlement against the testator's son, and prayed that the estate might be administered by the Court and that an order might be made for payment of the 8,500*l.* to the trustees of the settlement.

The chief clerk by his certificate found that the testator's estate in England did not exceed 1,500*l.*, but that there were large assets on various securities both on the Continent and in Canada. He also found that the testator's domicile was Canadian.

The question now arose whether the 8,500*l.* was a gift to the daughter absolutely or whether it was a gift *pro tanto* in satisfaction of her share of the residuary estate of the testator, but as, in the former case, there would not be sufficient funds in England to pay this sum if the chief clerk's certificate should be upheld and the domicile declared to be Canadian, it was necessary first to argue the question of domicile.

Mr. Eddis and *Mr. Locock Webb* appeared for the testator's daughter and her husband and the trustees of the settlement, and contended that on the facts of the case the testator had acquired an English domicile and had shewn an intention to abandon his Canadian domicile of origin—

Udny v. Udny, Law Rep. 1 Sc. Ap. 441;

Haldane v. Eckford, Law Rep. 8 Eq. 631;

Hoskins v. Matthews, 8 De Gex, M. & G. 18;

Attorney-General v. Fitzgerald, 25 Law J. Rep. (N.S.) Chanc. 743; s. c. 3 Drew. 610;

Brunel v. Brunel, Law Rep. 12 Eq. 298.

Mr. T. A. Roberts, for an infant child of the testator's daughter, was in the same interest.

Mr. Fooks and *Mr. G. W. Collins*, for the defendant, contended that the testator had never lost his domicile of origin, and

that in order to do so he must have shewn an intention to take up his "permanent abode" in this country; and that he had not done so. They commented on the cases cited by Mr. Eddis, and mentioned in addition

Douglas v. Douglas, 41 Law J. Rep. (N.S.) Chanc. 74; s. c. Law Rep. 12 Eq. 617.

They contended for the Canadian domicile because even if there was any doubt under the English law it was perfectly clear that under the Canadian law the gift of the 8,500*l.* must be brought into hotchpot.

BACON, V.C.—The chief clerk was of course bound to find one way or the other for the purpose of raising that question which to the parties was immaterial, but which interested them so much, and he has found one way. In my opinion the facts do not justify that conclusion.

The law upon this subject has been very often canvassed not only in the cases which have been referred to here, but in many others, and the rules are very distinctly expressed. The origin of the birth is *prima facie* the domicile. That may be changed on the voluntary inclination of the parties, and the substituted domicile may be proved by fact and intention. Relying on that principle, and considering the evidence in this case, I cannot for a moment doubt that there was in point of fact a domicile acquired in England by the act of the testator, and that it was his intention to retain that domicile, and not to revert to his original Canadian domicile. The facts are very simple indeed. In 1858, a merchant and man of business, who was in receipt of some wealth, winds up all his affairs in Canada, sells his house, even sells his grave, and goes to Paris for the purpose of educating his children; and that object being accomplished he comes to England. He takes a house, he there settles his children. The marriage of his daughter, and the apprenticeship first, and buying a partnership in the second instance, for his son, are as serious events in the course of a man's life as can well be considered with reference to his domicile.

Then it is said that this is controverted by the fact that he went back to Canada upon matters of business, and took part in the execution of his father's will. But from the vagueness of the expression, "upon matters of business," I am bound to conclude that it was not much—that it was not anything serious. It is certain he did not take a house in the country, he did not tie himself in any way, he did nothing to shew an intention to remain permanently in Canada. On the other hand, there was an intention he should permanently remain and inhabit the house in London where he married his daughter and established his son as merchant. The suggestion that he would lose his authority to act as executor to his father's will seems to be proved in the faintest way, if it can be said to be proved, and I do not think if it was more distinctly proved that it would at all alter the conclusion to which I arrive from the other facts. If he had any intention of regaining his domicile of birth, other facts must have happened, and must have been capable of proof, if they had happened, from which I could draw that inference. I have no means whatever of doing it. I find nothing in the evidence but facts from which the inference is necessary, and the inference until it is rebutted is, that he had established himself in England, meaning to reside in England, where he had established his children, all the days of his life. That he died possessed of Canadian property does not help the question, nor affect it in any way whatever; he also had French *Rentes* and French securities, and other property of various kinds, but no property whatever in the proper sense of the word in Canada. He had debts due to him from Canada, but no property otherwise than such debts.

I think consistently with all the cases, applying in its utmost strictness the rule that has been recognised in all these cases, on the intention, and on the facts, he had chosen his domicile in England, and died while that domicile was existing and was his. I think, therefore, dissenting from the conclusion of the certificate, that on the whole the testator at the time of his decease was domiciled in England.

Mr. Eddis, Mr. Locock Webb, and Mr.

Roberts then contended that, according to English law, the 8,500*l.* covenanted to be settled upon the daughter was not in satisfaction of the share of the residue given her by the will. They cited

Chichester v. Coventry, 36 Law J. Rep. (N.S.) Chanc. 673; s. c. Law Rep. 2 E. & I. App. 71;

Dawson v. Dawson, Law Rep. 4 Eq. 504;

Trimmer v. Bayne, 7 Ves. 508;

Cooper v. Macdonald, 42 Law J. Rep. (N.S.) Chanc. 533; s. c. Law Rep. 16 Eq. 258.

BACON, V.C. (without calling upon the counsel for the defence), said—In my opinion the document is sufficiently clear in itself, but if it were not, it is entirely covered by the decisions that have been referred to. I think the case of *Dawson v. Dawson*, *Trimmer v. Bayne*, and the last case which was before the present Lord Chancellor of *Cooper v. Macdonald*, have entirely covered and decided the point which has been raised. Upon the authority of those cases, not to say that there are others which might have been referred to of equal value, I think that both the sum advanced to the son and the sum settled upon the daughter must be brought into hotchpot in order to ascertain their interests in the residue.

Solicitors—Mr. John Holmes, for the plaintiffs;
Messrs. Monckton & Co., for the defendant.

MALINS, V.C. }
1873. } SCAFFOLD v. HAMPTON.
Dec. 2. }

Practice—Creditor's Bill for Administration — Short Cause — Administration Summons by another Creditor returnable before Hearing of Cause—Decree on Motion.

Where a cause for the administration of the real and personal estate of a testator has been instituted by one creditor, and a summons for the administration of the per-

NEW SERIES, 43.—CHANC,

sonal estate only has been taken out by another creditor which is returnable before the cause can be heard as a short cause, the Court will, with the consent of all parties to the cause, make an immediate administration decree on motion without requiring the cause to be in the paper and heard as a short cause.

Semble, the rule is the same even if the summons is for the administration of the real as well as the personal estate.

This was a suit by a creditor for the administration of the real and personal estate of a testator, Charles Hampton. A summons for a similar purpose had been taken out by another creditor, which would be returnable before the earliest time at which the present suit could be heard as a short cause, but on the summons no decree for administration of the real estate could be made under sec. 47 of the Chancery Act (15 & 16 Vict. c. 86), real estate not being vested in trustees. Accordingly

Mr. G. O. Edwards, for the plaintiff, now moved for a common administration decree on the authority of

Furze v. Hennet, 2 De Gex & J. 125.

Mr. Burgett, for the defendant, the executrix and universal legatee of the testator, consented to the application.

MALINS, V.C.—I never knew before that there was such a practice as that laid down in *Furze v. Hennet* (*ubi supra*), but on the authority of that case, it having been decided by the Court of Appeal, there must be a decree as asked for (1).

Solicitors—Messrs. Dixon, Ward & Letchworth.

(1) Malins, V.C., made this decree with considerable hesitation, and it may be mentioned that in an unreported case of *Williamson v. Easterby*, in 1868, Sir John Romilly, M.R., declined to follow *Furze v. Hennet* (*ubi supra*), though Wood, V.C., in *White v. Lyons* (4 N.R. 221), where the summons was for the administration of real as well as personal estate, did follow *Furze v. Hennet* (*ubi supra*).

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LORDS JUSTICES.

1873.

July 31.

Aug. 4.

In re THE UNITED PORTS
INSURANCE COMPANY.
WYNNE'S CASE.

Company — Contributory — Agreement for Amalgamation—Exchange of Shares—Application for Shares in Accordance with Agreement — Allotment — Variation between the two Parts of the Agreement—Failure of Amalgamation—Acquiescence.

An agreement was entered into for an amalgamation of the P. Company, limited, with the U. Company, unlimited, upon the terms that the U. Company should purchase the business and property of the P. Company for a sum of money, and should issue to shareholders in the P. Company shares in the U. Company to the same value and with the same amount considered as paid up thereon as the shares previously held by such shareholders in the P. Company, and should take upon itself and indemnify the officers of the P. Company against all the debts and liabilities of the P. Company. This agreement was reduced into writing, and engrossed in duplicate for the purpose of one part being executed by each of the two companies. Before executing their part the U. Company inserted in it, without notice to the P. Company, a clause limiting the liability of the U. Company under the agreement to the amount of its capital stock and property. The part executed by the P. Company contained no such provision.

W., a paid up shareholder in the P. Company, applied for 100 shares in the U. Company upon the terms of the above agreement. In reply he received a letter from a person purporting to be the general manager of the U. Company, stating that the directors had allotted him a certain number of shares in pursuance of the arrangement between the companies, and that the amount to be credited on such shares would be the proportionate amount of the net assets of the P. Company. W. received this letter at the end of August whilst absent from home. In the beginning of October he came to London and asked for an explanation about the letter, but could not learn by whose authority it was written. He also saw the chairman and solicitor of the U. Company, and told them that he objected to take the shares, when they both assured him his

name was not on the register. It turned out that his name had been placed on the register. On the 15th of October he wrote to the secretary of the company and formally repudiated the shares. In November the U. Company was ordered to be wound up on a petition presented before W.'s repudiation of the shares:—Held, that the variation between the two parts of the agreement for amalgamation rendered it invalid; that under the circumstances there was no contract between W. and the company to take the shares allotted, and that W. was not bound by acquiescence or laches, and his name must be removed from the register.

This was an appeal by Mr. James Wynne from a decision of Vice-Chancellor Bacon fixing the appellant on the list of contributories of the United Ports Insurance Company in respect of 100 shares.

In June, 1869, negotiations for an amalgamation were entered into between the above-mentioned United Ports Company and the Progress Assurance Company, limited.

The United Ports Company was a general fire and life insurance company, having its capital divided into shares of 1l. each, but without limited liability. The Progress Company was a limited company with similar objects, having its capital divided into shares of 5l. each. The terms of the proposed amalgamation were that the United Ports Company should purchase the business and property of the Progress Company for which they should pay 12,000l., and should issue to the shareholders in the Progress Company shares of 1l. each in the United Ports Company to the amount of the value of their shares in the Progress Company, and credited with that amount as paid up thereon; that the purchase should be completed as on the 8th of June, 1869, and that the United Ports Company should from that day take upon itself the debts, liabilities and engagements of the Progress Company, and should indemnify the directors and officers of the Progress Company against the same, and that the Progress Company should be wound up, and a committee appointed to carry the amalgamation of the two companies into

effect, and the above stated terms were reduced into writing in the shape of a formal agreement, of which a duplicate part was to be executed by each of the companies. One part was duly executed by the Progress Company without alteration, but the United Ports Company, before executing the other part, added to it a proviso to the effect that "the capital, stock and property of that company should alone be liable to answer and make good all claims and demands under or by virtue of that agreement, and that no director, officer, shareholder or member of the company should be liable or chargeable by reason of the agreement beyond the amount of his or her share of such capital stock or property, it being a part of the contract that the responsibility of the individual members should be limited to the amount unpaid on the shares held by them at the time of such claim or demand." The fact of this provision having been added by the United Ports Company to the part of the agreement executed by them was not communicated to the Progress Company, and although the part so executed was delivered to them, it appeared that they did not know of the discrepancy between the two parts until it was discovered during the progress of this case.

At an extraordinary general meeting of the shareholders of the Progress Company, held on the 24th of June, 1869, the agreement between the two companies was confirmed, and a resolution passed to wind up the Progress Company voluntarily. Before this a petition had been presented for the compulsory winding up of the company, and an order to that effect was made on the 26th of June. Subsequently, however, on the 30th of July, a voluntary winding up under supervision was substituted for the compulsory winding up.

The appellant, Mr. Wynne, was the holder of twenty fully paid up *5*l. shares in, and a director of, the Progress Company.

On the 27th of July, 1869, he filled up and forwarded to the Secretary of the United Ports Company a printed form of application for 100 shares of 1*l.* each in that company. Such form was as follows—

"Progress Assurance Company, Limited.
"Amalgamated with the United Ports and General Assurance Company.

"To the Directors of the United Ports and General Insurance Company.

"In accordance with the terms of the agreement for amalgamation between the above companies, and confirmed by a general meeting of shareholders of the Progress Assurance Company, limited, held on the 24th of June, 1869, I hereby request that you will allot me . . . shares in the United Ports, &c., Company, credited with £ thereon, in exchange for . . . shares held by me in the Progress Assurance Company, upon which the sum of £ has been paid, the scrip certificates for which are herein enclosed."

On the 29th of July Mr. Wynne wrote to the secretary of the United Ports Company as follows—"Dear Sir,—In my letter of Tuesday last, enclosing to you and to the committee the scrip certificate of my twenty shares in the Progress Assurance Company, I omitted to request, as I intended, that the committee would not place my letter to the directors of the United Ports Company in their hands until such time as the compulsory winding up of the Progress Company shall have been changed into a voluntary winding up, and all impediments in the way of the amalgamation of the two companies removed. If, as I suppose, you shall receive this before the committee have forwarded my letter to the directors of the United Ports Company, I request that they may retain it until the arrangements shall be in such a state by the removal of all impediments as that the amalgamation of the companies can certainly be effected."

It appeared by the minutes of a meeting of directors of the United Ports Company, held on the 3rd of August, 1869 (but which minutes were never signed by any one as chairman), that 100 shares were at that meeting allotted to Mr. Wynne, and his name was placed on the register as the holder of 100 shares.

On the 7th of August the following letter of allotment was sent to Mr. Wynne from the office of the United Ports Company—

"Sir,—The directors of the United Ports, &c., Company have allotted you 100 shares in pursuance of an arrangement with the directors of the Progress Assurance Company and United Ports, &c., Company for a transfer of the former to the latter company, and have entered your name in the registry of members of the United Ports, &c., Company as a member of the company in respect of such shares. The amount to be credited on such shares will be the proportionate amount of the net assets of the Progress Assurance Company, Limited. Certificates for such shares will be issued in exchange for this allotment letter when requested in writing so to do."

This letter was signed by a Mr. Leyland as "General Manager" of the United Ports Company, but in fact Mr. Leyland was not the general manager of the company, and it was not proved by whose authority it had been sent. Mr. Wynne being absent from home did not receive this letter until the end of August. On the 31st of August he wrote to Mr. Leyland, as representing the United Ports Company, a letter, enclosing a copy of an account of sums for disbursements, professional charges and director's fees due to him from the Progress Company, and asking for a payment on account thereof, but not referring in any way to the letter of allotment.

In the beginning of October, 1869, Mr. Wynne came to London and called upon Mr. Leyland, and asked for an explanation about the letter of August 7th, which Mr. Leyland was unable to give him. He also saw the chairman and solicitor of the United Ports Company, both of whom informed him that his name was not on the register of that company. On the 15th of October he wrote to the secretary of the United Ports Company formally repudiating the shares as having been allotted in a manner contrary to the agreement.

On the 9th of November, 1869, an order was made upon a petition presented on the 7th of the previous month for winding up the United Ports Company. In the winding up of that company the Vice-Chancellor held that Mr. Wynne ought to be settled on the list of contributories

for 100 shares. From that order Mr. Wynne now appealed.

Mr. Jackson and Mr. Graham Hastings, for the appellant, Mr. Wynne.—There was never any binding agreement by Wynne to take the shares. He applied for the shares "only in accordance with the terms of the agreement for amalgamation." The amalgamation failed and its terms could not be carried out, therefore he was not a contributory—

Dr. Dougan's Case, 42 Law J. Rep. (N.S.) Chanc. 460; s. c. Law Rep. 8 Chanc. 540.

There was not even a valid agreement for the amalgamation. The variation between the two parts of the agreement executed by the two companies respectively was fatal to its existence.

The fact that Mr. Wynne's name was on the register of shareholders in the United Ports Company did not fix him as a shareholder if he had never agreed to become one. His repudiation of the shares was, under the circumstances, sufficient to relieve him from all liability in respect of them—

In re the Monarch Insurance Company; Gorrisen's Case, 42 Law J. Rep. (N.S.) Chanc. 864; s. c. Law Rep. 8 Chanc. 507.

There was also a want of sufficient evidence of any proper allotment of these shares having ever been made to Wynne. There was no proof that Leyland was authorised to sign the letter of allotment.

Mr. Amphlett and Mr. Brooksbank, for the official liquidator of the United Ports Company.—Mr. Wynne applied for these shares, they were duly allotted to him, his name was placed on the register in respect of them, and he had never taken any proceedings to have his name taken off. Although Wynne, as between himself and the company, might have a good case to be relieved from liability, yet he was liable as between himself and the creditors of the company. There had been no sufficient repudiation by him of these shares—

Oakes v. Turquand, 36 Law J. Rep. (N.S.) Chanc. 949; s. c. Law Rep. 2 E. & I. App. 325;

Hare's Case, Law Rep. 4 Chanc. 503; *Stace and Worth's Case*, Law Rep. 4 Chanc. 682;

Lawrence's Case, 36 Law J. Rep. (n.s.) Chanc. 490; s. c. Law Rep. 2 Chanc. 412;

Kincaid's Case, 36 Law J. Rep. (n.s.) Chanc. 499; s. c. Law Rep. 2 Chanc. 412;

In re the Ports Insurance Company; Perrell's Case, 42 Law J. Rep. (n.s.) Chanc. 305; s. c. Law Rep. 15 Eq. 250;

Black, Hawthorn & Co.'s Case, 42 Law J. Rep. (n.s.) Chanc. 404; s. c. Law Rep. 8 Chanc. 254.

The application by Mr. Wynne shewed that he was aware the amalgamation was incomplete.

No reply was called for.

LORD JUSTICE JAMES said, — In this case I am of opinion that the decision of the Vice-Chancellor cannot be sustained. One material fact has been added to the materials before the Vice-Chancellor. It is made out beyond all question that there never was any amalgamation between the two companies at all. What appears is this, that the parties—the managing persons—the directors of the one company and the directors of the other—had had preliminary negotiations and a preliminary agreement for amalgamation; but when the documents come to be produced there is this most extraordinary thing, which I never saw before, there is the document under the seal of the one company which is substantially different from the document under the seal of the other company, which were supposed to be the two parts of the same agreement. In one agreement there is an unqualified covenant by the purchasing company, which, when you come to look at the deed executed by the purchasing company, is a very different thing, limited to the assets of the company. It is impossible to say that those two documents can be parts of one agreement, for the two things are inconsistent. Therefore there never was in fact the amalgamation which was the basis of the whole of the arrangements between the parties.

Now, in starting with that, that there was no amalgamation, Mr. Wynne writes a letter on the footing of the amalgamation which he supposes about to be effected,

or to have been effected. Now, if in answer to that letter there had been a simple assent to the terms—if he had said, having regard to the amalgamation, “I apply for so many shares,” and the company had allotted him so many shares, very probably he might have found himself fixed with the shares, because, although the amalgamation was the motive cause, if he had applied for shares and the shares had been allotted to him, and his name entered on the register, and he had been found on the register at the winding up, he would possibly have been in the same position as another person who has applied for shares and had them allotted to him, and been registered with his consent. But what occurred was this, he writes a letter proposing to have shares allotted to him on certain terms, the terms being very material indeed to him, viz., that he shall have paid up shares allotted to him in consideration of shares in another company. Well, the answer to that, written nobody knows how, by whose authority, under what circumstances, is a letter written containing a totally different bargain, saying, “the company has allotted shares to you—so many shares—and you will be credited with a proportion of the assets as they come in from the old company which you have been proposing to amalgamate with ours.” Those are very different terms. It is not contended that if the case had stood on those two letters, there would have been any agreement. But this is said, “the second letter went on to say—‘We have put you on the register on those terms,’ and Mr. Wynne having received this letter, so far acquiesced, so far abstained from objecting to it, that he must be considered to have entered into an implied agreement to accept the shares on the terms contained in that letter.” Well, the fact was this: this gentleman seems to have been a lawyer; it was the long vacation, and he was yachting; and happening to put into Dublin at the end of August, he received this letter. Nothing further was done by him except that he wrote for something due to him from the company about to be amalgamated, and he wrote to the same person from whom he had received the communication, merely ap-

plying for the debt alleged to be due. There was nothing further—no certificate of shares was ever received by him, he never attended any meeting and never did any act. He came to town in the month of October, and went to the office, to the authorities there, and said, "I entirely repudiate this;" and he goes to the chairman, and to the attorney, and he is assured by one or both of them that his name is not on the register of shareholders. It appears to me it would be carrying the doctrine of acquiescence to a very extravagant length to say that a man has not got, between the end of August and the beginning of October, to consider whether he will become a member in a company on terms which he would have refused at once if his other occupations in yachting had not prevented him considering what the letter was. Therefore he is not prevented from saying, "Those two letters of application and allotment do not constitute an agreement, and I was in October in sufficient time to say I won't accept the terms on which you say you have allotted the shares to me."

I am of opinion that there never was any agreement between these parties, either expressly or by implication from the conduct and acquiescence of the parties. I am therefore of opinion that the order of the Vice-Chancellor must be discharged.

LORD JUSTICE MELLISH.—I am of the same opinion. In the first place, I entirely agree that there was no binding agreement for amalgamation between these two companies. That agreement, I apprehend, ought to be and was intended indeed to be by deed. It may be the shareholders of both companies agreed to it, but the effect of their agreement was simply to give authority to the directors to make an agreement for amalgamation between the companies under the seals of the two companies, and that was manifestly necessary, because of course, if the assets of the Progress Company were to be handed over to the United Ports Company, it was the very essence of the agreement that the Progress Company should have a covenant from the United Ports that they would pay the whole of their debts. Well, then, during the negotiations for the amal-

gamation it does not appear that anything was said about there being any limitation of the covenant of the United Ports, but the terms having been arranged, and the indenture drawn without any clause limiting the agreement, there being two parts of it to be executed, the Progress Company execute their part, by which they transfer their assets to the United Ports, professing to have in the part which they execute an unlimited covenant from the United Ports Company to pay their debts, and to perform the agreement. But the United Ports Company, having the other part of the agreement before they execute it, insert a clause or proviso which has the effect of limiting their liability to the amount of their capital stock and shares. The only question is, what is the effect of that in point of law? I am not aware that that point has ever been raised. I have never met a case where there was that variation between the two parts of a deed. But in mercantile cases a variation between bought and sold notes is a matter that has often occurred, and the result of it always is that there is no contract; and it may be that both parties, after they have entered into an agreement by bought and sold notes, have to a considerable extent acted upon the agreement, but even though they have done that, unless you can find out from their acting which of the two agreements, viz., whether the agreement on the "bought" note, or the agreement on the "sold" note, is the one on which they are acting; if they vary you cannot make a confirmation of the agreement. Well so it is here. Even assuming that they could be bound (of which I have great doubt) without a contract under seal, yet in order that it may be confirmed by being acted upon afterwards, there must be something to shew whether they were acting on the part of the indenture which was executed by the United Ports Company, or the part which was executed by the Progress Company. And I do not see that there is anything at all by which it is possible to discover on which of those two parts they were acting. So that if there was held to be a binding agreement between the two companies, it would be impossible to discover whether the United

Ports are only liable out of their capital stock and funds, or whether they are bound absolutely as an unlimited company, in which case the Progress Company might compel all the shareholders to pay. The only result of that is that there is no agreement at all.

Well, then, there being no amalgamation, an application is made by Mr. Wynne for shares in the company in accordance with the amalgamation. No doubt he made that under the mistaken supposition that there was an amalgamation, when in fact there was not. Then the irregularities are most surprising. In the first place when they try to give in evidence the resolution of allotment, it turns out that it is not signed, and therefore you cannot give the particular evidence which is pointed out by the Act of Parliament of the resolution of allotment (Companies Act, 1862, sec. 67). Then there is nobody can be found who was present at that meeting, so that the allotment cannot be proved incidentally. Then the next thing is to prove the notice of the allotment. That notice is sent signed by a person who appears to have very little connection with the company, and containing terms totally different from the terms upon which Mr. Wynne had offered to take shares, and though it refers to the agreement for amalgamation, yet states terms which are most materially different from the amalgamation, because according to the amalgamation Mr. Wynne having been a shareholder in a limited company with paid-up shares, and therefore liable for nothing, was to receive paid-up shares to a similar amount, it is true, in an unlimited company, but nevertheless in a company which in all its contracts inserted a clause that it was only liable to pay out of the capital stock and shares, the practical effect of which would be that he would be very nearly in the same position as a shareholder whose shares were fully paid up in a limited company, though not precisely the same, because he would still be liable to the costs of the amalgamation and any incidental debts not covered by that agreement. Well, then, an answer is sent which states that they have allotted the shares, but then states merely

that he is to be credited his proportion of the assets of the Progress Company. Well now we know what the result of that would be. Some portion of the assets have been handed over, and some portion of the liabilities paid, and I think it was said there was a balance of 2*l.* one way or the other; and the rest cannot, as it appears to me from this difference in the deed, be carried out at all, so that the practical result would be that Mr. Wynne would be a shareholder in an unlimited company without anything paid at all. That is the effect if he is held to be a shareholder at all. Now the Act of Parliament says to constitute him a shareholder a man must have agreed to become a member of the company, and to have been put on the register. Well, the result of the evidence is that there is no amalgamation, neither is there any agreement between him and the United Ports Company. There is an offer, and no acceptance of that offer, but a letter written by a person who seems to have had no authority to write it, pretending to make an acceptance on different terms. And the whole case that can be put against him is that he was told he was on the register, and he did not object to that in time. I do not think it necessary to lay down in this case that if a man is told he is on the register, when he never made any offer at all, and never sent any proposal, he need not answer that. If a man has made a proposal of some sort or kind, and knows there is some mistake, possibly it is his business to take some step. But one has to look at all the circumstances of the case. Well, Mr. Wynne was away for the long vacation, he was yachting, and he had got this letter. He could not very well have taken any immediate steps, for the Courts were not open. I do not know whether the vacation Judge would have entertained a summons to take him off the register; I do not suppose he would. But very soon after his vacation is over he comes up to town. He did not receive the letter apparently until the end of August, though it was written on the 7th, and he made an application tolerably early in October, and I do not believe that any creditors really had been prejudiced in the interval,

and before the winding up he did make his objection. It was not as if it was a voidable contract and he was voiding it. There is a very distinct difference between a voidable contract capable of being voided, and a void contract which is capable so far of being affirmed. Here there is no contract at all, and the most you can say is that he has notice that they are going to treat him as a shareholder, and by not objecting to it he has ratified and assented to it. In my opinion, under these circumstances, we are justified in holding that he has not assented to it, and the order of the Vice-Chancellor must be reversed.

Solicitors—Messrs. Woodroffe & Plaskitt, for Mr. Wynne; Mr. A. Fulbrook, for the official liquidator.

HALL, V.C. }
 1873. } RICHARDS v. GODDARD.
 Dec. 18. }

Practice—Order 5th February, 1861, r. 19—Witness—Cross-examination—Expenses.

The party called upon to produce his witness for cross-examination by the opposite party in the cause, must, in the first instance, pay the expenses of the witness's production.

Motion. The real question in this case was, who ought to bear the expense of producing a witness for cross-examination?

By the 15th and 16th Vict. c. 86, s. 38, it was provided, *inter alia*, that any witness who had made an affidavit, filed by any party to a cause, should be subject to oral cross-examination. . . . by, or before, an examiner and after such cross-examination might be re-examined by or on the part of the party by whom such affidavit was filed, and such witness should be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had

been duly served with a writ of subpoena *ad testificandum* before such examiner; and the expenses attending such cross-examination and re-examination should be paid by the parties respectively in like manner as if the witness so to be cross-examined were the witness "of the party cross-examining," and should be deemed costs in the cause of such parties respectively, unless the Court should think fit otherwise and direct.

But by the order 5th February, 1861, Rule 19, it is provided, *inter alia*, as follows, viz., that where in "any cause or matter a party has filed an affidavit. . . . any opposite party desiring to cross-examine. . . . the witness, shall not be obliged to procure the attendance of such. . . . witness for cross-examination before the examiner, but any such opposite party may serve upon the party by whom such affidavit has been filed or his solicitor, a notice in writing requiring the production of such witness for cross-examination before the examiner and unless such witness be produced accordingly, such affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such witness shall be entitled to demand the expenses thereof, in the first instance, from the party requiring such production, but such expenses shall ultimately be borne as the Court shall direct."

The material facts of the case as stated in an affidavit of a clerk to the plaintiff's solicitor, were these: The plaintiff gave the defendant notice that he intended to use certain affidavits on the motion for a decree in the cause. Among those affidavits was one made by Frederick Oliver, of 7, Hogarth Terrace, Paxton Road, Chiswick, in the county of Middlesex, surveyor, which was sworn and filed on the 9th January, 1872. The defendant filed affidavits in opposition; and the plaintiff then filed further affidavits in reply. Among those were another affidavit of Frederick Oliver, sworn and filed on the 23rd April, 1872, and an affidavit made by Francis James Field, of No. 5, Sumner Road, Croydon, in the county of Surrey, builder, which was sworn on the 22nd, and filed on the 23rd April, 1872. Notice was duly given by

the defendant's solicitor of the defendant's intention to cross-examine all the plaintiff's witnesses. The 24th May, 1873, was then fixed upon for the purpose; but afterwards the 6th June was appointed as the day. The plaintiff's solicitor having then received the due notice, proceeded to get his witnesses ready for the cross-examination before the examiner; but in doing so, he found that Field had been for some months previously resident in Kansas, in the United States of America, and could not possibly be produced in proper time. Oliver also, although in this country, could not be found. The plaintiff's solicitor, however, attended the examination on the 5th June (the day ultimately agreed on) with the other witnesses. He then stated that if further time was allowed him he would be able to produce both Field and Oliver; and said he would bring over Field from America, "upon the payment of the reasonable expenses of so producing him." The plaintiff's other witnesses were then cross-examined. The defendant did not obtain any extension of the time for the cross-examination, and the plaintiff's solicitor thereupon wrote to the defendant's, asking whether the cross-examination of Field and Oliver was abandoned? stating the plaintiff's desire to set down the cause for hearing on the motion for a decree; and asking, if Field was to be produced from America, for time for his production, and at least 50*l.* to bring him to this country. In reply to that, the defendant's solicitor on the 7th November, 1873, wrote to say (*inter alia*) that the cross-examination was not abandoned; and that, so far as related to the witness F. J. Field, the correct interpretation of the order of 5th February, 1861, was that the plaintiff must produce him for cross-examination before either he, or the plaintiff, could ask for his expenses; but that upon his production for the cross-examination the defendant's solicitor would be prepared to pay what he was entitled to. To that letter the plaintiff's solicitor duly replied, accepting the undertaking to pay Field's costs; but asking the defendant to obtain further reasonable time for his production. The defendant took no steps for that purpose, the plaintiff, still ad-

NEW SERIES, 43.—CHANC.

hered to his view of the order of 5th February, 1861—and deeming the affidavits of Field and Oliver to be material to his case, and wishing to set the cause down on the motion for a decree, now moved for an order, directing that on the hearing of the motion for the decree, and on all other occasions in the cause, the affidavits of Frederick Oliver, sworn and filed respectively on the 9th January, 1872, and the 23rd April, 1872, and the affidavit of Francis James Field sworn on the 22nd April, 1872, and filed on the 23rd April, 1872, might be used as evidence on behalf of the plaintiff, notwithstanding that the deponents had not been produced for cross-examination before the examiner.

Mr. Osborne Morgan and *Mr. C. Browne*, for the plaintiff, contended that the party requiring the cross-examination should pay the witness's expenses "in the first instance." They referred to—

Morg. Ch. Acts & Ord. [3rd ed.]; 186, 191, 626, 627;

Brocas v. Lloyd, 23 Beav. 129; s. c. 26 Law J. Rep. (N.S.) Chanc. 758.

Mr. Dickinson and *Mr. Begg* were for the defendant.

HALL, V.C., thought the party producing the witness for the cross-examination should pay his costs in the first instance. Either interpretation of the order of 5th February, 1861, had its inconveniences; but the party producing the witness was presumably the party having the dominion over him. The motion must therefore be refused with costs.

Solicitors—*Mr. Thomas Wells*, for the plaintiff;
Mr. Charles Roberson, for the defendant.

BACON, V.C.

1873.

July 25.

SELBORNE, L.C.

MELLISH, L.J.

JAMES, L.J.

Nov. 19, 20.

Re THE MATLOCK OLD
BATH HYDROPATHIC COM-
PANY (LIMITED). MAY-
NARD'S CASE.

Companies Act, 1862, s. 23—Contributory—Set-off—Verbal Understanding that Shares were to be allotted as Payment for Land sold.

M. in November, 1865, signed the memorandum of association for 100 10l. shares, and alleged that at the time he did so there was a verbal understanding that the shares were to be paid for by the conveyance of certain land to the company. No allotment was made, but M. acted as a director, for which a qualification of twenty shares was required. Six months after the memorandum was signed, M. agreed to sell and afterwards conveyed the land to the company, and the consideration was stated to be 1,000l.; 100 shares were afterwards allotted to M. in pursuance of the purchase as fully paid up shares. M. afterwards purchased ten other fully paid up shares, and his name was on the register for 110 shares only:—Held, by one of the Vice-Chancellors, that in the absence of any written evidence of the understanding or agreement, the 100 fully paid up shares allotted for the land could not be taken as being the 100 shares for which M. signed the memorandum of association, but that he must be considered liable for 100 shares. But upon appeal this decision was reversed, and it was held that M.'s name ought not to be on the list for any other than fully paid up shares.

This was an application by the official liquidator that Mr. Maynard's name might be placed on the list of contributories of the above company for 210 shares; 110 shares were fully paid up, and as to these there was no dispute.

The company was formed in 1865 for the purpose of purchasing lands at Matlock Bath on which to build a Hydro-pathic establishment. It was duly registered under the Companies Act, 1862. The capital consisted of 25,000l., divided into 2,500 shares of 10l. each.

The first of the articles of association provided that "The business of the company shall be commenced although only a portion of the capital shall have been subscribed, and all provisional contracts which the promoter or promoters, or subscribers of the memorandum of association, shall have entered into or ratified with any party or parties for carrying into effect the objects of the company, shall be binding upon the company."

Mr. Maynard was one of the original directors, and from the articles of association it appeared that no qualification was necessary for an original director, but by Article 51 it was provided "that each future director of the company shall, at the time of his appointment and thenceforth during his continuance in office, hold twenty shares at the least in his own right, and shall have paid all calls due thereon."

By Articles 57 and 59, all the original directors were to retire at the first ordinary meeting after the incorporation of the company, but they were to be eligible for re-election.

In May, 1865, the Old Bath Hotel at Matlock, with the pleasure-grounds round it, belonged as to part to John Gilbert Compton, John Hallowell, Money Wigram and Maynard in undivided shares, and the remaining part belonged to Maynard alone. In that month it was arranged that this property should be sold to the above company when formed, and Maynard alleged that he then offered to accept paid up shares in the company, to the extent of 1,000l., in payment for that portion of the property which belonged exclusively to him. There was, however, no written evidence to this effect.

The memorandum of association was registered on the 29th of November, 1865, and Maynard signed it for 100 shares. The company at once entered into possession of the property, and, as Maynard alleged, upon the verbal understanding that the part of the property belonging to Compton, Halliwell, Wigram and Maynard jointly, should be purchased by the company at the price of 3,500l., which was to be secured by mortgage of the company's premises, and that the part belonging to Maynard alone should be pur-

chased by the company for 1,000*l.*, and that upon the completion of the purchase 100 fully paid up shares should be allotted to Maynard in payment and satisfaction of the 1,000*l.* coming to him alone.

On the 1st of March, 1866, an agreement was made between Maynard and the company, whereby Maynard agreed to sell, and the company agreed to purchase, the property which belonged to Maynard alone at the price of 1,000*l.*

The first ordinary meeting of the company was held on the 28th of March, 1866, Maynard was chairman and was re-elected a director. In a report of the company, dated the 28th of March, 1866, it was stated "That the directors have purchased the Old Bath Hotel property in Matlock Bath for the sum of 4,500*l.* on advantageous terms, the vendors having agreed to accept 1,000*l.*, part of the purchase money, in paid up shares of the company."

Meetings of the company were held on the 19th of April and the 11th of May, 1866, at both of which Maynard was present.

The land was conveyed to the company in May, 1866, and the consideration was expressed to be 1,000*l.* In the same month 100 fully paid up shares were allotted to Maynard.

At a meeting of directors, held on the 17th of April, 1867, ten additional shares were allotted to Maynard, and for these he paid 100*l.* in cash.

The official liquidator now applied to have Mr. Maynard's name fixed on the list of contributories in respect of 210 shares, namely, 100 shares for which he had signed the memorandum of association and to be deemed contributing, 100 shares which he agreed to take in 1866 as payment for the property sold, and the ten shares allotted to him in 1867; the latter 110 shares being admittedly fully paid up.

The chief question was whether the 100 shares allotted to Maynard in 1866 in respect of the property sold by him to the company were in satisfaction of the 100 shares for which he signed the memorandum of association.

Maynard filed three affidavits in support of his case, but only in the last of the three insisted strongly that the verbal

understanding was entered into before the memorandum of association was filed. These affidavits are, however, referred to and fully considered in the judgment of the Vice-Chancellor.

Mr. Kay and *Mr. Ince*, for the official liquidator, contended that the 100 shares for which Maynard signed the memorandum of association were not connected with the 100 shares which he afterwards agreed to take in payment of the purchase money for the property sold. They also laid great stress upon the fact that when Maynard was upon the 28th of March re-elected a director it was necessary for him under the 57th and 59th articles to have a director's qualification and to hold twenty shares, and that, as the purchase of the property was not completed till May, 1866, he must have acted for some time as director without a qualification, unless he was qualified by holding the 100 shares for which he signed the memorandum of association, and these 100 shares were distinct from the 100 shares afterwards allotted to him in respect of the premises sold to the company.

They relied upon

Migotti's Case, 36 Law J. Rep. (N.S.)
Chanc. 531; s. c. Law Rep. 4 Eq.
238;

Evans' Case, 36 Law J. Rep. (N.S.)
Chanc. 501; s. c. Law Rep. 2
Chanc. 427;

Fothergill's Case, 42 Law J. Rep.
(N.S.) Chanc. 481; s. c. Law Rep.
8 Chanc. 270;

The Companies Act, 1862, s. 23.

Mr. Amphlett and *Mr. Graham Hastings*, for Maynard, contended that the 100 shares for which Maynard signed the memorandum of association were allotted to him in respect of the property sold by him to the company, and that this was clearly shewn both by the agreement of the 1st of March, 1866, and by the report of the directors issued on the 28th of March, 1866. Also that in this case it was clear Maynard had paid for the shares by the land he had sold to the company, and that payment in money's worth was equivalent to payment in money. They cited

Drummond's Case, Law Rep. 4 Chanc.
772;

Pell's Case, 38 Law J. Rep. (N.S.)
Chanc. 564; s. c. (on app.) 39
ibid. 120; s. c. Law Rep. 8 Eq.
222; s. c. ibid. 5 Chanc. 11;

Forbes's Case, 39 Law J. Rep. (N.S.)
Chanc. 422; s. c. Law Rep. 5
Chanc. 270;

*Re The Baglan Hall Collieries Com-
pany*, 39 Law J. Rep. (N.S.) Chanc.
591; s. c. Law Rep. 5 Chanc. 346;

*Re The Bosworthen and Penzance
Mining Company; Jones's Case*, 40
Law J. Rep. (N.S.) Chanc. 133;
s. c. Law Rep. 6 Chanc. 48;

Spargo's Case, 42 Law J. Rep. (N.S.)
Chanc. 488; s. c. Law Rep. 8 Chanc.
407.

Fothergill's Case (*ubi supra*),
they argued, was decided with reference
to the 25th section of the Companies
Act, 1867. It was quite clear that had
the company prospered Maynard could
not have claimed the 100 additional
shares.

Mr. Kay in reply.—After signing the
memorandum of association no taking of
paid up shares is sufficient. This case
cannot be decided for the defendants with-
out overruling the decision in

Fothergill's Case (*ubi supra*).

BACON, V.C., said—The 23rd section of
the Winding-up Act is so clear and ex-
plicit that it, at least, is open to no doubt.
In November, 1865, Mr. Maynard, the
present applicant, signed the memoran-
dum of association for 100 shares. From
that time he was unquestionably the
owner of those 100 shares, and unques-
tionably liable for all the consequences
which attached to those 100 shares
for which he had signed; and the ques-
tion before me is, whether he has acquitted
himself of that obligation? whether by
the subsequent allotment of 100 shares,
under the circumstances stated in the
evidence, he is acquitted of the obligations
which he then contracted? The question
is fairly to be regarded as between the
creditors and the association, because,
upon the registration, contracts were
entered into, obligations were contracted
by the company, creditors came into exis-
tence, and as often as they came into
existence, and as often as there was any

demand against the company from No-
vember, 1865, up to at least March, 1866,
Mr. Maynard was liable with the other
persons who had signed the memorandum
of association to satisfy the demands of
any creditors. If, during that period, he
had died, the shares, if they were worth
anything, were assets in the hands of his
personal representatives. Nothing could
have deprived his executors, if he had
died leaving a will, of the right to sell
and transfer those shares. Is there any
transaction that I can find in the course
of the narrative, or in the course of the
evidence, which should induce me to be-
lieve that the rights and obligations so
acquired and contracted have been in any
degree relinquished? It is supposed that
that is so by the last paragraph of the
affidavit which has been filed, in which it
is stated—"It was always understood and
agreed between me and the promoters and
the directors of the said company and the
other subscribers of the memorandum
and articles of association thereof, and it
was part of the scheme for the formation
of the company, that I should take and
subscribe the memorandum of association
of the company for 100 shares, and that
what should become due from me in re-
spect of these 100 shares for which I
should subscribe the memorandum should
be satisfied by my conveyance to the com-
pany of the land of which I was the sole
owner, as stated in my said affidavit, and
I subscribed the said memorandum for
100 shares on the faith of such under-
standing." Now, am I to rely on that
statement? Am I to take it as proved
in this case, in the face of the other evi-
dence, that there was any such under-
standing, or that there was an agreement
by which the company, on the one hand,
could be bound, and by which Mr. May-
nard was bound on the other? When I
turn to the evidence which Mr. Maynard
has adduced in support of his own case,
I find no trace whatever of such under-
standing or agreement, although it is now
made a prominent fact in the case. In
his first affidavit he does not allude in any
degree to the fact that by signing in No-
vember, 1865, he had become the owner
of and liable for 100 shares, but he plunges
into the matter with the date of the year

1866, and says he was possessed of certain lands at Matlock, which "I contracted to sell to the company for 1,000*l.*, as appears by agreement A." When the agreement A is referred to, that also is equally deficient in any allusion or any reference to the shares of which he was the holder. It is an agreement for sale for 1,000*l.*—that and no more. The other stipulations do not touch the subject. He says—"The consideration of 1,000*l.* expressed to be paid to me in and by the said conveyance was paid in one hundred 10*l.* shares of the said company, fully paid up and not in cash." But what is there to identify these 100 shares with the 100 shares for which he signed the memorandum? He has not said they are identical until his last affidavit. No part of the transaction refers to it; no part of the documentary evidence justifies that which is said in the last paragraph of the last affidavit; but, on the contrary, when the applicant has to state his own case supported by his own evidence, and, of course, I need not say, in the most favourable manner to himself, he says—"I agreed to take, and did take, ten additional shares in the said company, and I paid all the calls thereon to the full amount of 100*l.* I held no further or other shares in the said company than the 100 shares and the ten shares above mentioned." On that affidavit his case was first launched, and in that affidavit, not only is there no trace of his being then the holder of 100 other shares, but there is no trace of, or allusion made to, the circumstances now introduced that the 100 shares for which he became liable in the first instance, were the identical shares for which he gave up his 1,000*l.* worth of land. The second affidavit is not only equally deficient in the points I have mentioned, but states a case very considerably differing in its external appearance from that which has been insisted on at the bar. This affidavit refers to the prospectus and the report, and then proceeds—"And at a meeting of the persons who were intended to be the first directors of the said company when formed, held on the said 10th day of May, 1865, it was resolved that the necessary steps should be taken to incorporate the company, and that the secretary should

be, and he was, thereby authorised and directed to enter into a contract for and in the name of the company, for the purchase of the Old Bath Hotel property for the sum of 4,500*l.*, on the understanding that the vendors agree to invest 1,000*l.*, part of the purchase-money," in paid-up shares of the company. This was at a meeting of directors held in May, 1865. It was not until November, 1865, that the articles of association were signed, by which signature Mr. Maynard became liable. The affidavit takes a leap from that May, 1865, without again noticing the signature of the articles of association, and it proceeds—"In pursuance of such resolution two agreements were prepared, dated the 1st of March, 1866." At that time the signature of November, 1865, had taken place. He goes on to say—"Although it is not so expressed in the said agreement, there was a verbal understanding between me and the company that I should invest the said 1,000*l.* in paid-up shares of the company, as referred to in the said resolution of the 10th day of May, 1865, or accept the purchase-money in paid-up shares." Now, to what period am I to refer that statement? Am I to adopt what is said in the last paragraph of the last affidavit, or am I to read it as in ordinary construction anybody would read it, that in March, 1866, two agreements were entered into, one providing for the security of 3,500*l.*, the other providing for the 1,000*l.*; am I to say that he meant there was then a verbal understanding come to, or am I to say that there had been a verbal understanding from the beginning, all the time that has been occupied in these transactions? If the latter, on what secure footing can I place any such conclusion? I am dealing now with the narrative written by Mr. Maynard himself, which does not enable me in this to guess at even what he means when he says—describing two written agreements—although it is not so expressed in the written agreement, there was a verbal understanding. In the 9th paragraph he says—"The said sum of 1,000*l.* was not, nor was any part thereof, even in fact paid to me; but on the completion of the purchase 100 paid-up shares in the company

of 10*l.* each were allotted to me, and I accepted the same as 1,000*l.* money's worth in payment and satisfaction of the purchase-money for the said property of which I was the sole owner as aforesaid, and in fulfilment of the said understanding that I would invest 1,000*l.*, part of the said purchase-money of 4,500*l.* in paid-up shares of the company." Take the statement as he gives it, being already the owner of 100 shares, he completes his purchase, and takes an allotment of another and different 100 shares in satisfaction of the 1,000*l.* which would be due to him on the completion of the purchase-money. That is the whole material evidence in this case. If the arrangement spoken of in the last affidavit had ever been come to, there ought to have been some mention of it in the written evidence when the occasion required that it should be expressed. I find a total blank and an entire absence of any statement of fact from which I can properly draw any such conclusion. And, on the other hand, I find the facts plain, that the memorandum of association is signed, that for months after that, this gentleman being a director of the company, upon which I lay no greater stress than the case positively requires me to do, he as director, not manager, interfering with the management of the company, carries on the operations of the company from November, 1865, to March, 1866, without any suggestion that he was not the absolute owner of the 100 shares which had been his from the time he signed the paper; and, against creditors who are asking to be paid by the shareholders in this company, am I to say that by this transaction, evidenced by such documents as I have referred to, this gentleman has acquitted himself of his obligation? He is a holder of 100 paid-up shares beyond all doubt; he is no less the holder of 100 shares which he contracted to take by signing the memorandum of association, and to hold otherwise would be to defy the plain facts of the case.

It is not necessary to go into the various authorities which have been referred to. The circumstances which have given rise to the decisions which have been referred to have often been very embarrassing, and

the particulars on which the judgment is founded sometimes very intricate, but in no case has the Court gone from that wholesome principle, that when the transactions of the parties are recorded in written documents you must rely on written documents, and you must not rely on any suggestion of an understanding confirmed and corroborated by what has been done between the parties. Now what corroboration is there of any part of this case? What is there inconsistent with the fact that after November, 1865, the 100 shares of which Mr. Maynard was the owner were his for all purposes, and might have been sold and dealt with by him, and were his property to all intents and purposes. There was no agreement binding anybody that he would sell for 1,000*l.*, or any other sum, his interest of that divided part of the property which is mentioned. If he had died the company had no means of enforcing the performance of the undertaking or agreement which is referred to. His heir-at-law, or devisee, would not be bound to sell for 1,000*l.* if the shares in this company had increased greatly in value as they might have done. He would not have been obliged to take the burthen on himself, if it was a burthen. If it was a benefit he might have claimed it, but he was under no sort of obligation between November and March to do anything with this company in respect of the sale of his land, and when he did, in the very words he himself uses, on the completion of the purchase have them allotted to him, he took them as paid-up shares, and paid-up shares they are.

Fothergill's Case (ubi supra), which has been referred to, is a very valuable decision, in my opinion, as it has established the principle on which alone the Court can safely act. The Lord Chancellor, although he conceded it to be his duty to examine the other cases as far as they had any application to that which was before the Court, relied wholly and entirely on the written testimony, or the documentary evidence which was before him and excluded from consideration, as, in my opinion, if I may say so with deference, there ought to be excluded from consideration here all that was said about

the intention of the parties. I can collect no intention from what has been done by the parties, except the intention which the documentary evidence plainly expresses, and, in my opinion, by signing the memorandum of association Mr. Maynard became, and is, the holder of 100 shares, and is under all the liabilities and obligations which attach under the Winding-up Act to the holder of shares in a joint-stock company.

Mr. Maynard appealed from this decision.

Mr. Amphlett and *Mr. Graham Hastings* appeared for the appellant.

Mr. Kay and *Mr. Ince*, for the official liquidator.

No fresh authorities were cited.

A reply was not called for.

THE LORD CHANCELLOR.—The question in this case is one of payment or no payment; the liability of the appellant to pay up to the company the full amount of the shares for which he subscribed the memorandum of association being unquestionable, and the company having been free to accept the payment in any honest way. If the contract for the sale of the appellant's property to the company, dated the 1st of March, 1866, and the conveyance consequent thereon, expressed the true agreement between the parties, the company became bound to pay the appellant 1,000*l.*, the same sum which he was liable to pay them for the shares in question, and there was no difficulty in point of law, in setting off one payment against the other, which, from the evidence before us, we are satisfied was the thing intended to be done, and was actually done, so far as the parties could do it. Whatever difficulty there is in the case arises from the statement in the prospectus, which I assume to have been issued after the registration of the memorandum of association, to the effect that the company had made a satisfactory arrangement for the purchase of the appellant's property, the vendor taking 1,000*l.* of the purchase-money in paid up shares of the company, and from the fact that the appellant, who was the chairman and a director of the company, must be taken to have authorised the statement, and that

the company was from the commencement of its legal existence, in November, 1865, in possession of this property upon the terms, as must be supposed, of some parol agreement for its purchase. It further appears that some months before the formation of this company its promoters had authorised their secretary to negotiate terms for the purchase of this property on the understanding that the 1,000*l.* in question, which was to be part of the entire purchase-money, should be invested by the vendor in paid up shares of the company, that a report was made by the directors to the shareholders on the 28th of March, 1866, stating that the vendor had agreed to accept 1,000*l.*, part of the purchase-money, in paid up shares of the company, and that in a board minute of the same date it is stated that 100 paid up shares had been issued to the applicant in part payment of the purchase-money. The Vice-Chancellor seems to have regarded this minute, and some passages in the appellant's evidence, as sufficient proof that he did in fact receive in payment for the land paid up shares not identified with the shares for which he signed the memorandum. But in this view of the facts we cannot agree. It seems to us clear that no paid up shares were ever allotted to or registered in the name of the appellant in addition to the shares now in question. The question to my mind is, whether this circumstance obliges or entitles us to disregard the terms of the written contract of the 1st of March, 1866, and the subsequent conveyance, and to hold that the appellant was never, after he subscribed the memorandum of association, a creditor of the company for 1,000*l.*, but only a creditor for 100 paid up shares in the company. If that were the proper conclusion, I should myself agree with the Vice-Chancellor, and should not, as at present advised, be able to hold that the shares for which the appellant subscribed the memorandum were or could be paid up by setting off against them the right which, upon that supposition, he would have had against the company to call for the allotment or issue to him of 100 other fully paid up shares. He was the chairman of the company,

and the directors, as I understand, had no power to invest any part of the funds of the company in the purchase of its own shares. But I do not think we are either obliged or entitled now to deal with written agreements which, as far as appears, were entered into in perfect good faith, and which cannot, in my opinion, be controlled by the prospectus, or the report, or the board minute to which I have referred. It may have been the true meaning, although, in my judgment, it is not aptly or accurately expressed, both of the prospectus, and the report, and the minute, that the appellant, as vendor to the company, would not require the 1,000*l.* to be paid to him in money, but would be content to have it applied in paying up his shares, or, to use the expression of the promoters in the authority given by them to their secretary the year before, that he would so invest the 1,000*l.* This operation, though not equally as advantageous to the company as if they had obtained the right to require from the appellant as a shareholder payment of the full sum of 1,000*l.* in cash, and also the right to his land without any money payment, on delivery to him as vendor of a certificate for 100 paid up shares in the company, was, nevertheless, beneficial to them as it relieved them from the necessity of paying down 1,000*l.* in money out of the previously paid up funds of the company. The proper conclusion of fact from the whole evidence, notwithstanding some inaccuracies of language in the appellant's affidavits corresponding with similar inaccuracies in the documents referred to, seems to me to be that this, and this only, was the operation throughout intended, and that, as suggested by Mr. Amphlett, when an allotment of paid up shares was spoken of in the board minute of the 28th of March, 1866, nothing more was meant than that the appellant had his right recognised to the issue of certificates shewing that the 100 shares registered in his name were in March, 1866, fully paid up, by setting off against the amount due on them the purchase-money for the land. Consistently, therefore, with all that was decided or ordered in *Fothergill's Case* (*ubi supra*), I think the appellant ought not to be on the list for

these 100 shares otherwise than as fully paid up shares.

JAMES, L.J.—I am of the same opinion. It appeared to me almost from the first, with deference to the view of the Vice-Chancellor, that really this was a plain case on the documents themselves. The appellant was, beyond all question, liable to pay for 100 shares, and beyond all question he did by a written agreement, the only binding agreement between him and the company, and by a conveyance, sell his land partly for 1,000*l.* That 1,000*l.* was applied by him in payment of the shares which he so contracted to take. It appears to me, that being so, unless in some proper proceeding, based on proper materials, that agreement and that conveyance could be set aside or rectified, it is impossible to raise such an equity as is suggested here by way of equitable replication or answer to the valid plea of payment. If it is suggested that the payment was made by means of money which the chairman had improperly obtained from the company, that must be established by some proper proper proceeding rectifying what was done. No doubt if it could be brought up to this case that the whole of that was a sham and a fraud from the beginning, it would be a different thing. If when they had executed the deed that was a mere contrivance to enable the chairman to pay up 1,000*l.* for his shares, and the thing was to be treated as a sham and he would be still liable, that would be a different thing, but if it is upon a refined equity arising upon some modification or rectification of the documents actually signed by the parties by reason of something said or done by some other document, then I am of opinion it is not capable of being raised, on the trial of an issue whether the money was paid or not.

MELLISH, L.J.—I am of the same opinion. Upon the written documents, if you look at them alone, the case is clear enough. By the memorandum of association Mr. Maynard became the holder of 100 shares unpaid up. By the written agreement he sold land to the company for 1,000*l.*, and he conveyed that land to the company and signed a receipt acknowledging he had received

the 1,000*l*. It is quite plain (and that is not disputed) that that 1,000*l*. was never paid: the only 1,000*l*. to which it can be referred is the 1,000*l*. which he owed on his shares. If it stood there, the matter is quite plain. But the Vice-Chancellor came to the conclusion, principally from expressions in Mr. Maynard's own affidavits, that in reality 100 additional paid up shares were allotted to him at the time when the conveyance was executed, and that in reality, although he signed the receipt admitting that he had received 1,000*l*. in money, what he really had received was 100 additional paid up shares. Now there is certainly no evidence in the books of the directors of any allotment of such additional 100 shares, neither is he registered for the additional 100 shares, but he is only registered for the original 100 shares in the memorandum. I cannot help coming to the conclusion that the expressions in his affidavit are merely inaccurate expressions, which it is very likely that persons might fall into from not really seeing the exact legal effect of signing the memorandum. In my opinion the burthen of proof is clearly on the liquidator to shew that there were really allotted to him, and that he did accept, 100 additional shares besides those in the memorandum. Looking at that, I think before the liquidator can rely on what may very probably be inaccurate expressions in his own affidavit, he should have cross-examined and have said—"Did you really mean by this to say that you got 100 additional paid up shares? How do you account for these shares in the memorandum?" If that had been done, I have not the least doubt he would have explained and would have said, I considered that they were all the same shares and that there was no additional allotment at all. I entirely agree with the judgment that has been given.

Solicitors—Messrs. Thomas White & Sons, agents for Messrs. Shipton & Halliwell, Chesterfield, for the appellant; Messrs. Satchell & Chapple, for the official liquidator.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} <i>Re</i> THE METROPOLITAN PUBLIC CARRIAGE AND REPOSITORY COMPANY (LIMITED). BROWN'S CASE.
JAMES, L.J.	
MELLISH, L.J.	
1873. Nov. 19.	

Winding up—Contributory—Director—Acceptance of Office—Contract to take qualifying Shares—Paid up Shares.

By the articles of association of a joint stock company the qualification for a director was fixed at fifty shares. The promoter of the company applied to B. to become a director, and promised to provide his qualification out of some fully paid up shares to which the promoter was entitled. B. consented and was appointed a director, and took his seat at the board. The promoter then requested the directors to allot to B. fifty of the promotion shares, which was done, the shares being entered in the register as fully paid up. B. never had any other shares. On the winding up of the company, —Held, affirming the decision of WICKENS, V.C., that no contract to take shares other than the fully paid up shares registered in his name could be inferred from B.'s acceptance of the office of director, and therefore he was not liable as a contributory.

Leake's Case (40 Law J. Rep. (n.s.) Chanc. 172; s. c. Law Rep. 11 Eq. 100; s. c. 6 Chanc. 469), explained.

This was an appeal by the liquidators from an order of Wickens, V.C., in chambers, upon a summons to vary the certificate of the Chief Clerk excluding the name of Mr. Brown from the list of contributories of the Metropolitan Public Carriage and Repository Company (limited), now in course of winding up.

The company was incorporated under the provisions of the Companies Acts, 1862 and 1867, on the 11th of March, 1870, with a capital of 150,000*l*., divided into 100,000 shares of 1*l*. each, and 50,000*l*. in debentures, bearing interest at 7½ per cent. per annum. The qualification of a director was the holding of fifty shares.

At a meeting held on the 15th of March, 1870, at which the subscribers to the memorandum and articles of association were present, the registration of the com-

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pany was reported and directors were appointed, amongst them being Mr. Brown, who took his seat at the board on the 18th of March. He acquired his qualification as a director in the following manner:

By an agreement dated the 25th of March, 1870, made between Mr. J. S. Betts, on behalf of the company, of the one part, and Mr. J. C. Bromfield, who was the promoter of the company, of the other part, it was agreed that Mr. Bromfield should float the company with a capital of 100,000*l.*, and that the company should allot to him 5,000*l.* in fully paid up shares; but in the event of his not raising the whole of the capital, he was only to be entitled to receive shares equivalent to the amount of capital raised. This agreement was registered at the Joint Stock Companies Registration Office on the 27th of March, 1870, and on the 29th of March a resolution was passed for allotting to Mr. Bromfield 5,000 fully paid up shares in pursuance of this agreement.

Mr. Bromfield applied to Mr. Brown to become a director, and promised to provide his qualification out of the paid up shares to which he was entitled as promoter, and on his consenting, requested the directors to allot to him fifty of the promotion shares to which he was entitled. This they did, debiting Mr. Bromfield's promotion account with the shares which were issued and entered in the register as shares fully paid up. Mr. Brown never had any other shares.

The shares subscribed for by the public were not sufficient to justify the directors in carrying on operations, and on the 16th of February, 1871, a resolution was passed for a voluntary winding up, which was afterwards continued under the supervision of the Court.

The liquidators sought to place Mr. Brown's name on the list of contributories for fifty shares, on the ground that by agreeing to become a director he had agreed to accept the shares necessary to constitute his qualification, and that the promoter's shares issued to him under the circumstances above related were not sufficient for the purpose.

The Chief Clerk by his certificate ex-

cluded Mr. Brown's name from the list of contributories, and Wickens, V.C., declined to vary the certificate.

The liquidators appealed from this decision.

Mr. Jackson and *Mr. Cutler*, for the appellants, urged that the acceptance of the office of director involved as a necessary consequence the taking of the number of shares necessary to give the qualification—

Re Disderi & Co., 40 Law J. Rep. (N.S.) Chanc. 248; s. c. Law Rep. 11 Eq. 242;

Leeke's Case, 40 Law J. Rep. (N.S.) Chanc. 172; s. c. Law Rep. 11 Eq. 100; s. c. 6 Chanc. 469;

Harvard's Case, 41 Law J. Rep. (N.S.) Chanc. 283; s. c. Law Rep. 13 Eq. 30;

The Marquis of Abercorn's Case, 4 De Gex, F. & J. 78; s. c. 31 Law J. Rep. (N.S.) Chanc. 828;

Levita's Case, Law Rep. 3 Chanc. 36.

Mr. Hamilton Humphreys, who appeared for Mr. Brown, was not called upon to support the decision.

THE LORD CHANCELLOR.—We think there is no reason for dissenting from the opinion which we must infer the Vice-Chancellor formed in this case, and we think we may imagine his reasons without much risk of error, though they are not actually given to us.

Mr. Jackson has argued as high as this—that in a company, the rules of which require that a director should have the qualification of a certain number of shares, the mere acceptance of the office of director by a person who had not the necessary number of shares carries with it from that moment of time—I think the argument must be carried so far—an implied contract that he will take from the company that number of shares, either immediately, or at least before he acts as a director. Without, in the first instance, referring to authority, it is obvious that that argument labours under this difficulty—that the qualification clause does not require that the director shall take shares by reason of any contract whatever with the company. At the most, it means that, if he

acts as he ought to act with the proper qualification, and without which he is no doubt disqualified, he must possess himself, in some way or other, of the necessary number of shares; but in whatever manner he may manage to possess himself of those shares, if he does so he has the qualification, and it is quite unnecessary that he should enter into a contract with the company rather than with any other person to take those shares—that he should be the original holder of shares, if it be possible to do it otherwise.

Now the authorities which have been decided really are inconsistent with Mr. Jackson's argument, because the only case in which the question was neatly raised was the case of *Lord Abercorn*, before the Lords Justices Knight Bruce and Turner, and in that case the naked question was raised whether, from the acceptance of the office of director, and the consequently authorised representation to the world that the person so accepting was a director, continued over a certain period of time, a contract with the company to take shares would be inferred. In that particular case the option was either to have shares or to insure in the company. But the shares might be acquired in various ways; and the Lords Justices held that, from the mere acceptance of the office of director without more, they could not infer a contract to make himself a shareholder.

The other cases are all cases in which, as a matter of fact, shares had been registered in the name of the director, and that circumstance occurs in this case also; and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered when a man tried to get rid of the shares actually registered in his name, that he had accepted the office of director, which a man ought not to fill without qualification. If, therefore, *prima facie*, I am right that he must have a qualification, and was bound, as a director, to be acquainted with what was done in the management of the affairs of the company, when that was actually done by a person acting under authority, the result of which was to have shares in his name, which he ought to have as a qualification, that

was a just conclusion of fact upon the whole that that was done upon his authority, and he was not allowed to repudiate it; and for my part I see no reason to doubt that the various cases which arose in that state of circumstances were well decided; and if there be found, as there does appear to be found in some of them, and in particular, I think, in one before Malins, V.C., some dictum not necessary for the decision of the question which would appear to be exaggerated to an extent not *prima facie* reconcilable with the decision in *Lord Abercorn's case* as to the value of the single circumstance of acceptance of the office of director, it seems to me to be only just to the learned Judge from whom this decision has proceeded to remember that Judges have tacitly in their minds the circumstances and facts of the case when they speak of the influence of any material fact in evidence before them, in the decision of it. They are not to be supposed to forget that there are other facts, but they speak of the value of the particular fact, bearing in mind the general character of the entire case. Therefore, I think it would not be placing a fair principle of interpretation upon the language found in some of those cases, if we were to infer that the learned Judge from whom that language proceeded felt himself authorised in judicially expressing dissent from what was decided by the Lords Justices in *Lord Abercorn's Case* (*ubi supra*). I do not, for my part, place that interpretation on the language.

Therefore, the result which appears to me to be the true one on the authorities is, that the effect of a man accepting the place of a director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorised by himself, shares which, in the ordinary course of the business of the company, have, substantially, got into his name, and which were needful for his qualification.

So much for the principle. If that be a right view of the principle, it follows that you cannot, from the mere fact of Mr. Brown in this case assenting, on the

8th of March (for I do not think he assented earlier), to the act of the other directors electing him as a member of their body, which they did on the 15th of March, that fact standing alone, and apart from the inference of the other circumstances, infer that Mr. Brown on that day entered into a contract with the company to be the allottee from them of the number of shares necessary for his qualification.

But, in truth, this case does not rest on that naked state of facts at all; for it appears, as in the other case (1), that shares which *prima facie* we think must be considered to have been taken as the qualification of Mr. Brown, actually passed into his name, and were duly registered in his name within ten days, or thereabouts, after the day on which he accepted the office of director. The evidence is admitted to be in such a state as to justify the inference that, when he accepted the office of director, he did intend to qualify himself, and to qualify himself by shares to be acquired in the manner in which he did acquire the shares actually registered in his name. What was that? Why, it appears that at this time there was a promoter named Bromfield, who had undertaken to float it: to place, as it is called, the capital, and to find the directors. He did get Mr. Brown, having at that time what, indeed, as far as anything appears which could be called a legal agreement with the company, good claims against the company, which, I think, it is an inference we are entitled to draw, were at that time intended to be satisfied by the allotment to Bromfield of a considerable number of paid-up shares: that is to say, he was to pay nothing more upon them, because his services to the company were considered to be equivalent to payment; and it appears at a meeting of the 28th of March, at which Mr. Brown was not present, that agreement, in whatever shape it may have existed before, was put into a formal shape as between Bromfield and the company, it being agreed that he should have for those services 5,000 paid-up shares on certain

special terms, the effect of which I will, for the judgment's sake, assume (without, of course, deciding anything more about it), was that the number would be liable to be reduced if the allotment of shares to the general public should not proceed to the extent contemplated, and possibly any shares so allotted would be liable to be cancelled if the allotment fell short of what was expected. Before any large allotment or any to the general public was actually made, on the 29th of March, at a general meeting at which Mr. Brown was not present, as in fulfilment of that agreement, 5,000 shares were allotted, as fully paid-up, to Mr. Bromfield, and of those 5,000 shares 50 were substantially transferred to Mr. Brown. I do not mean that the form of registration and transfer was gone through, but the substance of the matter was this: they being 50 of the shares authorised to be issued as fully paid-up shares to Mr. Bromfield under his agreement, by his direction that number was transferred to Brown, and registered in his name, Brown having from the beginning contemplated qualifying himself in that manner, and not otherwise, for the office of director.

Now these shares were or were not validly issued. If they were not, then the qualification must fail, but you cannot on that hypothesis substitute a different agreement to take a different qualification. If they were, the qualification was good. Which of those alternatives would be correct seems to me to be immaterial for the present purpose to enquire, because either way we come to this, that there was really no other contract to qualify himself by shares except that which was carried into effect by means of that transaction with Bromfield.

JAMES, L.J.—I entirely agree in the conclusion and the reasons that the Lord Chancellor has given. I desire to add that in the case of *Admiral Leake*, it certainly was not my intention nor the intention of the Lord Justice to overrule the decision in *Lord Abercorn's Case* (*ubi supra*). We never even referred to it. There may be an expression taken by itself, separate from the context, which may appear to give colour to the proposition that I intended to say that becoming

(1) *Maynard's Case*, *ante*, p. 146.

a director involved an agreement to take the qualifying shares. If so, it is only another instance of the inaccuracy of language which we are all liable to.

MELLISH, L.J.—I am of the same opinion. In order to constitute anybody a shareholder there must be proof of an agreement between him and the company that he should become a shareholder. The question is, is that proved in this case?

I think it quite clear that the mere fact of being a director cannot of itself make a man a shareholder, that is to say, make a man who agrees with the company to take shares, because the expression that he must be qualified by holding so many shares, does not oblige him to take shares from the company, but he may agree to take the shares by any other legal mode by which shares may be acquired, and I think, strictly to comply with the articles of association, it would be sufficient that he should have acquired the shares before he acts as director. If that were not so, if the meaning of the articles of association were that a person must have the shares before he is elected to be a director, the consequence would be that the election of Mr. Brown as a director would be wholly void. According to the ordinary understanding of mankind it would be sufficient if a person acquired shares before he became a director, and there can hardly be any doubt that if a proposal were made to a particular gentleman to become a director in the company, and he enquired how many shares were necessary for a qualification, and assented to be a director and went into the market and purchased the shares, or got a friend to transfer the necessary number of shares before he acted, that would be quite sufficient qualification, and it would be impossible to infer, under the circumstances, that he had agreed to take over unpaid shares and to pay them up.

That being so, the single circumstance in this case is, can we infer that Mr. Brown agreed to take shares because he attended that one single meeting on the 18th of March? It appears to me, simply as a question of fact, that it is impossible under all the circumstances of this case to make that inference, because I think it is

tolerably clear that from the very beginning Mr. Brown was in fact a representative of Bromfield, who was to have a very large interest in the company, and it was intended from the beginning that he should qualify himself by having some of Bromfield's shares. It is quite possible that, though his name is mentioned as having attended as a director at that meeting of the 18th of March, all he did was to go there for the purpose of expressing his assent to accepting the office of director, it not appearing that he had accepted previously; it being understood all along by all the parties to that transaction that he was really to be qualified by receiving the shares from Bromfield, and that seems to be corroborated by the fact that he does not attend other meetings by which the agreement with Bromfield was concluded and the shares allotted. He does not attend the meeting or attend at all until the shares are allotted to him which were intended to be Bromfield's shares.

In my opinion, under the circumstances, it is impossible to infer that he assented to that as a shareholder. I do not mean to say if a person consented to be a director, and had shares allotted to him for his qualification, and went in and acted as a director for a considerable time, that you might not infer that he agreed to accept the shares, or, of course, to be qualified in any other manner.

In my opinion, in this particular case, it is impossible to infer that he ever consented to take any shares except paid up shares in the company, and to hold that would be to hold that he became a shareholder contrary to his own assent.

Appeal dismissed with costs.

Solicitors—Messrs. Vallance & Vallance, for appellant; Messrs. Tibbitts & Co., for Mr. Brown.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} COOPER v. COOPER.
JAMES, L.J.	
MELLISH, L.J.	
1873.	
July 28.	

Settlement—Charge of Portions—Satisfaction by Advancement in Lifetime of Tenant for Life—Gift by Will.

A testator devised real estates in strict settlement subject to a term for raising portions for younger children, and directed that if the tenant for life should during his life advance or pay any sum or sums of money to or for the use or benefit of any younger child for whom a portion was thereby intended to be provided, then, unless the contrary should be declared by the person making such advance by deed, the sum or sums of money so to be advanced should be taken to be in full or part satisfaction as the case might be of such child's portion. The tenant for life by will gave legacies and shares of residuary estate to some of the younger children:—Held, that such gifts were not to be taken in satisfaction pro tanto of the portions.

Rickman v. Morgan (1 Bro. C.C. 63; s. c. 2 ib. 394); *Twisden v. Twisden* (9 Ves. 413); *Leake v. Leake* (10 ib. 476); and *Golding v. Haverfield* (M'Cle. 345; s. c. 13 Price, 593) observed upon.

John Cooper by his will dated the 21st of October, 1817, gave his real estate to trustees upon trust for his daughter Elizabeth during her life, with remainder to the use of her husband, W. D. C. Cooper, for his life, with remainder as to his Bedfordshire estates to trustees for 1,000 years, in trust to raise 30,000*l.* for younger children, with remainder to W. C. Cooper, the eldest son of his daughter Elizabeth, for his life, and to his first and other sons in tail, and as to his estates in Cheshire and Essex to the second son of the testator's daughter Elizabeth, in tail, and then proceeded to direct as follows—

In case my said daughter Elizabeth and W. D. C. Cooper, or either of them, shall at any time or times during their lives or the life of the survivor of them, advance or pay any sum or sums of money to or for the use or benefit of any younger

child or children for whom a portion or portions is or are hereby intended to be provided, then and in such case and unless the contrary shall be directed by my said daughter Elizabeth and W. D. C. Cooper respectively, or the survivor of them, making such advancement as aforesaid in and by any deed or writing, deeds or writings, to be sealed and delivered by them, her or him respectively in the presence of and attested by one, two or more credible witness or witnesses, the same sum or sums of money so to be advanced to or for the use of any such younger child or children as aforesaid, shall be deemed, accepted and taken to be in full or in part satisfaction as the case may be of the portion or portions to which such child or children would have been entitled under the provisions of this my will, and to the intent (unless the same shall be directed to the contrary by my said daughter Elizabeth and W. D. C. Cooper, or the survivor of them, making such advancement as aforesaid to be expressed in manner aforesaid) to exonerate and discharge the Bedfordshire estates from the portion or share of the younger child or children to whom such advancement shall be made as aforesaid, or so much and such part of the same portion or share as such sum or sums of money shall amount to, anything herein contained to the contrary notwithstanding.

Elizabeth Cooper, the daughter of the testator, had two sons and five daughters, viz., W. C. Cooper, James Lindsay Cooper, Jane Cooper, Elizabeth, wife of Count van der Burch, Amelia, wife of Moses Tearl, Caroline Cooper, and Lucy, wife of Sir Henry Robinson.

W. D. Cooper Cooper, the son-in-law of the testator, survived his wife and died in 1860, having by his will given pecuniary legacies to all his daughters except Jane who died in his lifetime, and to W. S. C. Cooper, the only son of his eldest son, W. C. Cooper, and bequeathed the residue of his personal estate in equal shares to his daughter Caroline, and the trustees of Mrs. Tearl's settlement, and devised his residuary real estate to N. C. Milne in trust for his daughters, Caroline and Mrs. Tearl, and the survivor of them during their lives and the life of such survivor.

The will contained no declaration that the benefits thereby given to his daughters should not be taken in satisfaction *pro tanto* of their shares in the 30,000*l.*, nor was there any deed executed containing such declaration.

Many questions arose in the suit which was instituted by Caroline C. Cooper and Mr. and Mrs. Tearl and their children, but the only question which calls for a report was whether the legacies and shares of residue given by the will of W. D. C. Cooper were to be taken in part satisfaction of their shares in the 30,000*l.*

The Master of the Rolls decided in the affirmative. Hence the appeal.

Mr. Southgate and Mr. Vaughan Hawkins, for the respondents W. C. Cooper and his eldest son W. S. C. Cooper, tenant for life and tenant in tail of the Bedfordshire estates, who were appellants from another portion of his Lordship's judgment, after opening and arguing their own appeal, proceeded to argue in support of his Lordship's decision upon the question above stated. They contended that it had been long settled by authority that a legacy of a particular sum or of a residue, for it was immaterial which, was to be considered as an advancement in the lifetime of the testator within the meaning of such a clause as was contained in the will of the original testator in this case—

Rickman v. Morgan, 1 Bro. C.C. 63 ;
s. c. 2 *Ibid.* 394 ;

Twisden v. Twisden, 9 Ves. 413 ;

Leake v. Leake, 10 Ves. 476 ;

Bengough v. Walker, 15 Ves. 507 ;

Onslow v. Mitchell, 18 Ves. 490 ;

Golding v. Haverfield, M'Cle. 345 ;
s. c. 13 Price 598 ;

Fazakerly v. Gillibrand, 6 Sim. 591 ;

Papillon v. Papillon, 11 Sim. 642 ;

s. c. 10 Law J. Rep. (N.S.) Chanc.
184 ;

Douglas v. Wills, 7 Hare 319.

This rule of construction has been laid down in all the text books—

Matthews on Portions, 217 ;

Roper on Legacies, 1098 (4th ed.) ;

Peachey on Settlements, 497 ;

and the proviso in the original testator's will merely follows the common form used

in all books of precedents, with the single exception of

Davidson's Conveyancing Precedents,
vol. 3, p. 872 (2nd ed.) ;

where the words, "in his lifetime," are omitted.

They referred to—

Powell's Conveyancing by Barton,
vol. 6, p. 97 (ed. 1802) ;

2 *Saunders on Uses*, 264 (4th ed.) ;

2 *Martin's Conveyancing* (1844), 301 ;

9 *Bythewood's Conveyancing by Jar-*
man, 232 ;

2 *Crabb's Precedents*, 1381 (5th ed.
by *Shelford*) ;

2 *Prideaux's Conveyancing*, 284 (7th
ed.) ;

Hayes' Concise Precedents, 601 (3rd
ed.).

They also referred to—

Smith v. The Earl of Jersey, 3 Bligh
290 ;

Folkes v. Western, 9 Ves. 456 ;

Powys v. Mansfield, 3 Myl. & Cr.
359 ; s. c. 7 Law J. Rep. (N.S.)

Chanc. 9 ;

Duke v. Doidge, 2 Ves. sen. 203 (N.) ;

Scarisbrick v. Lord Skelmersdale, 4
You. & C. 79 ;

Thynne v. Glengall, 2 H.L. Cas. 153.

The Solicitor-General (Sir G. Jessel),
Sir Richard Baggallay and *Mr. Cookson*,
for the plaintiffs, and

Mr. Joshua Williams, *Mr. Fry*, *Mr.*
Charles Hall and *Mr. Waller*, for defen-
dants in the same interest as the plaintiffs,
were not called upon.

Mr. Bury, for trustees.

THE LORD CHANCELLOR.—We all think that upon the terms of this particular will, whatever may or may not be the consequence or effect of former decisions upon other wills of different import, we are not obliged to hold, contrary to the natural and reasonable interpretation of the words which the testator has used, that a gift of a share of residuary estate by will is an advancement or payment to the legatee in the lifetime of the person making such will.

Supposing the case were entirely free from authority, I for my part could not entertain the slightest doubt as to the meaning of these words. By the will of

the grandfather, as I will call him, because the question in this case arises between persons in the third generation, a settlement is made of real estates whereby the eldest grandson and the male heirs of the elder line are to succeed to those estates, and a term is created out of which in the events which have happened portions to the amount of 30,000*l.* are raisable for the younger children, of whom there are five, all being daughters. Then the will contains a proviso that "in case my said daughter and son-in-law, or either of them, shall at any time or times during their lives or the life of the survivor of them, advance or pay any sum or sums of money to or for the use or benefit of any younger child or children for whom a portion or portions is or are hereby intended to be provided, then and in such case and unless the contrary shall be directed by my said daughter Elizabeth and W. D. C. Cooper respectively, or the survivor of them, making such advancement as aforesaid, in and by any deed or writing, deeds or writings, to be sealed and delivered by them, her or him respectively, in the presence of and attested by one, two or more credible witness or witnesses, the same sum or sums of money so to be advanced to or for the use of any such younger child or children as aforesaid shall be deemed, accepted and taken to be in full or in part satisfaction, as the case may be, of the portion or portions to which such child or children would have been entitled under the provisions of this my will; and to the intent (unless the same shall be directed to the contrary by my said daughter Elizabeth and W. D. C. Cooper, or the survivor of them, making such advancement as aforesaid to be expressed in manner aforesaid), to exonerate and discharge the Bedfordshire estates from the portion or share of the younger child or children to whom such advancement shall be made as aforesaid, or so much and such part of the same portion or share as such sum or sums of money shall amount to, anything herein contained to the contrary notwithstanding."

The question is whether or no a share of residue given to one of the granddaughters by the will of the son-in-law

who was the last survivor of the two was an advancement or payment in the lifetime of the son-in-law of the testator within the meaning of the proviso in the testator's will. Now, as I have said, if the matter were entirely free from decision I could not feel a doubt about it. If there be anything familiar in the world, it is the distinction between acts *inter vivos* and acts taking effect *post mortem* by testamentary instrument. And the English equivalent of the Latin words *inter vivos* is, "during their lives or the life of the survivor of them." The words "advance and pay" imply, not the execution of an instrument which does not operate until after the death, but the word "payment," it is admitted, implies the handing over, or that which is equivalent to the handing over, of money in the lifetime of the person making the payment; and the word "advancement," in my judgment, implies an act which, when done in the lifetime, either by anticipation puts money or money's worth into the hands of the party who would not otherwise receive it, or operates as an advancement in the lifetime by conferring a present benefit, whether actually dependent upon some previous interest to be first exhausted or not. But either way, those two words, "advance" and "pay," appear to me to be inapplicable to the mere execution of an instrument inoperative in the lifetime, and applicable only to the doing of a thing which operates immediately in the lifetime as an advancement or as a payment. That view is very much fortified by the words which follow, shewing that the intention to the contrary is to be expressed by a sealed instrument, and one delivered in the presence of witnesses. It is in the last degree unlikely, if it had been meant, contrary to the natural meaning of the words, that it should be sufficient to do it by an instrument operating only *post mortem* as a testamentary instrument, requiring no seal, and not in the ordinary course of things likely to be sealed—it is most unlikely that such a clause should have been introduced requiring a solemnity alien to the character of the instrument by which, according to the argument, it was intended that the thing should be

capable of being done, and causing therefore even the most express declaration of intention to fail if such an instrument were not executed with formalities alien to its proper character. Now these circumstances have not occurred in any other case. The other cases upon which decisions have been given or opinions expressed have been cases in which—I am speaking of the strongest of them—you have such words as “give or advance,” “give or settle,” which were words that in some of those cases were taken to include what I will admit they might by possibility in some contexts mean, execute in the lifetime an instrument which will operate when it comes into operation as a settlement or as a gift. And Sir William Grant in the case before him of *Onslow v. Mitchell* (*ubi supra*), laid no inconsiderable stress upon the force which he thought in that respect might be ascribed to the words “give and settle,” which you have not in this instrument. The same, or similar words, also occurred, I will not say in every one of the cases which have been cited before us, but in almost all of them, and in all those upon which material stress was laid, particularly the case of *Golding v. Haverfield* (*ubi supra*), in the Court of Exchequer, and in the original case, which in other respects also was distinguishable, of *Rickman v. Morgan* (*ubi supra*). In that state of things I think we should be extending much further than they have ever yet been carried, and to a case in which the natural and proper meaning of the words used would make it unfit to apply them, even if they were right, authorities which, when examined, are in themselves almost remarkable examples of the extraordinary manner in which the use of precedents in the courts of this country causes the courts, first of all, to slide into manifest error, and afterwards to follow that error upon the notion that they are bound by it.

The history of the doctrine relied upon as being now established by the authorities is this. In the case of *Rickman v. Morgan* (*ubi supra*), before Lord Thurlow, there were words which said that if, during a man's life, or at his death, he should do a certain thing, it should have

a certain effect; the word “give” being there used, and not “advance” or “pay.” It was perfectly manifest that in that case what was done by the will took effect at the testator's death, and was within the plain words of the instrument, and nothing was decided in that case or even said, as far as I can see, which would lead you to anything farther. Then comes the case of *Twisden v. Twisden* (*ubi supra*), in 1804 before Lord Eldon, in which *Rickman v. Morgan* (*ubi supra*) was referred to, and Lord Eldon, evidently to my mind, expressed on the whole an opinion to the effect that, notwithstanding what had been suggested tentatively in the argument, and not confidently at all on this subject, the natural interpretation of these words was the right one, and that a thing was not to be held to be done during the lifetime of a man which only took effect after his death. Lord Eldon there said at page 426 of the report: “If the law is that what is to be taken under a will is not an advancement in the life of the party, it is very difficult to say that what is taken under an intestacy shall be an advancement. And though it is true the will must be made in the life, it is equally true nothing is advanced or given to the party to take till after the death.” The expression of opinion, as far as it goes, is this, that he first concludes that what is taken under a will is not an advancement in the life of the party, and then says that *a fortiori* what is taken by way of intestacy is not an advancement in the life of the party, which is the particular point decided in that case. Then came *Leake v. Leake* (*ubi supra*), in the very next year, before Lord Eldon, and in that case Sir Samuel Romilly and other counsel for the plaintiffs, who were interested in contending that there was no satisfaction, said that they did not mean to argue it. The words are: “The plaintiffs cannot contend that a provision by will must not be considered a provision given in the lifetime of the testator after *Rickman v. Morgan* (*ubi supra*), and *Twisden v. Twisden* (*ubi supra*), though if that distinction can be maintained, two of these children, George and Ann, had

nothing advanced in the life of their father, and have no provision except by the will." And then they went on with other arguments, which prevailed in the result, and upon which, for reasons which I do not feel called upon to attempt to explain, they preferred to rely. But the only thing that is material for us is, that those eminent and learned counsel said they could not contend that a provision by will must be considered as if it were given in the lifetime of the testator, after *Rickman v. Morgan* (*ubi supra*), and *Twisden v. Twisden* (*ubi supra*). We have referred to *Rickman v. Morgan* (*ubi supra*), and *Twisden v. Twisden* (*ubi supra*), and we find in those cases no warrant whatever for that proposition. Then Lord Eldon, in *Leake v. Leake* (*ubi supra*), the matter not having been argued before him, and having the year before expressed a different opinion in *Twisden v. Twisden* (*ubi supra*), is reported to have said (p. 489): "It is truly said that a provision by will is to be considered as an advancement in the lifetime to the party. That has been repeatedly decided, and is not to be disturbed." It had been so put before him by counsel, but the matter had not been argued, and I suppose even Lord Eldon was capable, when counsel treated a thing as not arguable, but as decided, of placing confidence in that statement. The learned reporter has been unable to find anything but *Rickman v. Morgan* (*ubi supra*), and *Twisden v. Twisden* (*ubi supra*), to support that doctrine, and it is a very remarkable thing that, when Lord Eldon came to deliver his final opinion in that very case, he used language which draws the distinction, for he says, at page 492: "My opinion, rather than a judgment, upon this case is, that, according to the real intention and legal effect of all the instruments, money advanced by the father, as preferment in marriage, or on any other occasion, is an advancement within the proviso; that the devise and bequest of the real and personal estate is not in this case an advancement in the life of the father." He had had to consider whether, upon the true construction of that will, it was necessary

that the advancement which was to be in satisfaction, should be made in the lifetime of the father, and he had determined expressly, as I understand him, that of two constructions which were possible—that narrower construction being one, and a wider construction which would take in an advancement not only upon marriage, which must be in the lifetime of the father, but upon any other occasion—the larger was to be preferred, and so it had been argued before him; and he found that an intention that the provision actually made by will should not be taken in satisfaction of the portion was in that case sufficiently manifested. It was not therefore in any way whatever, in any point of view, a necessary ingredient in the judgment that Lord Eldon should entertain or express the opinion he did on that particular point. Sir William Grant examined the matter afterwards in the case of *Onslow v. Mitchell* (*ubi supra*), in which, as I have said, he relied on the words "give and settle," and said he could find no foundation for the doctrine except those two cases of *Rickman v. Morgan* (*ubi supra*), and *Twisden v. Twisden* (*ubi supra*), which, however, evidently were not authorities for it; but Sir William Grant said that he thought it was involved in the decision, not adverting to the fact that it was not necessary in that case that the advancement, in order to be a satisfaction, should have been made on the occasion of the marriage in the lifetime of the father, because the settlement contained the important additional words "or otherwise provided for." The particular decision, after all, of Sir William Grant, is rested on the force of the words "settle and give." *Golding v. Haverfield* (*ubi supra*) is also rested on similar words, and, I must say, upon a somewhat exaggerated weight given, not merely to the extra-judicial dictum of Lord Eldon, but to the fact that the counsel for the plaintiff in that case did not argue the point. Whether or no, for the reasons which have been so ably argued by Mr. Southgate and Mr. Hawkins, or for any other reasons in precisely similar cases, the Court would feel that upon an exactly similar form of words a construction had been placed

which could not now be disturbed, it would perhaps have been improper for me on this occasion to determine, for that is not the case before us. Here we have different words. We have not the word "settle," we have not the word "give;" we have the words "advance or pay," and we have the indication of intention contained in the reference to a deed or sealed writing as the necessary and only mode of declaring the true intention with which the act should be done. I therefore am of opinion that in this particular case there was no advancement by means of the gift of the shares of the residue.

JAMES, L.J.—I am of the same opinion. Independently of authority, I could not have brought my mind to doubt what the meaning of the clause in the will of the original testator is; and it is to be borne in mind, which it appears to me has not been borne in mind in any of the cases, that in putting a strained and unnatural meaning upon words in a proviso of this kind, the greatest possible violence is done to that which I have always considered one of the cardinal rules of construction in this Court, that is, that where you have an interest vested and given, the words by which that interest is to be defeated and taken away must be reasonably clear and certain. In this case this interest is clearly given to these children. It must be taken away, as it seems to me, by equally clear words, or words indicating an equally clear meaning. It appears to me that nobody would say that it was according to the ordinary use of the word that a thing left by a will was advanced or paid, and I do not feel myself constrained by the authorities to put upon this will, having regard to all the words of it, or upon these two wills, the construction which is contended for by the appellant. I cannot help noticing, in addition to the observations of the Lord Chancellor, this: that it is very singular that, the case having been left in the position in which it was left by Lord Eldon by his two judgments, singularly inconsistent as they are, in *Leake v. Leake* (*ubi supra*), and *Twisden v. Twisden* (*ubi supra*)—that the case having been left there as far back as the years 1804 and 1805, there never

has been any opportunity apparently for the Court of Chancery to make any comment on those cases, except in that case before Sir William Grant in 1812, *Onslow v. Mitchell* (*ubi supra*), and in which he found himself obliged, in order to arrive at a conclusion following what was decided in *Leake v. Leake* (*ubi supra*), to place the whole of his judgment on the meaning of the words "give and settle." Though Lord Eldon lived himself for many years afterwards and held the Great Seal, he never had an opportunity of expressing his opinion upon it or explaining the two decisions, and we have in this Court nothing but that one comment of Sir William Grant, and the one train of reasoning by which he justifies himself in following *Leake v. Leake* (*ubi supra*). Under these circumstances I agree with the Lord Chancellor in thinking that we are not obliged to extend the doctrine, such as it is, any further.

MELLISH, L.J., concurred.

Solicitors—Messrs. Milne, Riddle & Mellor, for plaintiffs; Messrs. Farrer, Ouvry & Co., and Mr. J. R. Bailey, for defendants.

SELBORNE, L.C.	} BRUNSKILL v. CAIRD.
for	
LORD ROMILLY, M.R.	
1873.	
Aug. 7.	

Trust to invest in Land—Repairs—Jurisdiction of Court.

When personalty is directed to be invested in land to be conveyed to the same uses as certain existing settled estates, the Court of Chancery cannot authorise the outlay of any of the personalty in doing repairs on the existing settled estates.

In re Lord Hotham's Trusts (Law Rep. 12 Eq. 76) not followed.

This was an adjourned summons in an administration suit. The will devised real estate to one for life with remainders over, and gave personal estate to trustees on trust to invest it in land to be settled to the same uses. The tenant for life had become bankrupt, and the estates comprised houses in hand which were out of repair. The summons was taken out by

the trustee in bankruptcy, and it asked that the trustees of the will might be at liberty to lay out a portion of the personalty in doing repairs on the settled estates. No opposition was offered to the application, the proposal being considered beneficial for all parties, but some of the remaindermen were infants. Evidence was tendered to shew that these remaindermen would be benefited by the outlay.

Mr. Bristowe and Mr. Graham Hastings, for the applicant, mentioned

In re Lord Hotham's Trusts (Malins, V.C., May, 1871), Law Rep. 12 Eq. 76,

in which a similar application was granted.

Sir R. Baggallay, Mr. Southgate, Mr. Fry, Mr. Hornell, Mr. Whitehead and Mr. Mander, appeared for the other parties.

THE LORD CHANCELLOR said that he thought the Court had not power to authorise such an expenditure of the testator's personal estate.

Solicitors—*Mr. W. R. Harris*, agent for *Mr. J. H. Square, Kingsbridge*, for plaintiffs; *Messrs. Halse, Tristram & Co.*, agents for *Mr. R. T. Head, Exeter*, and *Messrs. Lewis & Lewis*, for defendants.

MALINS, V.C. }
1873. } WEBBER v. CORBETT.
July 15. }

Will—Latent Ambiguity—Parol Evidence—Christian Name.

A testatrix after making specific bequests to his niece Clara and "my niece Laura, second daughter of my brother, J. H. W.," bequeathed as follows: "to each of my nieces, K. G., H. M. T., H. B. and Laura W., the sum of 50l." and further bequeathed "to each of my nieces the said C. W., Laura W., R. W., M. E. S. S., and E. G. S. the sum of 100l.," and gave the residue "in trust for the said M. E. S., Laura W., E. G. M. and R. W." It appeared that the testatrix had two nieces, one Laura W., a daughter of her brother J. H. W., and the other Laura Frances Tomkins W., a daughter of her brother William W. Parol evidence had been entered into to shew which Laura was intended:—Held, that in the first gift the person (Laura W.) who was intended was ac-

curately described; that there was no latent ambiguity and that parol evidence was not admissible. That the same Laura W. mentioned in the first gift took both the legacies of 50l. and 100l. and also the share of the residue.

Martha Amelia Webber, by her will dated the 2nd of June, 1870, among other bequests gave as follows: "I give to my niece Clara, eldest daughter of my brother John Huish Webber, my lava vase," and then further on, "I give to my niece Laura, second daughter of my said brother John Huish Webber, my four alabaster Italian poets," and then, "I give to my niece Rosa, youngest daughter of my said brother John Huish Webber, one gold bracelet." And after giving the residue of her property to trustees upon trust for sale and payment thereof of a sum of 19l. 19s. to her brother John Huish Webber, and an annuity of 50l. to her brother William Webber, the testatrix gave as follows: "To each of my nieces, Kate Gilbert, the wife of John Gilbert, of the city of Cork, Ireland, Hannah Maria Thomas, the wife of Frederick Thomas, of Birmingham, Harriet Bird, the widow of John Bird, of New Zealand, and Laura Webber, the sum of 50l., and to Mary Anne, the wife of John Huish Webber, junior, the sum of 100l. To each of my nephews, Henry Webber, Arthur Wynn Webber, and Edwin Vincent Webber (sons of my brother William Webber), George Webber (youngest son of my brother John Huish Webber), and William Webber, of Bourne, Lincolnshire, the sum of 50l. To each of my nieces, the said Clara Webber, Laura Webber, Rosa Webber, Martha Elizabeth Sarah Sankey, and Emma Georgiana Morris, the sum of 100l.; and as to all the rest, residue and remainder of the moneys to arise from such sale, collection and conversion into money as aforesaid, and all other my residuary moneys and estate, in trust for the said Martha Elizabeth Sarah Sankey, Laura Webber, Emma Georgiana Morris and Rosa Webber, share and share alike."

It appeared that the testatrix had three nieces who were the daughters of her brother John Huish Webber, namely,

Clara Webber, the plaintiff Rosa Webber, and Laura Webber, and five nieces who were daughters of her brother William Webber, namely, Kate Gilbert, Hannah Maria Thomas, Harriet Bird, Laura Frances Tomkins Webber, and Mary Anne Webber.

The question to be decided was which of the testatrix's nieces was entitled to the two legacies given to Laura Webber and also to the share of the residue.

The Vice-Chancellor had in chambers allowed parol evidence to be entered into for the purpose of shewing which Laura Webber was intended, and it thereby appeared that the testatrix had been in the habit of addressing both Laura Webber and Laura Frances Tomkins Webber simply as "Laura," and that she had been on friendly relations with both of them, but that during the latter part of her life the family of her brother John had been living much nearer to her than that of William, and that consequently she had seen much more of Laura Webber than of her cousin and had become much attached to her. Laura Webber had frequently stayed with the testatrix and was with her in her last illness. It also appeared that the testatrix had by a previous will executed in 1863 made large provisions for her brother William and his family.

The cause now came on for further consideration.

Mr. Pearson and *Mr. C. C. Berkeley*, for the plaintiff.

Mr. Cotton and *Mr. Cookson*, for Laura, the daughter of John Huish Webber.—Parol evidence is not admissible in this case to shew who was intended to take, there being no patent or latent ambiguity—

Doe v. Westlake, 4 B. & Ald. 57;

Bernasconi v. Atkinson, 10 Hare, 345; s. c. 23 Law J. Rep. (N.S.) Chanc. 184;

In re Kilvert's Trust, 40 Law J. Rep. (N.S.) Chanc. 703; s. c. (on app.) 41 ibid. 351; s. c. 12 Eq. 183; s. c. 7 Ch. 170;

Wigram on Wills, 4th Ed., pp. 27, 57.

The legatee is accurately described in the first gift as "Laura, the second daughter of my brother John Huish

Webber," and wherever the name Laura Webber occurs afterwards the same Laura Webber is intended.

[MALINS, V.C.—I am disposed to think that when a legatee is once properly described in a will and the same name occurs again in a later part of the will the same legatee must be taken to be intended.]

This will can be read without any extrinsic aid.

Jefferies v. Michell, 20 Beav. 15, has some analogy, but that was a case of latent ambiguity; here there is neither patent nor latent ambiguity.

If the evidence however is gone into it is all in favour of Laura, the daughter of John, being intended.

Mr. Glasse and *Mr. Lonsdale*, for Laura Frances Tomkins Webber.—It is clear from the will itself that the testatrix intended to benefit the families of all her brothers, and it is also equally clear that she could not have meant the same person to take the two legacies of 50*l.* and 100*l.* With regard to the legacy of 50*l.* the Laura there mentioned must be taken to be Laura, the daughter of William, as she is mentioned in conjunction with the other children of William. The circumstance that two of her Christian names are omitted has no weight whatever—

Bennett v. Marshall, 2 Kay & J. 740; but the fact that two legacies are given apparently to the same person raises a latent ambiguity, and parol evidence is therefore admissible.

The previous will made in 1863, whereby the testatrix largely provided for her brother William and his family, is inadmissible—

Re Gregory's Settlement and Will, 84 Beav. 600.

Mr. Fooks and *Mr. Whitheorne*, for the other defendants, the trustees of the will.

MALINS, V.C.—This case involves some very curious questions, but there are some points as to which the principles of law are so clear that they ought not to be departed from without the most irresistible reasons. I entirely agree with the authorities which have been cited, but in the absence of any authority I should

have come to the conclusion that Laura Frances Tomkins Webber, for the purposes of this will, must be regarded as Laura Webber, because she is still Laura Webber, and as much so as the daughter of John, who is Laura only. That point is decided by the case of *Bennett v. Marshall* (*ubi supra*). In that case there were two persons in the same degree of relationship to the testator, one named William Marshall and the other William John Robert Blandford Marshall. The decision in that case was that they were both to be regarded as simply William Marshall, that there was a latent ambiguity, and that therefore parol evidence was admissible. In this case, therefore, if there had been nothing but the simple description of "my niece Laura Webber," I should have held it to have been perfectly clear that there being two nieces of the name of "Laura," and therefore a latent ambiguity, parol evidence might be resorted to for the purpose of shewing which was meant. But in this case, upon the face of this will, I am very much disposed to think that parol evidence is not admissible, for the reason that the Laura Webber, named in the first gift, is accurately described as "my niece Laura, second daughter of my brother John Huish Webber," and that you must not resort to any other evidence for the purpose of shewing who was intended. I think that the principle decided in the case of *Doe v. Westlake* (*ubi supra*) is applicable to this case. In this case the testatrix has described who she means by her niece Laura, namely, the second daughter of her brother, John Huish Webber. If she had meant the other Laura, it was incumbent upon her to have added the words, "the daughter of my brother William." I am clearly of opinion, therefore, that the testatrix having once described her niece in a manner which removes all possibility of doubt as to who was intended, whenever she mentions her niece Laura Webber again the same person is intended, and therefore that in point of law the gift of the legacy of 50*l.* to Laura Webber is to the same Laura before named, and the gift of the legacy of 100*l.* to "the said Laura Webber" is to the same Laura who was

before accurately described. For the same reason, the Laura Webber mentioned in the gift of the residue must mean the same Laura Webber previously mentioned, namely, the second daughter of her brother John. That is the conclusion I arrive at from the will itself, but I do not regret that in chambers I decided that parol evidence might be gone into, as it has perfectly satisfied me that my decision is in accordance with the intention of the testatrix.

If I am at liberty to conjecture, I have but little doubt that the testatrix meant that Laura, the daughter of her brother William, should take the legacy of 50*l.*, for it is improbable that within the short space of six lines she should have given two legacies to the same person, and though in point of law both the legacies in my opinion go to Laura, the daughter of John, yet in point of equity, I am of opinion the legacy of 50*l.* ought to go to Laura, the daughter of William, but that must be left to the parties themselves.

Solicitors—Mr. J. H. Webber, for plaintiff; Messrs. Lee, Pemberton and Reeves; and Messrs. Iliffe, Russell & Iliffe, for defendants.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	}	ELMER v. CRESSY.
JAMES, L.J.		
MELLISH, L.J.		
1873.		
Nov. 18, 25.		

Exceptions to Answer—Redemption Suit
—*Refusal to account before Decree.*

A mortgagee in possession, defendant to a bill for redemption, admitting himself by his answer to be redeemable, cannot decline to answer interrogatories requiring him to set forth an account of the rents and profits of the mortgaged hereditaments, the rule being that when a party answers he is bound to answer fully.

The bill was filed by the owner of the equity of redemption, in certain freehold hereditaments against the mortgagee in possession for redemption, and praying that the usual accounts might be taken with proper rests.

The plaintiff by his eleventh interroga-

tory required the defendant to set forth a full, true and particular account of all rents and profits of the mortgaged hereditaments received by him, or come to his hands, or to the hands of any person or persons, by his order or for his use, specifying the dates when and the persons from whom, and the times at which he had received the same, and every part thereof, and how and in what manner he had applied each and every part thereof.

The defendant by his answer stated that he was willing that the plaintiff should have the common decree for redemption, but submitted that it would be premature to set forth such account in the answer, and that he was not bound to do it, and that under the circumstances it was unnecessary and would be improper for him to answer the eleventh interrogatory, or any part thereof. The plaintiff excepted to the answer for insufficiency, and Malins, V.C., allowed the exception. See 42 Law J. Rep. (N.S.) Chanc. 807.

The defendant appealed.

Mr. Hemming, for the appellant, contended that the mortgagee could not be called upon to account until the mortgagor had established his right to redeem, that is to say until he had obtained a decree.

Mr. Ince, for the plaintiff.

THE LORD CHANCELLOR (on November 25th) read the judgment of the Court, which was as follows—

The question in this case is whether a mortgagee in possession, defendant to a bill for redemption, admitting himself to be redeemable, can wholly decline answering interrogatories as to the state and particulars of the account which it is one of the objects of the suit to take.

We find no authority and we see no reason for treating a redemption suit as subject to any different rule in this respect from that applicable to a suit for any other kind of accounts necessary for or consequential upon the principal relief prayed. The question whether before the abolition of the master's office, when exceptions to answers for insufficiency were heard in the first instance by the masters and not by the Court, a defendant to an ordinary suit for such accounts, could by answer protect himself from discovery as

to the particulars of the account prayed, is discussed by Sir James Wigram in ss. 159-185 of his work on discovery, and by Mr. Hare in part 4, c. 1, of his work on the same subject, with the usual ability of those writers. The result is that although during the interval between Lord Kenyon's appointment as Master of the Rolls and the accession of Lord Eldon to the Chancellorship, a different practice was followed in certain cases, of which *Jacobs v. Goodman* (1) and *Lord Donegall v. Stewart* (2) are examples, the true rule as finally settled by Lord Eldon and his successors was that a defendant submitting to answer, even when he altogether denied the plaintiff's title, was obliged to answer fully, not only as to other matters, but also as to consequential matters of account. The principle expressed in Sir J. Wigram's first proposition (sec. 25) that the right of a plaintiff to discovery is in all cases confined to the question or questions in the cause which according to the pleadings and practice of the Courts is or are about to come on for trial, might indeed have seemed to justify the postponement until after the decree of all discovery as to items of account, concerning which no special proof was prayed, especially if Lord Gifford was right in refusing as he did in *Law v. Hunter* (3) and *Walker v. Woodward* (4), to receive at the hearing, or to enter in the decree as read, evidence as to such items. It must also be admitted that much unnecessary delay and expense might, and probably did in many cases, result from the rule that discovery as to such matters could be limited only by demurrer or plea. The rule, however, was in fact established both on technical grounds, which may perhaps have lost some of their force since the removal of the hearing of exceptions for insufficiency from the masters to the Court, and also because a full discovery of the details of the account might in some cases enable a plaintiff to take an immediate and final decree at the hearing, for what on the defendant's own statement might appear to be due to him,

(1) 3 Bro. C.C. 487 (n.).

(2) 3 Ves. 446.

(3) 1 Russ. 100.

(4) Ibid. 107.

and because if this part of the discovery were postponed till a later stage the plaintiff might run the risk of losing it altogether by death or other intervening accidents.

In the Court of Exchequer, when that Court exercised equity jurisdiction, exceptions to answers for insufficiency always came immediately before the Court itself, and there was a larger degree of discretion as to the allowance or disallowance of those exceptions, according to the view which the Court might take of their materiality to the issues to be determined at the hearing in each particular case prescribed.

After the passing of the Act for the abolition of the master's office efforts were very soon made to obtain in this Court the benefit of a limitation of the plaintiff's right to discovery by answer, such as had prevailed on the equity side of the Court of Exchequer, and such as had recommended itself to the mind of Lord Kenyon and Lord Loughborough. In *Swinborne v. Nelson* (5) and *Clegg v. Edmondson* (6), in both of which cases I was counsel, this experiment was unsuccessfully made before the late Master of the Rolls. Nor is it correct to say that those decisions of Lord Romilly were ever reversed or overruled by the Court of Appeal; what really happened in the Court of Appeal was that the Lords Justices succeeded in putting pressure upon the parties so as to obtain their consent to reasonable terms for expediting the hearing, including such admissions for the purpose of that hearing as their Lordships thought sufficient, and upon those terms the exceptions or the appeals from the orders allowing them (I am not sure which, for those cases upon appeal are not reported) were ordered to stand over till the hearing.

Vice-Chancellor Wood in *De la Rue v. Dickinson* (7), an exactly similar case to *Swinborne v. Nelson* (5), thought himself warranted by these precedents in making an adverse order that exceptions for in-

sufficiency should stand over till the hearing. It is manifest, however, that the question of sufficiency or insufficiency was by that mode of dealing with it evaded and not determined.

In all these cases the defendant by his answer had wholly denied the plaintiff's title to relief. They furnish, in any view of them, no authority for the claim of a defendant, who admits (as the defendant here does) the plaintiff's right to relief, to refuse all discovery before the hearing, as to consequential matters of account.

In the case before us, the plaintiff asks, by the prayer of his bill, that the account against the defendant, the mortgagee, may be taken with rests. He has not, indeed, alleged in his bill any circumstances entitling him, by the course of the Court, to that particular relief. But if the course of the Court entitles him, in this stage of the suit, to discovery as to the state of the account, it would be premature for us to assume that he may not, by means of such discovery (and by amendment, if necessary, of his bill), be enabled to present to the Court at the hearing a case requiring consideration in support of that part of the prayer. We are not now called upon to determine whether the defendant must, in answer to these interrogatories, set forth as full and detailed a statement of all the items of the account as he might be obliged to give under a decree of redemption. The Court may be trusted to exercise a proper control over any attempt, on the plaintiff's part, to press for any such minuteness of discovery as would be either vexatious or unreasonable; as indeed it can do in any case in which it is satisfied that any kind of discovery is required vexatiously or oppressively—*Roade v. Woodroffe* (8). But the present question is, whether the defendant is entitled to refuse to answer at all, before decree, as to these matters? The Vice-Chancellor has decided that he is not, and with that decision we agree. The appeal must be dismissed with costs.

Solicitors—Messrs. Hensman & Nicholson, agents for Mr. W. L. Ollard, Upwell, for appellant; Mr. T. M. Wilkin, for plaintiff.

(5) 16 Beav. 416; s. c. 22 Law J. Rep. (N.S.) Chanc. 331.

(6) 22 Beav. 125; s. c. 26 Law J. Rep. (N.S.) Chanc. 673; s. c. 8 De Gex, M. & G. 787.

(7) 3 K. & J. 388.

(8) 24 Beav. 421.

BACON, V.C.
1873.Nov. 21, 22,
24, 25.

Dec. 10.

HEATH v. CREALOCK.

Trustee—Mortgagee—Fraud—Priorities
—Legal Estate—Purchasers for Value with-
out Notice—Production and Delivery up of
Title Deeds—Estoppel—Escrow.

In 1856 H. & C., who were trustees of a settlement, lent 7,700l. on mortgage of freehold lands belonging to S. The mortgage was for three years certain. C. was a solicitor and acted in the matter both for the trustees and S., and took possession of the title deeds on behalf of the trustees, and paid the interest as it became due to the cestui que trusts. In 1859, before the three years had expired, S. sold parts of the property in mortgage to three purchasers. The mortgage was not disclosed, and S. purported to convey the legal estate to the respective purchasers in consideration, in the whole, of 3,080l., C. again acting as solicitor to S. Such title-deeds as related only to the parts sold were handed to the respective purchasers. Between S. and C. there was a running account, and S. paid to C. the 3,080l., C. giving to S. a receipt signed by him on behalf of himself and his co-trustees H., who he alleged was abroad. H. was in England, but knew nothing of these transactions. In 1870 S. contracted to sell another part of the property in mortgage to P. for 1,500l. He declined on this occasion to conceal the mortgage, and pressed C. to obtain for him a reconveyance of the parts already sold. C. then informed S. that he had appropriated the 3,080l. and lost it. C. then represented to H. that S. had sold different parts to purchasers for 3,080l., and 1,500l., and obtained from H. a conveyance to P. of the part agreed to be sold to him, and a reconveyance to S. of the parts sold for 3,080l., in order that S. might convey direct to these purchasers. The sale to P. was then completed, with the knowledge of S., and the reconveyance was handed to S. C. was to have paid the whole of the money to a joint account but he failed to do so, and absconded taking the title-deeds of the property with him. Before S. had conveyed the legal estate to the purchasers H. filed his bill against C. S. and all the purchasers :

NEW SERIES, 43.—CHANC.

—Held, that H. was entitled to have the reconveyance cancelled, and to an account of what was due on the mortgage security ; and also to a decree that the amount found due should be paid by S., and upon default, and on the purchasers, except P., failing to pay such amount, that H. was entitled to realise his security by sale, except as to the parts sold to P. The purchasers were directed to produce the title-deeds in their possession for the purposes of the sale and to deliver them up to the new purchasers. The bill was dismissed against P.

In March, 1856, the plaintiff, the Rev. Charles Harbord Heath, and the defendant, William Swain Crealock, who was a solicitor at Aberystwith, were appointed trustees of certain trusts funds, which they held subject to the trusts of an indenture of the 24th of February, 1816. A portion of the trust funds had been divided amongst the persons beneficially entitled. The balance, amounting to 7,700l., was on the 24th of November, 1856, invested by Heath and Crealock on mortgage of certain freehold lands belonging to the defendant, Thomas King Stephens. The mortgage was for a term of three years certain, but otherwise it was in the ordinary form ; the title-deeds were handed to Crealock, who continued to hold them on behalf of himself and his co-trustee. Stephens had practised as a solicitor, but had then retired from practice, and Crealock acted as the solicitor both for the trustees and Stephens. Stephens and Crealock also had other transactions together, including some mining speculations, and there was a running account between them, and the sum of 7,700l. was in fact put by Crealock to the credit of Stephens and shortly afterwards paid to him.

From the date of the mortgage Crealock took upon himself the management of the trust funds and paid the interest as it became due to the tenant for life.

In the year 1858 Stephens attempted to sell by auction some of the property in mortgage but did not then succeed. Shortly after, however, and before the term of three years had expired, he sold some parts of the property by private contract to three different purchasers, namely, John

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White Lewis, James Beavan, and Thomas Pugh. Abstracts of title to the properties sold to the respective purchasers were duly delivered by Crealock to their respective solicitors, but none of such abstracts disclosed the mortgage from Stephens to Heath and Crealock. Before the purchases were completed each of the purchasers enquired whether there was any other mortgage or charge affecting the properties about to be conveyed to them, and took all other ordinary and proper precautions for their security. The purchases were completed in February, 1859, and on the completion the title-deeds belonging exclusively to the properties sold were handed to the respective purchasers. The whole of the purchase money for these properties, amounting to 3,080*l.*, was received by Stephens, and by him handed to Crealock, and the latter gave to Stephens a receipt for this amount signed by him on behalf of himself and his co-trustee. Crealock informed Stephens that he could not at that time have a proper receipt endorsed upon the mortgage deed because his co-trustee Heath was out of the country. These several transactions were carried on wholly without the knowledge of Heath, who was then a clergyman residing and holding a living in England.

In 1864, a short correspondence took place between Stephens and Crealock, Stephens proposing to pay off the balance of the mortgage debt, and enquiring whether there was an endorsement on the mortgage deed as to the amount already paid off. In reply Crealock said that, speaking from memory he believed the memorandum referred to had been endorsed, and that he thought the tenant for life would prefer not to have the mortgage security disturbed.

In 1865 a small portion of the property in mortgage was taken by the Central Wales Railway Company. Heath joined in the conveyance to the company. In 1866 Major Bowen, the tenant for life, died, and the fund then became divisible amongst the *cestui que trusts*.

In December, 1869, Stephens agreed to sell a further portion of the property comprised in the mortgage to William Price for 1,500*l.*

It appeared from the correspondence between Crealock and Stephens, which was in evidence, that Stephens had been desirous of obtaining from the trustees a reconveyance to himself of the portions which he had sold for 3,080*l.*, and that upon the sale to Price this desire became more urgent, because the statute, 22 & 23 Vict. c. 35, had then been passed and he was afraid that he might incur some danger if he again suppressed the fact of the mortgage. He, therefore, pressed Crealock to procure for him a reconveyance to himself of the portions which he had sold in 1859, and of the part he had then contracted to sell to Price, and he also asked him to procure the plaintiff's receipt for the two sums of 3,080*l.* and 1,500*l.*

In answer to this request Crealock, on the 4th of March, 1870, wrote to Stephens and represented that the 3,080*l.* had been reinvested in his, Crealock's, own name; and on the 2nd of August, 1870, Crealock again wrote to Stephens as follows—

"The *cestui que trusts* have not as yet received either of the 3,000*l.* (3,080*l.*) or the 1,500*l.*, and if you carry out your present intention of not sending me the conveyance to get executed to you I do not see how they are likely to get either of them."

In the year 1870 Crealock represented to the plaintiff, who then heard of it for the first time, that Stephens had then sold part of the mortgaged property for 3,080*l.* and another part for 1,500*l.* and that he was desirous of having the portions sold reconveyed to himself upon payment of the respective purchase moneys to the trustees, and, in order that he might convey these properties direct to the purchasers, two deeds were prepared to carry this purpose into effect, the one being a conveyance by the mortgagees, by the direction of Stephens, to Price of the property purchased by him for 1,500*l.*, and the other being a reconveyance to Stephens, in consideration of 3,080*l.* alleged to be paid by him of several small properties comprised in the mortgage, to enable him to convey them separately to the respective purchasers.

Heath executed these deeds in August, 1870, and they were sent to Crealock that

he might execute them and hand them over to Price and Stephens respectively when he received the purchase moneys of 1,500*l.* and 3,080*l.* At first Heath's solicitors said they must be present at the completion, but their suspicions were disarmed by letters of Crealock's in which he agreed to pay the purchase moneys as soon as he received them into a joint account at a bank in the names of Heath and himself.

On the 2nd of September, 1870, Price and Stephens' son, who attended on behalf of his father, met at Crealock's office, and Price's purchase was then completed, Price paying the 1,500*l.* to Crealock in exchange for this conveyance. At the same time the reconveyance to Stephens of the parts of the mortgaged property sold for 3,080*l.* was handed to Stephens' son.

For some weeks Heath's solicitors were put off by letters from Crealock, stating that he could not get Stephens to complete, but at last, on the 21st of September, they were informed by a Mr. Tweed, of Honiton, that Crealock had absconded and that he had appropriated to his own use at least 4,580*l.* of the trust money. On the 24th of September they received a letter from Crealock written from Ostend, in which he acknowledged that he had appropriated this money and said that he intended to remain out of the jurisdiction of the Court, and that he had taken the whole of the papers and deeds in the trust matter with him. He further offered to make terms with the plaintiff on condition of handing over these deeds.

On the 29th of September the plaintiff filed his bill and he thereby prayed—

First. That the deed of reconveyance to the defendant, Stephens, of the property stated to have been sold in 1859 for 3,080*l.* might be ordered to be given up to be cancelled.

Second. That meanwhile Stephens might be ordered to hand the same over to the Court, and be restrained from passing either the deed or the legal estate to to any of the purchasers.

Third. For a declaration that Stephens was still liable to pay to the plaintiff the sums of 3,080*l.* and 1,500*l.* and all unpaid interest, and that those sums were

still a charge upon all the properties comprised in the mortgage deed of 1856.

Fourth. For an account of what was due on the mortgage security, and that the defendants other than Crealock might be ordered to pay the amount into Court, and according to their respective interests therein to redeem the properties or to be foreclosed.

Fifth. Upon redemption, for certain vesting orders in favour of the defendant purchasers. And

Sixth. That upon foreclosure Lewis, Beavan, Pugh and Price might be ordered to deliver up any deeds in their respective custody relating to the mortgage security.

The defendants to the bill were Crealock, Stephens, Lewis, Beavan, Pugh and Price. Lewis died before the hearing, and by amendment his executors were made parties in his stead.

Mr. Kay and *Mr. Bedwell* appeared for the plaintiff.—We contend that Stephens only got the legal estate in the mortgaged premises from the plaintiff by fraud, and that he is therefore merely a trustee of the legal estate for the plaintiff. It is clear from the correspondence Stephens was a party to the fraud, and the legal estate obtained in that way cannot benefit either him or any of the purchasers under him. The plaintiff is entitled to the decree he has prayed for, and we ask for a sale of the premises comprised in the mortgage security, and that the purchasers from Stephens may be ordered to deliver up the deeds in their possession—

Thorpe v. Holdsworth, 38 Law J. Rep. (N.S.) Chanc. 194; s. c. Law Rep. 7 Eq. 139;

Newton v. Newton, 37 Law J. Rep. (N.S.) Chanc. 705; s. c. Law Rep. 6 Eq. 135; on appeal, 38 Law J. Rep. (N.S.) Chanc. 145; s. c. Law Rep. 4 Chanc. 143.

Mr. Locock Webb, for Crealock.

Mr. Fischer and *Mr. William Barber*, for Stephens.—Stephens has paid the money once, and cannot be called upon to pay it again. All the probabilities of the case are against his having been guilty of a fraud. Stephens intended very shortly after the sale in 1859 to pay off the whole mortgage, and then the conveyances by him without disclosing the mortgage,

though irregular, would not have worked any harm. The plaintiff has been guilty of negligence in leaving the deeds in the possession of his co-trustee, and he has therefore no remedy against Stephens—

Evans v. Bicknell, 6 Ves. 174.

Payment to one of two trustees is sufficient, and binds both—

Wallace v. Kelsall, 7 Mee. & W. 264 ;

s. c. 10 Law J. Rep. (N.S.) Exch. 12;

Husband v. Davis, 10 Com. B. Rep.

645 ; s. c. 20 Law J. Rep. (N.S.)

C.P. 118 ;

Charlton v. Earl of Durham, 38 Law

J. Rep. (N.S.) Chanc. 183 ; s. c.

Law Rep. 4 Chanc. 433.

The conveyances to the purchasers in 1859 were made before the Act of 22 & 23 Vict. c. 35. s. 24, was passed.

As to the 3,080*l.* we rely upon the receipt given by Crealock as being a good discharge, and as to the 1,500*l.* we rely on the receipt on the conveyance.

Mr. Amphlett and *Mr. Crossley*, for Beavan, and the executors of Lewis.—The purchasers come into Court with perfectly clean hands. When their titles were examined everything was done on their behalf which could have been done by the most experienced professional men.

The plaintiff has not adduced sufficient evidence of the mortgage deed. He says he cannot produce the deed itself, and the secondary evidence of it is very unsatisfactory. The copy of the deed produced only purports to be a copy of a copy, and this cannot be evidence at all. The reconveyance is no evidence, because if there was no mortgage the reconveyance is useless. If the plaintiff were proceeding to recover in ejectment the mortgage deed would not be allowed without proof.

The bill contains charges of fraud against the purchasers, and these have only been withdrawn at the bar; the plaintiff ought, therefore, to pay the costs of the purchasers. Then as to the law. We may ignore the trust, and consider the case as that of two joint tenants. One joint tenant has allowed the other to hold the deeds from 1856 to 1870. Surely the purchasers must be entitled to Crealock's moiety, at all events.

When a person in possession of property purports to convey to *bona fide*

purchasers the legal estate in that property, the authorities are uniform that this Court will not deprive such a purchaser of any advantage he may happen to have, such as the possession of the title deeds or of the land—

Head v. Egerton, 3 P. Wms. 280 ;

Wallwyn v. Lee, 9 Ves. 24.

(Our case is similar to, but stronger than this, because we were actually put into possession)—

Bowen v. Evans, 1 J. & Lat. 263 ;

Joyce v. De Moleyns, 2 J. & Lat. 374 ;

Frazer v. Jones, 5 Hare, 475 ; s. c.

17 Law J. Rep. (N.S.) Chanc. 353 ;

Attorney-General v. Wilkins, 17 Beav.

285 ; s. c. 22 Law J. Rep. (N.S.)

Chanc. 830 ;

Colyer v. Finch, 19 Beav. 500 ; s. c. 26

Law J. Rep. (N.S.) Chanc. 65 ;

5 H. L. Cas. 905 ;

Hunt v. Elmes, 28 Beav. 631 ; s. c.

2 De Gex, F. & J. 578 ; 30 Law

J. Rep. (N.S.) Chanc. 11, 255.

In this case title-deeds were ordered to be delivered up by the Master of the Rolls, but the order was in this respect varied on appeal.

Thorpe v. Holdsworth (*ubi supra*), may shew that Vice-Chancellor Giffard disapproved of this rule as applied to equitable estates, but does not go further than that.

In

Newton v. Newton (*ubi supra*), the purchaser had only an equity, and knew that he had only an equity when he took the estate.

We are entitled to the deeds on the supposition that we have not the legal estate, but we now contend that we have the legal estate. In 1859 Stephens purported to convey the legal estate to us by deed. He is therefore estopped from now saying that he had not the legal estate then. In 1870 he acquired the legal estate, and this acquisition feeds the estoppel and enures for our benefit—

Smith's Leading Cases, 6th Ed. Vol.

1, p. 79, and Vol. 2, p. 670.

It has been argued for the plaintiff that the reconveyance was void, because it was obtained by fraud ; but this is not so. The deed was sent to Crealock on purpose to enable Crealock to receive

the purchase-moneys, and with the very intention that it might be handed to Stephens, to enable him to convey the legal estate to the purchasers. The question whether a deed, executed under similar circumstances, was a void deed at law, was discussed in

Hunter v. Walters, 41 Law J. Rep. (N.S.) Chanc. 175; s. c. Law Rep. 7 Chanc. 75.

If a deed is obtained by fraud, it is true that a third person cannot take advantage of it—

Eyre v. Burmester, 10 H. L. Cas. 90, but to this rule there is one exception, namely, in the case of a purchaser for valuable consideration without notice—

Pilcher v. Rawlins, 41 Law J. Rep. (N.S.) Chanc. 485; s. c. Law Rep. 7 Ch. 259.

Carter v. Carter, 3 K. & J. 617; s. c. 27 Law J. Rep. (N.S.) Chanc. 74.

As between the plaintiff and the purchasers, the latter have certainly the better equity. They are perfectly innocent; they omitted no precaution, but examined the title shown to them with the utmost strictness. The plaintiff, on the contrary, by leaving the deeds in the possession and power of Crealock, has enabled him to commit this fraud. He might have protected these deeds, and he has not.

Mr. Eddis and *Mr. Ingle Joyce*, for Pugh.—The rule which regulates the conduct of equity towards a purchaser for value without notice is laid down in Lord St. Leonards'

Vendors and Purchasers, 13th Ed. 607–8.

We contend that the reconveyance was a good deed at law, and that if so, it feeds the estoppel—

Sturgeon v. Wingfield, 15 Mee. & W. 224; s. c. 15 Law J. Rep. (N.S.) Exch. 212.

[BACON, V.C.—If the deed had been stolen on the way to Stephens, would it still have conveyed the legal estate to him?]

Mr. Eddis.—No; for in that case it would have been an escrow; but no such case as that is set up by the bill.

Mr. Hardy and *Mr. Charles Browne*, for Price, asked that the bill might be

dismissed against him, and for their costs.

Mr. Kay, in reply.—We are unable to produce the mortgage deed, but we have produced the very best secondary evidence that we have. This is sufficient—

Roscoe's Law of Evidence, 13.

Even slight evidence is sufficient to shew that a deed is lost—

Brewster v. Sewell, 3 B. & Ad. 299.

We gave notice to the solicitors to produce it, and this is sufficient—

Cates v. Winter, 3 Term Rep. 306.

It is sufficient, even though the client is abroad—

Bryan v. Wagstaff, Ry. & M. 327.

We produce, in addition, a copy of the deed, with Crealock's name upon it. If this evidence is not sufficient, we ask to have the case adjourned, that we may produce further evidence.

The doctrine of estoppel is that a man may not deny his own solemn deed; and this is the whole of it. The doctrine does not extend to third persons who are neither parties nor privies to the deed. The plaintiff might have filed his bill against Stephens to have the deed delivered up without making the purchasers parties. There are words in Lord Hatherley's judgment in *Pilcher v. Rawlins* (*ubi supra*), where he says: "Would the *cestui que trust* lose the estate because of the estoppel of the trustee?" which apply to this very case.

This is no case of joint tenancy, for Heath is asserting his rights, not for himself, but for the innocent *cestui que trusts*.

The deed amounts to no more than an escrow.

If the deed had been handed to third parties, the plaintiff might have been bound by it, but not so in the hands of Crealock and his accomplice, Stephens.

We have a right to have back the legal estate, and, having this, we have a right to a foreclosure order, and to have all the deeds, fraudulently handed to the purchasers, returned to us. This case differs from *Colyer v. Finch* (*ubi supra*), for here there was neither fraud nor gross negligence.

It is not negligence for a trustee to leave deeds in the hands of his co-trustee—

Lewin on Trusts, 483.

We ask for an order for sale, as being more convenient, in substitution of the order for foreclosure prayed for by the bill.

Amphlett, in reply, on point of escrow.—This case was not raised on the pleadings.

If there is an absolute delivery of a document it is a deed; it can only be an escrow when it is delivered upon a condition. There was no condition in this case.

For definitions of an escrow, see

Coke upon Lit., 36 a.

Shepherd's Touchstone, vol. 1, 58.

The deed must be delivered to a stranger—

Cruise's Digest, vol. 4, p. 31.

An order for sale cannot be substituted for foreclosure, because it is not asked for by the bill.

BACON, V.C.—The question to be determined in this case is one of considerable difficulty and of great importance: difficult because of the somewhat complicated facts attending parts of the case, and because it is necessary to ascertain in what manner a loss which has been sustained shall be borne among persons, some of whom are not morally culpable, in respect of the circumstances which have led to the loss; and important, because of the principles by which the decision of this Court must be guided in such like cases, which are, unhappily, of not unfrequent occurrence.

[His Honour having then stated the facts of the case, and having gone through the evidence, particularly in relation to the transactions as they affected the case between the plaintiff and the defendant Stephens, continued his judgment as follows:]

As far, then, as Mr. Stephens is concerned, I am of opinion that the plaintiff is entitled to the relief he seeks—to have it declared that the reconveyance of the property sold and conveyed in 1859 has been obtained by the defendant wrongfully, and that he be ordered to deliver it up to be cancelled; and a further declaration that the whole of the original mortgage debt due from the defendant Stephens

remains charged upon the whole of the hereditaments comprised in that mortgage, except only so much as has been conveyed to Price, against whom, as a purchaser for valuable consideration without notice, the bill must be dismissed. Beyond this there will be the ordinary decree for an account of principal, interest and costs.

The cases of the other defendants remain to be considered—Lewis, Beavan, and Pugh, whose cases may be considered as one for the purposes of this suit. They are, no doubt, purchasers for value without notice, and are entitled to all the protection which the rules and practice of the Court extend to persons in their position; and they are entitled to avail themselves of any just objection, technical or otherwise, to the plaintiff's demand. And in the exercise of this their right, it has been argued by their counsel that there is not sufficient evidence of the original mortgage deed. Let us see how this stands. The fact is abundantly admitted by the defendant Stephens, as well in the pleadings as by a copy which has been furnished of the deed itself, and by the recitals in the deeds executed by him. It is further sufficiently proved that the deed is or ought to be in the possession of Crealock, and that it is out of the power of the plaintiff to compel the production by him. All that the law of evidence requires is that the best evidence of which the case is susceptible shall be adduced, and although the defendants say, and say truly, that no admission by Stephens or Crealock can be used as direct evidence against them, they are nevertheless subject to the rule I have stated. The defendants have in no part of their answer raised any direct issue on this point. They nowhere dispute the existence of the mortgage as it is alleged by the plaintiff. The utmost they say is, "if there is such a mortgage and it is still existing," then their defence is so and so. In my opinion this form of pleading does not make it incumbent on the plaintiff to prove the mortgage more directly against them. Their defence is that they are purchasers for value without notice, and they plead and say in substance, "We care not whether there

was, or was not, or is, or is not, the mortgage, for, supposing there is, we have a title which your mortgage cannot disturb." If I thought there was any weight in this objection I should have directed the cause to stand over, that better evidence might be adduced by the plaintiff; but I do not think so, not only for the reason I have stated, but because the defendants, each and all of them, rely upon the reconveyance of 1870, which contains a full recital and recognition of the mortgage and proceeds upon the footing of its validity and existence, and one of the defendants sets it out in his answer *in extenso*.

Their defence on the ground of their being purchasers for value without notice was that which was most insisted on, and that because the bill prays the delivery up of the title-deeds. I think, however, that the argument on this subject has been pressed beyond its legitimate extent.

It is true that a Court of Equity will not assist a person having a claim against a purchaser for value without notice; but there the rule stops. Now is there any difference between the rules in Equity and those which prevail at Common Law? If my chattel is stolen I can compel its restitution, in some cases by action, in others by summary proceedings before a magistrate. If my land is transferred, no matter by what form of transfer, I can bring ejectment, and there is a reason apparent, at least sufficient to form a basis for the rule that a Court of Equity will not actually assist a person who can assert his right at law. But if the relief I claim is foreclosure, or realising the security pledged to me, the rule and the reason cease to be applicable; and I know of no case in which, where the suit has been to foreclose or realise a thing pledged or charged, a subsequent title, however innocently acquired, has been held to be a sufficient defence to such a claim. Certainly, none of the cases cited furnish any authority for such a proposition.

In *Head v. Egerton* (*ubi supra*), which was the first case cited, and the oldest in point of date, the plaintiff's bill prayed foreclosure and the delivery of title-deeds. A subsequent mortgagee pleaded to so much of the bill as prayed for delivery of

the title deeds, that he was a purchaser for value, and his plea was allowed; but I have no reason to suppose, either from the report or from the nature of the case, that the plaintiff's title to foreclosure was affected by the allowance of the plea.

Wallwyn v. Lee (*ubi supra*) was a similar case. The bill was not to recover the estate, but for the delivery of the title-deeds. The plea was only to so much of the bill as sought the discovery and delivery of the title-deeds, and that plea was allowed, Lord Eldon saying, "The principle of the Court is that against a purchaser for valuable consideration without notice, this Court gives no assistance."

Joyce v. De Moleyns (*ubi supra*) was an administration suit, and the bill sought to compel the delivery of deeds which had come into the possession of the defendants without notice. Lord St. Leonards dismissed the bill against them, as he expressly says upon the authority of *Wallwyn v. Lee* (*ubi supra*), which he considered to be in point. In *Newton v. Newton* (*ubi supra*) Lord Hatherley considers the two cases I have last mentioned, and points out the distinction between them and cases in which the beneficial interest in the estate was properly subject to the decision of a Court of Equity. In that case the decision of the Master of the Rolls was reversed, not upon the law, but upon the facts, the Lords Justices coming to a conclusion different from that of the Master of the Rolls; but Lord Hatherley desired to be understood as not entertaining any opinion adverse to that expressed by the Master of the Rolls upon the question of law, the Master of the Rolls having decided as a matter of law that the defendant was compellable to deliver the title-deeds. In *Hunt v. Elmes* (*ubi supra*) the plaintiff, a mortgagee of an entire estate, filed a bill of foreclosure against the defendant, who, upon subsequently purchasing a part of the estate, had the title-deeds of the entirety delivered to him by a fraudulent solicitor. The plaintiff's right to foreclosure, which had been declared by the decree, was established upon the appeal; but the decree was varied by omitting from it that part which ordered the delivery up of the deeds. The point does not seem

to have been argued. No authorities were referred to upon it, and the plaintiff was a mortgagee for a term only. In *Thorpe v. Holdsworth* (*ubi supra*), Vice-Chancellor Giffard held that the possession of the title-deeds by a previous mortgagee did not give him priority, and that, although the Court could not order the defendant, who was an incumbrancer for valuable consideration without notice, to be deprived of the custody of the deeds, yet, a sale being ordered, the production of the deeds for the purpose of the sale was ordered, and the Vice-Chancellor said that, upon the application of a purchaser (who by the order was to be at liberty to apply in Chambers as he might be advised), he should not hesitate to order the deeds to be delivered up to the purchaser. But in *Colyer v. Finch* (*ubi supra*) a case which appears directly applicable came to be decided. The bill was filed by Finch for foreclosure against Collyer, a subsequent purchaser without notice. The Master of the Rolls, before whom the case first came, states the law so distinctly and so shortly that it may be worth while to refer to it.

[His Honour then read a part of the judgment in this case from the report in 9 Beav. 509.]

On the hearing of the appeal in the House of Lords, *Joyce v. De Moleyns* (*ubi supra*), and other cases of that sort, were cited in support of the appellant's contention, that he was a purchaser for value without notice. Lord Cranworth, in the course of the argument, expressed doubts whether the rule of not interfering against such a purchaser applied to a case of foreclosure, and, in delivering his reasons for the judgment, he notices the argument that the Court will not interfere, and he says he thinks that an entire fallacy. He says—"There is no difference whether the purchaser has or has not the legal estate. His equity depends on this—that he stands in equity in at least as favourable a position as his opponent, and, therefore, the Court will not interfere against him. That cannot apply to foreclosure." And then, referring to the judgment of the Master of the Rolls, a passage from which I have read,

he says, "But I should proceed on a much shorter ground. Foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor or the purchaser from the mortgagor for value without notice, that the purchaser can at any time file a bill to redeem the mortgage, and, that being so, it would be most unjust if there was not a correlative right on the part of the mortgagor to say, you shall redeem me now, or you shall never redeem me;" and, therefore, the ordinary foreclosure decree was pronounced.

This being, as I consider, a most clear authority, applicable to the case before me, I am led to consider what are the rights of the parties in this foreclosure suit. That the legal estate was duly vested in the plaintiff and Crealock by force of the mortgage deed of 1856, I take to be conclusively established. That, by the conveyance of 1859 to the several persons who then purchased from Stephens, no legal estate passed seems to me to be equally clear. They could not buy, and Stephens could not sell, what he had not. All that they could take, and all that he could give, was an equitable interest. I see no reason to doubt that they could at any time file a bill to redeem the plaintiff's mortgage, and to foreclose Stephens'; but this was the very utmost extent of the interest they acquired. That they have great reason to complain of the manner in which they were dealt with is obvious; but how can the plaintiff be made answerable for that, or why are his legal and equitable rights, one of which is to foreclose against his mortgagor and all persons claiming under him, to be affected? The reply which the defendants make to these enquiries is contained in their several answers, which are, in this respect, in the same terms. I will read from one of them, and I believe the others, if not identically in the same terms, are to the same effect. In the 24th paragraph, to which I am about to refer, Mr. Lewis says: "I say that the plaintiff is, by his own act and deed, estopped from denying or challenging my title to the property No. 3, so purchased by me. I claim the benefit of the said deed of reconveyance executed by the

plaintiff in August, 1870, and sent by him or his solicitor to the defendant, William Swain Crealock, and of every aid to my title or advantage resulting therefrom. I claim the benefit of the receipt and discharge contained in and endorsed upon the said deed of reconveyance, and signed by the plaintiff and the defendant, William Swain Crealock. I say that the defendant, Thomas King Stephens, is a bare trustee for me of the legal estate in the said property No. 3 so purchased by me, and that I am the person at present having the best right to claim the conveyance of that legal estate, and I claim the same accordingly."

Upon this it is argued that the plaintiff is estopped by his conveyance of 1870, procured by a direct fraud, Stephens knowing that the validity of the deed must depend upon payment to the trustees of the sum mentioned as the then present consideration expressed in that deed, and, knowing that not only was the sum not paid by him, but that Crealock was in such a hopeless condition of insolvency that, if it was not paid, the trust estate must lose it—he, I say, in these circumstances, procures that deed to be delivered to him, and takes it as the price of his permitting the other sum of 1,500*l.* to be received by Crealock. If Stephens, having sold and conveyed to the defendants (the purchasers) without a title had afterwards obtained a perfect title, then, as between him and them, his subsequent title would no doubt have fed the estoppel, and would have entitled them to have their originally defective title made perfect by him. But the principle of estoppel applies only between parties and privies; and, if the estate supposed to be acquired by Stephens under the reconveyance is destroyed by the cancellation of that conveyance, and before any estate can have passed from him to them, there can exist no food for the supposed estoppel, and the defendants (the purchasers) are reduced to the position in which they would have been if no reconveyance had been executed, it being wholly out of the question to suggest that any equity exists as between them and the plaintiff.

If any authority were required to support

a proposition so plain in law and so consonant with justice, it would be found in the case of *Eyre v. Burmester* (*ubi supra*).

[His Honour then stated the facts of this case, and read several parts of the judgment delivered by Lord Westbury.]

The defence upon this ground failing; as in my judgment it does wholly fail, the case is reduced as to all the defendants, except Price (whom I have disposed of), to a simple case of foreclosure. However much I may regret that loss and trouble and expense should be inflicted upon perfectly innocent persons, as these defendants (the purchasers) undoubtedly are, I am compelled, in justice to the plaintiff, to declare and order that the deed of reconveyance be cancelled, the consequence of which is that the plaintiff is entitled to all such rights as he would have possessed if that deed had never been executed. An account must be taken of what is due in respect of the original mortgage for principal, interest and costs, and Stephens must be ordered to pay the amount which, upon taking such account, shall be found to be due; and upon his failure to pay, and upon the defendants (the purchasers) declining or failing to pay such amount, the plaintiff will be entitled to realise his security. Under the circumstances of this case, it appears to me that the proper and just mode of realising that security is by a sale of the whole of the mortgaged hereditaments, excepting only that part which has been conveyed to the defendant Price; and for the purposes of such sale, if and when it shall be made, the defendants must be ordered to produce the title deeds in their respective possessions, and to deliver such title deeds to whomsoever may become the purchaser or purchasers. Liberty will be given to the plaintiff to apply in chambers, as may be necessary, to give full effect to this part of the decree.

Solicitors—Messrs. Budd & Son, for plaintiff; Messrs. Coombe & Wainwright, for defendant Pugh; Messrs. Batty & Whitehouse, agents for Mr. William Stephens, Presteign, for defendants Lewis and Beavan.

JESSEL, M.R. }
 1874. }
 Jan. 13. } GALL v. FENWICK.

Administration of Estate—Stat. 30 & 31 Vict. c. 69—Stat. 17 Vict. c. 113 (Locke King's Act)—Mortgage—Primary Fund for Payment—Leaseholds—Apportionment of Mortgage Debt.

The Act 30 & 31 Vict. c. 69 amounts in effect to a legislative declaration that the Court of Chancery had put a wrong interpretation on the 17 Vict. c. 113 (Locke King's Act), and though it only expressly enacts that a direction for payment of debts out of personalty shall not be held to indicate a contrary intention to the rule that a mortgage is to be paid primarily out of the estate subject to it, it really overthrows the whole reasoning on which the former cases had proceeded.

A testator seized of an estate partly leasehold and partly freehold subject to a mortgage devised it specifically, and also created a mixed fund consisting of personalty the proceeds of sale of some realty and annuities to be raised out of the mortgaged estate and other estates, and directed his debts to be paid out of this mixed fund:—Held, that he did not manifest a contrary intention to the rule laid down by Locke King's Act, but as leaseholds were not within that Act the mortgage ought to be apportioned between the freeholds and leaseholds according to their values at the testator's death and the part apportioned in respect of the leaseholds paid out of the mixed fund.

Sir Thos. Phillips, Bart., by his will dated 1st February, 1872, devised all his lands in Childswickham to two trustees whom he also appointed executors on trust for sale, and he devised four other estates to the same trustees on trust to raise 100*l.* a-year out of each and subject thereto to the use of various members of his family and their issue in settlement, and he gave to the same trustees all his personal estate not otherwise disposed of and the moneys to arise from the sale of his lands at Childswickham and the sums to be received from the four rent-charges of 100*l.* each, upon trust thereout to pay all his just debts and testamentary expenses and also all legacy or succession duties which might

be payable on certain devises and bequests contained in his will or on the legacies of 100*l.* per annum to each of his two trustees as thereafter mentioned, and also his funeral expenses and all such costs, charges and expenses as his trustees and executors should incur in executing the trusts and directions contained in his will, and he directed that his two trustees and executors should each receive an annuity of 100*l.* per annum for their respective lives so long as they should respectively act as trustees and executors, and that the four annuities to be raised out of the four estates should abate *pro tanto* on the ceasing of the annuities to his two executors and should cease when the trusts of his will should cease by the absolute vesting of certain effects bequeathed as heirlooms, and he directed his trustees to invest the surplus of the residuary fund and stand possessed of the investments on certain trusts for the benefit of his daughter and her issue.

The testator died in February, 1872, and his will was duly proved. Two of his specifically devised estates were subject to a mortgage for 6,000*l.*; and one of these estates comprised some leaseholds held for long terms of years as well as freehold lands. The words of the will disposing of this estate were: "I give and devise all and every my houses, cottages, land and real estate situate in the parish of Broadway." The bill stated that questions had been raised as to whether the leaseholds passed by this description, and whether the mortgage was to be borne by the estates subject to it or paid out of the fund created by the testator for payment of debts.

Mr. Fry and Mr. W. F. Robinson, for the trustees, stated the case to the Court.

Mr. Southgate and Mr. Cecil Russell, for the residuary legatees, admitted that the leaseholds situated in the parish of Broadway passed by the devise of the testator's land there under 1 Vict. c. 26, s. 26, and that an apportioned part of the mortgage corresponding to the value of the leaseholds was payable out of the personal estate. They were not called upon on the other points.

Mr. Roxburgh and Mr. T. A. Roberts, for the specific devisees.—*Locke King's*

Act (*ubi supra*) does not throw the burden of a mortgage upon the land subject to it when a contrary or other intention appears by the will. Then under that Act it was decided that a direction that debts should be paid out of personal estate was a contrary or other intention—

Eno v. Tatham, 4 Giff. 181; s. c. 32

Law J. Rep. (n.s.) Chanc. 311.

A fortiori a direction to pay debts out of a mixed fund of personalty and realty, consisting in part of the proceeds of sale of an estate specifically devised for the purpose and in part of a sum raised out of the mortgaged estate itself, must be a contrary intention. Then the Amendment Act,

30 & 31 Vict. c. 69,

only alters the law as to a mere direction for payment of debts out of personal estate, but leaves a direction for payment out of a mixed fund to have the same effect as before.

It is admitted that in accordance with

Solomon v. Solomon, 33 Law J.

Rep. (n.s.) Chanc. 473,

we are entitled to have the leaseholds exonerated, and it is strange if the case is to be different with respect to the freeholds which are included in the same devise.

They also referred to

Brownson v. Lawrance, 37 Law J. Rep.

(n.s.) Chanc. 351; s. c. Law Rep.

6 Eq. 1 (1868, a case under the original Act).

Woolstencroft v. Woolstencroft, 2 De

Gex, F. & J. 350; s. c. 30 Law J.

Rep. (n.s.) Chanc. 22 (1860);

Nelson v. Page, 38 Law J. Rep. (n.s.)

Chanc. 138; s. c. Law Rep. 7 Eq. 25

(1868, under the Amendment Act);

Pembroke v. Friend, 1 Jo. & H. 132

(1860);

Lewis v. Lewis, 41 Law J. Rep. (n.s.)

Chanc. 195; s. c. Law Rep. 13 Eq.

218 (1871, under the Amendment

Act);

Harding v. Harding, 41 Law J. Rep.

(n.s.) Chanc. 523; s. c. Law Rep. 13

Eq. 493 (1872, under the Amend-

ment Act).

The Amendment Act applies to the wills of all persons who die after Dec. 31, 1867.

THE MASTER OF THE ROLLS.—I do not feel any doubt about this case; I think the questions really before the Court are very clear. The first is what was the meaning of the original Act. And if there had been no decision I should have thought that tolerably plain. The Act says that when any person entitled to land subject to a mortgage shall not by his will or other document have signified any contrary or other intention the heir or devisee shall pay the mortgage debt. Now therefore a person by his will must signify a contrary or other intention, that is contrary to the heir or devisee paying the debt. I should have thought under that Act, that a mere direction that debts should be paid out of any land was not a contrary intention, for the land might not be sufficient. And certainly a decision that a direction that debts should be paid out of personal estate was a contrary intention, I think could only be arrived at from a desire to give as little effect to the Act as possible. However that was decided, and if no further legislative intervention had taken place I should have been bound to follow it. But there has been a legislative interference by the Act of 1867. And that is not a new enactment, but a correction of the interpretation of the former Act adopted by the Court of Appeal in Chancery; though it expressed it in a polite way and refers to that decision as doubts, saying, whereas doubts may exist upon the construction of the said Act and it is expedient that such doubts should for the future be removed, the doubts alluded to being the decision of the Court of Appeal in Chancery. Then it expressly reverses the decision in *Eno v. Tatham* and removes the doubt which had been created by that decision. That shews that that decision ought never to have been given; and therefore in construing the two Acts together you must consider not merely the actual case of a direction to pay debts out of personal estate, but any direction of the kind. And the Act means to say that the reasoning on which the Lords Justices arrived at their conclusion must be treated as erroneous, and is not to be used in construing this Act of Parliament. That being so I find a decision of

Vice-Chancellor Giffard in *Nelson v. Page* (*ubi supra*), after the second Act, in which he comes to that very conclusion. He says :

"We all know the direction which was given to the current of decision on this subject. There were at length so many of them that they came to be established as law, and in the end gave rise to the passing of the statute of 1867. I think the language of that statute is reasonably plain, though it is not perhaps so happily expressed as it might be. The Act of 1867 says that in the construction of the will of any person who may die after 1867, a general direction that debts shall be paid out of the personal estate shall not be deemed to be a declaration of an intention contrary to the rule established by Mr. Locke King's Act, unless such contrary or other intention be further declared by words expressly or by implication referring to all or some of the testator's mortgage debts. The meaning of that appears to be this—that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to or describe them."

Now I am asked to say that a general direction contained in a will thereout to pay all my just debts is to have no effect as to general personal estate, but it is to have effect as to certain moneys to arise from policies of insurance and the sale of lands. In fact I am to say that the direction to pay debts out of these subjects of devise, moneys from policies, land and personal estate, is to take effect as to two out of the three, although as regards the third the words of the second Act say that it was an improper doubt to be raised. I think absurdity could not be pushed much further, and I decline to adopt that view. The second Act is based on the principle that the doubt as to debts, including mortgage debts, was an ill-founded doubt, and says that it shall not apply in the case of a direction to pay debts out of personal estate. It mentions that case because the decision was in that case ; but that is a mere illustration of what the

doubt was that required to be removed. I do not think that the word "debts" excludes mortgage debts in the case of personal estate and includes them in the other two funds.

Then the only other point to be disposed of is this. It seems that by some slip of the draftsman of Locke King's Act leaseholds were omitted from it, though the same considerations apply to their case. The result is that the leaseholds must be exonerated. The mortgage debt must be apportioned between the freeholds and the leaseholds according to their respective values at the date of the death of the testator, and the sum apportioned in respect of the leaseholds must be paid out of the mixed fund created for payment of debts. The costs will also come out of the same fund.

Solicitors—Messrs. Walker & Martineau, for the plaintiffs & residuary legatees ; Messrs. Vizard Crowder & Anstie, agents for Mr. W. Smith, Winchcombe, for the devisees.

JESSEL, M.R. }
1873.
Nov. 24. }

BETHEL v. ABRAHAM.

Administration Suit—Discretion of Trustees—Decree—Suspension of Discretion—Investment.

When a decree for administration has been made all discretionary powers of management vested in the trustees are suspended, and whatever discretionary power of investment is given to the trustees, the Court will only authorise investments in securities in which funds under the control of the Court may be invested.

Semble—In order to give trustees power to invest in securities not authorised by the Court, a clear and express discretionary power must be given to them.

This was a suit instituted by two of the trustees of the will of the late Lord Westbury for administering the estate, and executing the trusts of his will. The usual decree had been made. The case now

came before the Court, on a summons taken out by the plaintiffs for leave to sell certain stocks and shares, including Turkish Government securities of large amounts, and shares in a bank with considerable liability attached to them, and to invest the proceeds, and also the proceeds of policies on the life of the testator amounting to 29,430*l.*, in the United States Federal Funded Five per Cents., the United States Baltimore and Ohio Six per Cent. sterling bonds, and other securities of a like nature.

The testator's estate, at the time of his death, comprised large investments in shares and stocks and stocks of English and foreign railways, shares in banking and mining, and various other companies besides the foreign stocks proposed to be sold.

The sale and investments mentioned in the summons were proposed by the trustees, under the advice of Messrs. Hichens, Harrison & Co., an eminent firm of stockbrokers. The letters containing such advice were put in evidence, and also affidavits, shewing that the intention of the testator, as expressed in his lifetime, was that his estate should be invested in securities of the character now proposed.

The material clauses of the will were as follows—

"All my property, of every description (except the things hereinafter specifically given), I devise and bequeath to my trustees, and their heirs, on the trusts hereinafter mentioned.

"1. For the period of five years, to be computed from the day of my death, there shall be paid quarterly the following annuities, clear of every deduction." After naming the annuitants, the will proceeds—

"2. All the residue of the income of my estate shall be accumulated and invested, at the discretion of my trustees, during such five years, and the money also receivable on my policies shall be invested at their discretion. My trustees shall not be obliged to alter any investment, or to convert perishable into permanent securities, but may continue or change securities from time to time, as to the majority shall seem meet.

"3. At the end of the five years a full account and valuation shall be made of my estate, and the following sums (with proportionate abatements, if necessary), shall be paid equally."

After specifying the sums, including a sum of 50,000*l.* by the 5th clause, the testator directed, "As to the 50,000*l.*, the same shall be invested, or equivalent existing securities set apart, and the interest shall be paid to my daughter-in-law, Florence, during the joint lives of herself and her husband."

Mr. Fry and *Mr. Everitt*, for the plaintiffs, two of the trustees of the will.—The first point to be considered is what is the construction of the will, independently of the existence of the decree?

[THE MASTER OF THE ROLLS.—My impression, when it was before me in Chambers, was that the trustees had an absolute discretion given them, as part of the will.]

Then the question is whether the Court will strike out that part of the will, because there is a decree?

[THE MASTER OF THE ROLLS.—If you ask me the question, I will tell you my view of it, and then you will deal with it as you best can. My view of it is that that those powers are suspended pending the administration. When the administration comes to an end, the fund goes back to the trustees, unless the parties object; but, pending the administration, as I have always understood, all the powers of the trustees are subject to the jurisdiction of the Court, that is to say, they are suspended. The Court makes the order, pending administration. When the administration is ended, and the fund is clear, the fund goes back to the trustees, and the suspension ceases; but, pending the administration, it is suspended, that is my notion.]

Our contention is that the decree does not destroy or suspend trustees' discretions, but that the trustees must exercise them, subject to the supervision of the Court.

Webb v. The Earl of Shaftesbury, 7 Ves. 480,

shews, no doubt, that the Court will control the trustees' discretion if improperly exercised, but not that the trustees' dis-

cretion is destroyed; here we shew that the trustees' discretion is properly exercised. In

Cafe v. Bent, 3 Hare, 245; s. c. 13 Law J. Rep. (N.S.) Chanc. 169 (at p. 249)

the Vice-Chancellor says—"There is no authority for the proposition that the mere filing of a bill in this Court has the effect of suspending the power given by the will to the surviving or remaining trustee. There is no reason why the mere institution of a suit, which may never be prosecuted, should have the effect of preventing trustees from exercising their discretion. Where, indeed, the Court has assumed the execution of the trusts, it would be highly inconvenient, if not impracticable, that the trustees should afterwards act independently of the Court. The Court does not, however, in the absence of any misconduct in the trustees, deprive them of the exercise of their discretion, but only requires them to act under the control of the Court." That is all that the case of

Webb v. The Earl of Shaftesbury (*ubi supra*)

decides upon this point. If the trustees, by acting independently of the Court after the suit has been instituted, should occasion expense which might have been avoided if they had acted under the direction of the Court, they may be made to pay the expense occasioned by such conduct. In

Widdowson v. Duck, 2 Mer. 494, the Lord Chancellor says—"The principle acted upon by former Chancellors is, that after a decree an executor cannot deal with the assets for the purpose of investment without the leave of the Court."

Therefore the cases shew that the leave of the Court must be obtained, but that the discretion is not destroyed—

Sillibourne v. Newport, 1 Kay & J. 602, is in point.

[THE MASTER OF THE ROLLS.—That was the case of an application for maintenance and power of appointment. No one ever supposed that *Webb v. The Earl of Shaftesbury* (*ubi supra*) applied to a power of appointment among children. Besides, is it quite clear that the will

gives the trustees discretion to invest in anything they like? The discretion may apply to the time of investment. I should require the clearest terms to satisfy me that they were to invest in anything they liked.]

The words are, "the income may be invested at the discretion of my trustees; they may continue or change securities, from time to time, as to the majority shall seem meet." The words are—

"At discretion," no limit is expressed or implied.

"Change" implies not only selling but re-investing, and the discretion applies to both.

The application the trustees make is twofold, and comes under two distinct parts of the clause. As to the policy moneys, 29,000*l.*, the words, "shall be invested at their discretion," apply. As to the sale and re-investment of securities, that comes under the word "change."

The discretion is unlimited in both cases. So in the 5th clause, as to the 50,000*l.*, the testator directed that "the same shall be invested, or equivalent existing securities set apart."

[THE MASTER OF THE ROLLS.—There is not a word as to the securities into which the existing investments are to be changed.]

We submit that the whole scope of the will shews this intention, and there are no words controlling the discretion.

Sir R. Baggallay, Mr. Southgate, Mr. F. Harrison and Mr. Rowcliffe, for other parties.

THE MASTER OF THE ROLLS.—I am not satisfied that the trustees have the power they claim. It is not necessary for me at the present moment to say more than that. I have already indicated, in the course of the argument, why I am not satisfied; but if they have the power they claim, I am not satisfied that I ought to exercise the discretion, which I undoubtedly have to control the exercise of their discretion by acceding to the request to make these investments, which in the eye of this Court are speculative. I do not say they are really, for that I know nothing about, but they are speculative so far as this Court is concerned; so that, even if I

thought the construction of the will other than I do think it, I should not grant this application. However, I should like to say this, that as long as an estate remains to be administered in this Court, if I understand the doctrine of the Court rightly, the Court does not allow a purchase to be made, or a mortgage to be made, or any other investment to be made, unless the Court is satisfied of its safety. There is a reason for that, the Court has to protect the property from all claims; and, even where the trustees have an undisputed power to make a purchase, or to make a mortgage, it is referred to the Judge, generally in Chambers, to ascertain the propriety of the investment which is intended to be made, that is to say, its propriety in all respects, and therefore, in no case, should I have entertained this application for a moment, except subject to that qualification. But, entertaining the opinion I do, that it is not a proper investment for infants to put the money into American railway stocks, of course there is no occasion for me to send it to Chambers. Even if I had a different opinion from that which I entertain as to the power, I should not grant the application, and, as I understand the doctrine of the Court, I am bound to exercise my personal discretion in the matter. I do not mean to say that it is not a case that can be appealed, because it would be for the Court of Appeal to decide whether the discretion is personal in that sense; but I do understand the practice of the Court to be that a Judge does exercise a personal discretion, that is, exercises a discretion according to his own judgment, as to the safety and propriety of a proposed investment. Therefore, I feel bound to add, that if I had been satisfied with the argument, which I am not, that the trustees have this power, I should have declined absolutely to sanction it.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} BROPHY v. BELLAMY.
JAMES, L.J.	
MELLISH, L.J.	
1873.	
July 30.	

Trustees—Discretion—Control of by Court after Decree.

After a decree in a suit for administration of trust funds the Court will not without reason control a discretionary power given to the trustees by the instrument creating the trust.

This suit was instituted for the administration of the estate of Nicholas Winsland, who by his will, after directing the conversion of his estate and investment of the proceeds, and the payment of an annuity of 600*l.*, which was by a codicil increased to 700*l.*, to his wife during widowhood, gave the principal to his children equally, and directed the shares of his daughters to be settled for their separate use without power of anticipation, with remainder to their children, to vest in sons at twenty-one and in daughters at twenty-one or on marriage; and the will contained also a direction that the trustees should, after the decease of each of his daughters, pay or apply the annual income of any share to which any child should be presumptively entitled, or so much thereof as the trustees should think proper, for or towards the maintenance and education of such child; and such annual income might be so applied if the trustees thought fit, notwithstanding the father might be living and of sufficient ability to maintain it.

One of the daughters of the testator having died leaving a husband and several children, some of whom were infants, the trustees presented a petition in the suit praying that the income of the presumptive share which had been paid into Court of the infant children might be paid to the father, he undertaking to apply it for their maintenance and education.

The petition came on before the Lord Chancellor sitting for the Master of the Rolls, and his Lordship thinking that there was a question whether after decree made in the suit the discretion of the

Solicitors—Messrs. Harrison, Beal & Harrison, for the plaintiffs and one of the defendants; Messrs. Gregory, Rowcliffe & Rawle, for the other defendant.

trustees was not gone, directed it to be heard before the full Court.

Mr. Elphinstone appeared for the trustees.

Sir R. Baggallay and Mr. Chitty, for the father.

Mr. Kekewich and Mr. P. V. Smith, for the infants.

The following authorities were referred to as shewing that the Court would not interfere with the discretion of the trustees in the absence of misconduct—

Livesey v. Harding, Tam. 460 ;

Collins v. Vining, C. P. Cooper 472 ;

Cafe v. Bent, 3 Hare 245 ; s. c. 13

Law J. Rep. (N.S.) Chanc. 169 ;

Costobadie v. Costobadie, 6 Hare 410 ;

s. c. 16 Law J. Rep. (N.S.) Chanc. 259 ;

Talbot v. Marshfield, 2 Dr. & S. 285 ;

s. c. 37 Law J. Rep. (N.S.) Chanc. 52 ;

Law Rep. 4 Eq. 661 ; on appeal, Law Rep. 3 Chanc. 622 ;

Sillibourne v. Newport, 1 Kay & J. 602 ;

Ransome v. Burgess, 36 Law J. Rep. (N.S.) Chanc. 84 ; s. c. Law Rep. 8 Eq. 773 ;

Lewin on Trusts, 439-441 (5th ed.).

THEIR LORDSHIPS thought there was no reason for controlling the discretion of the trustees, and made the order.

Solicitors—Messrs. Domvill, Laurence & Graham, for trustees ; Mr. T. H. Strangways, for the father ; Messrs. Nicholson & Herbert, for the infants.

SELBORNE, L.C.
for
LORD ROMILLY, M.R.
1873.
Aug. 2, 4.
JESSEL, M.R.
Nov. 10.

In re THE WESTERN OF
CANADA OIL, LANDS
AND WORKS COMPANY.

Winding up—Company—Creditor's Petition—Right to winding up Order—Petition to stand over—Companies Act, 1862, ss. 80, 86, 91.

A creditor of a company who cannot get paid without a winding up, is entitled ex

debito justitiæ to an order for winding up.

The 91st section of the Companies Act, 1862, is applicable when a petition for winding up is before the Court, and does not necessarily pre-suppose a winding up order.

Where it appears that there is a reasonable chance of a creditor getting paid without a winding up order sooner than if an order was made, the Court may order a creditor's petition to stand over, although the creditor has, under section 80 of the Companies Act, served on the company a formal demand for payment, and not been paid within the three weeks.

The company was registered as a limited company under the Companies Acts, 1862 and 1867, on the 22nd of December, 1871, with a nominal capital of 450,000*l.*, divided into 4,500 shares of 100*l.* each.

2,250 shares were issued as fully paid up in payment of lands purchased by the company.

The other 2,250 were reserved to be issued to the holders of mortgage debentures in case they should elect to take the same in payment of their debentures, none of the debenture holders elected to take shares, and none of these shares were issued.

Mortgage debentures of 100*l.* each were issued by the company to the amount of 200,000*l.*

On the 26th of May, 1873, at a general meeting of the company, a report and balance-sheet were read and approved, shewing a profit made by the company during the eleven months ending on the 31st of December, 1872, of upwards of 17,320*l.*

The interest on the debentures was regularly paid until the half-yearly instalment due on the 1st of July, 1873, which was not paid.

On the 16th of July, 1873, a meeting of debenture holders was held, which all debenture holders were invited to attend and which many attended. At this meeting it was unanimously agreed that a person should be sent to Canada to investigate and ascertain the real state of the affairs of the company.

A suit was also instituted in England on behalf of the debenture holders against the company, in which a receiver was

appointed; another similar suit was instituted in Canada.

On the 2nd of July, 1873, Mr. Sills, holder of debentures to the amount of 5,000*l.*, served on the company a notice on behalf of himself and Mr. Dallas (another holder of debentures to a similar amount), for payment of the interest then due on their debentures.

On the 24th of July, 1873, Mr. Sills served on the company a petition for winding up the company.

On the 28th of July, 1873, Mr. Chapman, another debenture holder, served on the company a petition for winding up, stating that the company was insolvent.

It was stated that the debts of the company other than those due on the debentures were of very small amount.

A large number of the debenture holders were opposed to an immediate order for winding up, desiring delay in order that the investigation proposed at the meeting of the 16th of July should be carried out. Mr. Chapman had attended that meeting.

The amount of the debentures of those who actually supported the petition was 20,000*l.*

From what appeared from the affidavits and statements in Court, the Lord Chancellor calculated that the amount of the interest of the debenture holders who actually opposed the petitions was 98,000*l.*

Mr. Bagshawe, for Mr. Sills, argued that as the statutory notice for payment had been given by his client, and the three weeks elapsed without payment, it must be taken under section 80 that the company was unable to pay its debts, and that the petitioners were entitled to an order for winding up *ex debito justitiæ*.

He cited

Bowes v. The Hope Mutual Life Insurance Company, 11 H. L. Cas. 389.

Mr. Jackson and Mr. Locock Webb, for Mr. Chapman.

Sir B. Baggallay, Mr. Whitehorne, Mr. T. A. Roberts and Mr. Charles Walker, for debenture holders who opposed the petition, contended that as a large majority of debenture holders opposed the winding up and a receiver had been appointed in the suit, the Court would, under section

91 of the Companies Act, 1862, refuse to make an order for winding up until the affairs of the company had been investigated. They cited

In re The Brighton Hotel Company, 37 Law J. Rep. (N.S.) Chanc. 915; s. c. Law Rep. 6 Eq. 339;

In re The Langley Mills Steel and Ironworks Company, 40 Law J. Rep. (N.S.) Chanc. 313; s. c. Law Rep. 12 Eq. 26;

In re The Planet Building Society, 41 Law J. Rep. (N.S.) Chanc. 738; s. c. Law Rep. 14 Eq. 441.

THE LORD CHANCELLOR (on Aug. 4).—I think that both these petitions must stand over until the first day of Michaelmas Term. The case made by the petitioners is, that this is a company that was recently started for operations on an extensive scale in Canada, and it has been established mainly by a capital raised on debentures to the amount of 200,000*l.* on which the interest has been regularly paid until the 1st of the month which has just expired—July. The petitioners are persons who hold some of these debentures, and to whom the last instalment of interest which became due on the 1st of July has not been paid. They have taken proper steps according to the statute to entitle themselves to present a petition, and beyond all doubt, in my opinion, unless they get paid after giving proper and reasonable time within which they may be paid if the company is able to do it, there ought to be a winding up order.

But that does not at all involve as a necessary consequence that such order should be made now. The state of the affairs of the company appears imperfectly from the materials now before the Court. So far as it does appear, there is nothing to throw the least doubt upon the integrity and proper conduct of those who have had the management of the affairs of the company, and who have it now. The balance-sheet which was read to the meeting on the 26th of May last is produced, and if that balance-sheet gives a correct representation of the state of affairs of the company, it would appear that the company worked at a profit for the eleven

months down to the 31st of December last, the profit being 17,320*l.* odd, and also that at the time the balance-sheet was made up, which I presume, though I am not quite sure, was the same time, it shews a general balance of profit of 84,341 dollars, which may or may not be exclusive of some part of the claims of the debenture holders, although the inference I should draw, in the absence of further explanation, is that the balance-sheet is intended to represent in some shape or other the amount of those debentures, whether accurately and sufficiently I cannot at present say.

Then it further appears that the whole of this large class of creditors for 200,000*l.* hold certain securities, they have specific charges, as I collect, upon the whole of the property of the company, and they have instituted two suits, in one at least of which, if not in both, a receiver has been appointed, and therefore everything is secure for their benefit. I do not say that the present petitioners are plaintiffs in those suits, but they would have the benefit of them. Those suits do not preclude a winding up order, but they go very far to shew that, so far as the whole class of creditors is concerned, a winding up order is not immediately necessary for the protection of their interest in the property, and of their eventual chance of being paid.

A meeting was held on the 16th of July, to which I infer all the debenture holders were invited to come, and it was attended, amongst others, by one of the present petitioners, Mr. Chapman, for whom Mr. Jackson appears. I do not understand that Mr. Chapman or anybody else proposed a winding up to the persons who were present, but that which was unanimously agreed to, Mr. Chapman not dissenting, although he declined to serve upon the committee, was that there should be a person sent to Canada in order to investigate and ascertain the real state of the affairs of the company. That was to be done, and that investigation is being proceeded with.

In that state of things I am asked immediately to make an order to wind up. That is asked at the instance of debenture holders who, including those who support

the petition, seem to have interest to the amount of 20,000*l.*, and I am told (although it is not verified) that there are some more who support the same view. On the other hand, by affidavit and by appearance before the Court, debenture holders of the same class to the total amount, as I reckon, of 98,000*l.*, take the opposite view. It is clear if the 91st section applies, as I think it does, what the duty is that I have at this moment to perform. A very large majority of the debenture holders think that their interests would be better promoted by delay, and the delay appears to me in the circumstances not unreasonable. I have no doubt that the 91st section is a part of the Act which is applicable before making any winding up order, and when the petition for winding up is before the Court, and that it does not presuppose a winding up order, or relate only to the manner in which that shall be made or the terms upon which it shall be made.

I entirely agree with the doctrine of Lord Cranworth, that if a creditor cannot get paid without winding up it is *ex debito justitiæ* that he should have a winding up order; but so far am I from thinking that it would be a certain consequence of delaying this case until November that the creditors would be denied payment, I think that there is at least a fair, possible and reasonable chance of their getting paid by means of that delay very much earlier than they would be under a winding up order, because it may turn out, from the result of the investigation, that assets will be sent over to this country for the purpose of paying the whole of the debts which are now unpaid and the interest now overdue. I am, therefore, clearly of opinion that the proper course, as I have mentioned, is to direct the two petitions to stand over until the beginning of Michaelmas Term.

Mr. Jackson.—The first day for petitions?

THE LORD CHANCELLOR.—Yes.

Nov. 10.—The petition now came on for hearing before the Master of the Rolls, and it appeared that nothing had been done in the matter, and no further affidavit filed on behalf of the company.

A large majority of the debenture holders opposed the petition.

Mr. Bagshawe, for the first petitioner.

Mr. Jackson and *Mr. Locock Webb*, for the second petitioner.

Hon. R. Butler, for debenture holders supporting the petition.

Mr. Roxburgh and *Mr. O. T. Simpson*, for the company.

Sir E. Baggallay, *Mr. Whitehorse* and *Mr. T. A. Roberts*, for debenture holders opposing the petition.

THE MASTER OF THE ROLLS.—I consider it settled that a creditor of a company who cannot get paid without a winding up order is entitled to such an order *ex debito justitiæ*. This was in fact held by the Lord Chancellor, and is quite consistent with holding that, under special circumstances, the Court has power to direct the petition to stand over.

The facts of the case are, that the debt only became due in July, the petitions were heard in August, and the Lord Chancellor came to the conclusion that there was a reasonable chance of the petitioners getting paid sooner if the petition was ordered to stand over. Under these circumstances he gave three months to the company. These three months and a few days have now expired, and nothing appears to have been done. Not a word of evidence is produced to shew that there is any probability of the debts being paid. Under these circumstances I must assume that the petitioners cannot get paid without a winding up order, and therefore that they are entitled to such an order *ex debito justitiæ*.

The Master of the Rolls made the usual winding up order on both petitions, giving the carriage of the order to the first petitioner.

Solicitors—Messrs. Atwell and Mr. H. W. Vallance, for petitioners; Messrs. Wilkinson & Son, for the Company; Mr. Holmes and Messrs. Lewis, Munns & Longden, for debenture holders.

MALINS, V.C. }
1873.
July 19.

LANE v. GRAY.

Production of Documents—Affidavit of Documents—Order discretionary—15 & 16 Vict. c. 86. s. 18.

It is within the discretion of the Court to make or refuse an order for production by a defendant upon oath of documents under the 18th section of 15 & 16 Vict. c. 86.

Where a suit to administer the estate of an intestate was instituted by a person claiming to be her next of kin in a distant degree against the Solicitor to the Treasury, to whom administration had been granted, the Court declined to make the order until the plaintiff had made out a prima facie case.

The bill in this administration suit was filed by the plaintiff as one of the next of kin in a distant degree of Mrs. Maria Mangin Brown, who died in December, 1871, intestate, and possessed of property to the amount of about 250,000*l.*, against Mr. Gray, the Solicitor to the Treasury, to whom, as representing the Crown, administration of the intestate's estate had been granted in the absence of any claim by her next of kin.

The plaintiff, who it appeared claimed through an ancestor who died in 1713, had taken out a summons for the usual affidavit by the defendant as to documents, under 15 & 16 Vict. c. 86. s. 18, and the plaintiff having declined to make such affidavit, the summons was now adjourned into Court.

Mr. E. Ford, in support of the summons.—Every plaintiff has a right to call upon the defendant to make an affidavit as to documents in his possession or power relating to the matters in question in the suit, and under the 18th section of 15 & 16 Vict. c. 86, it is imperative upon the Court to make an order for the production by the defendant upon oath of such documents.

He referred to

Rumbold v. Forteath, 3 Kay & J. 44.

Mr. Hemming, for the Crown.—The 18th section of 15 & 16 Vict. c. 86 enacts that it shall be lawful for the Court to make an order for the production of such documents "as the Court shall think right," and it is not imperative upon the

Court to order production, but within the discretion of the Court whether it shall do so or not. Here there is simply a claim by a plaintiff, who alleges a distant kinship to the intestate, without any evidence to support the allegation. A *prima facie* case should be shewn and supported by affidavit, otherwise fictitious claims might be made with the object of procuring information on which to found other fictitious claims.

MALINS, V.C., said that it appeared that a large amount of property was involved in this case, and that it was an easy thing for persons to make claims to the property without sufficient grounds. The words of the section, he thought, vested in the Court a discretionary power to order production when it should appear to the Court right to do so; and he considered that it was just and reasonable that the Court should not order persons in the possession of an estate to produce their documents of title to every one who made a claim, which might perhaps have no foundation. His Honour held that he was justified in refusing the present application until the plaintiff had made out a *prima facie* case in support of his claim, and dismissed the summons.

Solicitors — Mr. J. T. A. Patrick, for plaintiff;
Messrs. Raven & Bradley, for the Crown.

HALL, V.C. }
1878. } BINNS v. FISHER.
Dec. 17. }

*Obligor and Obligee—Bond—Payment—
Delivery up of Bond—Bill for, dismissed
with Costs.*

In 1869 B. gave a bond to H. for payment of money in 1874, with interest in the meantime. B. and H. both admitted that the bond was satisfied in July, 1870, but before complete satisfaction H. had deposited the bond with his bankers, who claimed a lien, and expressed an intention of suing at law on the bond when it should become due. The bankers had given no notice to B. of the deposit until after the alleged satisfaction, but they charged collusion between B.

and H.:—Held, in 1873, that a bill would not lie for delivery up of the bond.

The plaintiffs in this suit were the obligor of a bond, and his two sureties. The defendant was the registered public officer of the Halifax joint-stock banking company; with whom the bond had been deposited by the obligee.

The facts of the case, so far as they are material to this report, were shortly these:

Leedham Binns and Joseph Garside Hillam, in 1867, entered into partnership, as worsted manufacturers, at Oakenshaw, near Low Moor, in the county of York—but there were no written articles of the partnership, nor any fixed period for its termination.

Shortly before the month of October, 1869, it was agreed between them that Hillam should retire from the partnership as from the 15th day of October, 1869; and that his share therein, and in the partnership stock in trade, machinery, credits and effects should be purchased by Binns for the sum of 3,500*l.*, payable in the course of the then next five years, and that Binns should thenceforth carry on the business alone.

In order to secure the payment of the purchase money it was arranged between Binns and Hillam that a bond with two sureties should be given by Binns to Hillam, payable at the furthest at the end of five years from the dissolution of the partnership; but it was at the same time verbally agreed between the parties that if the business to be carried on by Binns should be successful and it should be convenient to Binns, the money secured by the bond should be paid by instalments from time to time as Binns should find himself able to make such payments.

In accordance with that agreement a bond was prepared, which was dated the 15th October, 1869, and by which Binns and two sureties became jointly and severally bound to Hillam, in a sum of 7,000*l.* The condition of the bond was this, viz., that if Binns, his sureties, or any or either of them, their or any or either of their heirs, executors or administrators, should pay, to Hillam, his executors, administrators or assigns, the sum of 3,500*l.* on the 15th day of October,

1874, and should pay to Hillam, his executors, administrators or assigns, interest at the rate of 5*l.* per centum per annum upon the said principal sum of 3,500*l.*, or so much thereof as should for the time being remain unpaid by monthly payments on the last day of every lunar month to be computed from the 15th day of October then instant, without any deduction, the above written bond should be void, otherwise the same should remain in full force and virtue.

Before the bond was actually executed or the partnership dissolved, Binns ascertained that Hillam had overdrawn the partnership funds for his own private purposes to the extent of 1,800*l.*; and consequently, it was arranged, that on taking the partnership accounts between Hillam and Binns the sum of 1,800*l.* should be deducted from the amount to be paid to Hillam by virtue of the bond; and a memorandum was drawn up and signed by Hillam shewing the state of accounts between himself and Binns, with reference to the partnership; but no alteration was made in the bond as to the amount payable to Hillam thereunder. To further secure the payment of the 1,800*l.*, an agreement in writing was also entered into between them, on the 14th October, 1869, to which, however, it is not necessary more particularly to refer.

The partnership was dissolved, as from the 15th October, 1869. The business was profitably carried on by Binns, who in 1869 and 1870 paid Hillam several sums of money, on account of the bond. The last of those payments was a sum of 605*l.* 1*l.* 8*d.*, made on the 19th July, 1870—at which time it appeared from a memorandum signed by Hillam that he had been overpaid what was due to him under the bond, by so much as 135*l.* 18*s.* 1*d.* On that last payment being made Binns applied to Hillam for the delivery up of the bond; but the application, though repeated, was not complied with. Hillam, however, on the 18th August, 1870, wrote to one of the sureties, telling him that the bond was null and void, Binns having up to that date liquidated and paid off the bond in full, along with interest; and adding, that that letter was to shew the surety that he was no longer liable for the bond.

In the meantime, viz., on the 24th June, 1870, Hillam, who then opened an account with the defendant's bank, had deposited the bond with the bank, and also given them his brother-in-law's guarantee in writing to the extent of 500*l.*, to secure the balance of his account. Shortly after the 19th July, 1870, Binns for the first time heard a report that Hillam had so deposited the bond with the bank. Binns, thereupon, immediately applied by letter both to the bank and to Hillam to know whether such report was true; at the same time informing the bank that the whole amount due upon the bond had been paid off; and requiring the bond to be delivered up to Binns.

A long correspondence then took place between the parties, in the course of which the bank alleged that they had advanced money to Hillam on the security of the bond. They declined to deliver up the bond to Binns, and claimed to hold it as a security for money due to them from Hillam.

The bill in this suit, after stating to the above effect, charged that at the time when the bond was deposited with the bank the whole or at all events the largest portion of the principal money and interest secured thereby had been in fact paid to or on behalf of Hillam by Binns in accordance with the arrangement so entered into between them as aforesaid.

It also charged, and stated it to be the fact, that the bank did not, nor did any one on their behalf, make any enquiry of the plaintiffs or any of them or any other person at the time when they alleged that the bond was deposited with them, or at any other time before such applications as aforesaid, as to whether the whole or any part of the money secured by the bond was then actually due or not; nor did they, or any person on their behalf, ever give notice to the plaintiffs or to any or either of them that the bond had been deposited with them; or that they had any claim thereon until after Binns had made such application to them as aforesaid.

The bill, therefore, further charged that the bank ought to set forth when in particular and under what circumstances and for what purposes the bond was

deposited with them; and whether it was to secure a debt then already due to them by Hillam or how otherwise?

The bill also charged that the bank, although they were well aware that nothing was due by virtue of the said bond, still refused to deliver it up, to the plaintiffs, and threatened and intended to sue the plaintiffs for the money originally secured thereby or part thereof, when the bond should, according to the tenor thereof, become due and payable.

The bill prayed a decree that the bond might be delivered up by the bank to the plaintiffs to be cancelled; that in the meantime the bank might be restrained from parting with, negotiating, transferring or otherwise dealing with the bond; and from commencing or prosecuting any action, suit or other proceeding against the plaintiffs, or any of them, to recover the money or any part thereof purported to be secured thereby. And that the defendant might be ordered to pay the costs of the suit.

The defendant by his answer (which was very long) stated, *inter alia*, the grounds of the case made by the bank. He said that the whole of the arrangements said to have been entered into between Binns and Hillam were so suspicious that he did not admit or believe that the bond for 3,500*l.* was really or *bona fide* satisfied by the alleged payments as in the manner mentioned in the bill; that the bond had continued uninterruptedly in his custody from 1870 till Dec., 1871 (when the answer was filed), and that if proper enquiries had been made by Binns for it, he could not have failed to discover, even if he had not otherwise known, that the bond was deposited with the bank; that on the 8th May, 1871, Hillam's balance then due (and still unsatisfied) was 1,242*l.* 15*s.* 2*d.*, that neither he, nor the bank, had, when Hillam's account was opened, any notice of the alleged additional agreement of the 14th October, 1869; that, on all the facts of the case, it was to be assumed that Binns "had some notice or knowledge of the deposit of the bond, and that Hillam was making use of it as a *bona fide* security for the sum purporting to be secured by it, to obtain a fictitious credit on the

faith of the bond; and that Binns was, in effect, assisting Hillam to obtain money by false representations, on the faith of the bond debt being wholly due and unsatisfied;" that there were other sums besides the 1,242*l.* 15*s.* 2*d.* due from Hillam to the bank, amounting in all to more than the whole secured by the bond; he admitted, however, that neither he nor the bank gave either Binns, or his sureties, any notice of the deposit, or of any claim of the bank on the bond, till after Binns had applied to them about it; that, under the circumstances, the bank refused to deliver up the bond to Binns and insisted that they were entitled and intended, but did not otherwise threaten, to sue Binns for the money originally secured thereby or any part thereof, when the bond should according to its tenor become due and payable; and finally, the defendant submitted that Binns was not entitled to any part of the relief sought by his bill; and that under the circumstances, he had, in any case, by his conduct and acts precluded himself from obtaining any relief or assistance from this Court; and that the bill ought to be dismissed with costs.

Mr. Osborne Morgan and *Mr. Pemberton*, for the plaintiffs.—The defendant's bank claim to be equitable mortgagees of the bond, which, they contend, is to be treated as a security. Their case is that they cannot sue us till October, 1874, when they will be entitled so to do. They assume that the 3,500*l.* is not paid; and that that sum will then become payable from the plaintiffs to them. In equity the plaintiffs are not bound so to wait. They say the money has been paid off, or satisfied. There is really no other question in the case, but that of the right of the plaintiffs, under those circumstances, to the intervention of this Court; and to a decree for the delivery up to them of the bond. If this had been a mortgage instead of a bond, this Court would clearly relieve the plaintiffs.

[HALL, V.C.—Surely there is a distinction between the title-deeds of an estate which you say belongs to you, but which the defendant may be keeping from you, and this case?]

The Bank say they may come into a Court of equity, five years after the

expiration of the bond, to make the plaintiffs pay the amount.

[*Mr. Dickinson*.—The bank say they intend to sue Binns at law.]

We say they have no case against him either at law, or in equity.

If their case is that there has been fraud upon the bank itself—the plaintiffs will be obliged to come here, after all. But our whole case is that the money has been paid.

[*HALL, V.C.*—Then you have a good defence at law.]

It is the right of a man who has paid off a mortgage to have his securities handed back to him. If, therefore, a mortgagor gives as a collateral security, a bond as well as a mortgage deed, and those instruments are withheld from him, when the money is paid, he may file a bill in this Court for their delivery up—

Norrish v. Marshall, 5 Madd. 475.

The fact that the bond is in the hands of third parties makes no difference. The plaintiffs have satisfied the bond; they have, so to say, paid off their mortgage debt, and are entitled to have the bond delivered up to them. They cannot get the document in any other Court.

Mr. Dickinson and *Mr. Everitt*, for the defendant, were not called upon.

HALL, V.C.—If any authority had been cited in the arguments for supporting or maintaining a bill in equity to have a bond delivered up, of course I should have followed it. But I am reasonably satisfied in my own mind that there is no such authority. Indeed, it is so contrary to my notions, that there should be, that I really do not think I need defer the case, to search for any.

The distinction between a mortgage and a bond is a very obvious one. In the case of a mortgage which a man makes to pay off his debt it is part of the contract at the time of his depositing the deeds, that the deeds should remain; and that they shall be delivered back to him in order that he may make a title to his estate after that time. You give a man a bond, because he likes a bond better than a simple contract security. But if once there has been a debt contracted, I do not know where you are to stop. If you have

paid off the debt there is an end of the debt, at law as well as in equity; whether it is secured by a bond or not. Your case, *Mr. Morgan*, is that it is paid off. Your case, moreover, is, that it was paid off before the bank had any deposit of the bond with them; and that it was completely worthless at the time the bank got it. Under those circumstances, the bank, alleging a case of conspiracy between the first plaintiff here (the principal), and his brother-in-law, to give a bond with some sort of collateral arrangement which really does not affect the case one way or the other; and, even the fact that there was a conspiracy of that kind in order that the bond might be deposited—does not make any difference whatever, as it seems to me. Because, if any such case as that is to be asserted and brought forward, it must be brought forward in a suit instituted by the bank themselves. It cannot be paid any attention to now, because, according to one view of the case, the time has not, in fact, arrived for suing upon this bond. According to your view of the case, on the other hand, you might pay it off before you had to pay it off.

I cannot see the equity of this bill. I think the bill must be dismissed with costs.

Solicitors—Messrs. Edwards, Layton & Jaques, agents for Messrs. T. W. Clough & Son, Huddersfield, for plaintiffs; Messrs. Emmets, Watson & Emmet, agents for Messrs. J. & H. J. Franklin, Halifax, for defendant.

MALINS, V.C.
1873.

July 31.

In re TADDY'S SETTLED
ESTATES.

Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120. ss. 23 and 25—*Interim Investment*—23 & 24 Vict. c. 38. ss. 10, 11—*Cash under the control of the Court*.

Purchase moneys in Court arising from a sale under the Settled Estates Act are "cash under the control of the Court," within the meaning of 23 & 24 Vict. c. 38. ss. 10, 11, so as to empower the Court to order them to be invested as such.

The minutes of an order made upon a petition for a sale of settled estates under the Settled Estates Act, provided for the

interim investment of the purchase moneys upon any stocks, funds or securities, in or upon which cash under the control of the Court might be invested. The trustees of the settlement, however, upon the authority of a recent case before Selborne, L.C., sitting for the Master of the Rolls (see

In re Boyd's Settled Estates, 42 Law J. Rep. (N.S.) Chanc. 506), altered minutes as to the interim investment by substituting the investments prescribed in the 25th section of the Settled Estates Act, i. e. Exchequer Bills or 3l. per Centum Consolidated Bank Annuities.

Mr. Glasse and Mr. Bromehead, for the petitioners, now applied to have such part of the minutes as directed the interim investment to be in Exchequer Bills or Consols restored to its original form.

Mr. Cotton, Mr. Macnaghten, Mr. Bristowe, Mr. Kekewich and Mr. Herbert Lake appeared for other parties.

MALINS, V.C., said that he adhered to his own decisions upon the point. He felt bound to regard the Lord Chancellor, when sitting for the Master of the Rolls, as if he were in fact the Judge for whom he was sitting, i. e. the Master of the Rolls, who was only a Judge of first instance. It appeared from the reported cases (1)

(1) Reporter's note. Cases in which the Court has authorised the investment of moneys paid in under special Acts, as "cash under the control of the Court," notwithstanding such special Acts prescribed a more limited mode of investment.

Wall v. Hall, 11 W. R. 298, V.C.K. Settled Estates Act.

Re Milford's Estate. V.C.W. January 13th, 1866. Private Act.

In re Birmingham Blue Coat School, 35 Law J. Rep. (N.S.) Chanc. 85; s. c. Law Rep. 1 Eq. 632. Lord Romilly, M.R. Private Act.

In re Wilkinson's Estate, 37 Law J. Rep. (N.S.) Chanc. 384; s. c. Law Rep. 9 Eq. 343. V.C.M. 67 Geo. 3. c. xxix.

In re Cook's Settled Estates, 40 Law J. Rep. (N.S.) Chanc. 400; s. c. Law Rep. 12 Eq. 12. M.R. Settled Estates Act.

In re Thorold's Settled Estates, 41 Law J. Rep. (N.S.) Chanc. 780; s. c. Law Rep. 14 Eq. 31. V.C.M. Settled Estates Act.

Reading v. Hamilton, Law J. W.N., 1872, p. 72; s. c. Law Rep. W.N., 1872, p. 91. M.R. Settled Estates Act.

Contra.

Ex parte The Great Northern Railway Com-

pany, that the Master of the Rolls had originally held purchase moneys of land sold under the Settled Estates Act to be cash under the control of the Court, and had afterwards decided the contrary. His Honour had himself always treated such purchase moneys as cash under the control of the Court, and he adhered to his previous decisions, as he should be very sorry to see any disposition to narrow the construction of the Act under which the powers of investment possessed by the Court had been extended.

Solicitors—Messrs. Lake & Co., for petitioner and some of the respondents; Messrs. Cookson, Wainwright & Pennington, for the other respondents.

LORD SELBORNE, L.C. }
 for }
 LORD ROMILLY, M.R. } HERMANN v. HODGES.
 1873.
 May 2.

Specific Performance of Agreement to execute a Mortgage.

The Court will decree specific performance of an agreement to execute a mortgage with immediate power of sale.

This was a suit for specific performance of an agreement to execute a mortgage with an immediate power of sale.

The advance was made at the time the agreement was entered into.

Mr. Townshend, for the plaintiff, asked for a decree in the form given in

Seton on Decrees, p. 443.

He referred to

Ashton v. Corrigan, 41 Law J. Rep. (N.S.) Chanc. 96; s. c. Law Rep. 13 Eq. 76;

in which Wickens, V.C., expressed a doubt whether the Court would make a

pany, Law Rep. 9 Eq. 274. M.R. Parliamentary Deposits Act.

In re Shaw's Settled Estates, 41 Law J. Rep. (N.S.) Chanc. 466; s. c. Law Rep. 14 Eq. 9. M.R. Settled Estates Act.

In re Boyd's Settled Estates, 42 Law J. Rep. (N.S.) Chanc. 506. Lord Selborne, L.C., for M.R. Settled Estates Act.

decree for specific performance of an agreement to execute a mortgage.

Mr. Northmore Lawrence, for the defendant, did not oppose.

THE LORD CHANCELLOR.—I have no doubt that the decree is proper. The defendant does not offer to pay or that would be an answer to the suit. Decree as prayed for.

Solicitors—*Mr. C. J. Orton*, for plaintiff; *Messrs. Poole and Hughes*, for defendant.

HALL, V.C. }
1873.
Dec. 5, 6, 8. }

LEESE v. MARTIN.

Banker's Lien—Deposit of Deeds—Safe Custody—Banker and Customer—Committees of Lunatic—Garnishee Orders—Injunction—Damages.

Bankers have no general lien on boxes containing securities deposited with them for safe custody. A customer who had deposited such boxes for safe custody, having become lunatic, and his committees having been appointed,—Held, that the bankers had no right to retain or open the boxes as against the committees. The bankers who claimed such a lien having obtained garnishee orders against debtors of their lunatic customer through information obtained after opening the boxes, the Court granted an injunction to prevent them from enforcing their garnishee orders with respect to the securities in question, but refused damages for the opening of the boxes.

This was a bill filed by *William Leese*, who was found a lunatic in 1870 (suing by one of the committees of his estate), and by the committees, against *Messrs. Martin & Co.*, bankers, of the city of London, and the object of the suit was to have delivered over to the committees of the lunatic three boxes with the deeds contained in them, and to obtain compensation in respect of those boxes having

NEW SERIES, 43.—CHANC.

been, as the plaintiffs alleged, improperly retained by the defendants.

The defence was, first, that third parties had an interest in the deeds contained in the boxes; second, that the defendants had a banker's lien on the documents; third, that the defendants had obtained certain charging and garnishee orders, which would prevent the plaintiffs from having the relief they sought.

The facts of the case were as follows, as stated in the judgment of the Vice-Chancellor. *Mr. Leese*, the lunatic, was a share and stock broker in the city of London. He had a banking account with the defendants, and the nature of that banking account was explained in the evidence in the suit to be, that *Messrs. Martin & Co.* were the bankers of the plaintiff, *William Leese*, and, according to the usual custom between bankers and stockbrokers, were in the habit of making advances to him (*William Leese*) upon the security of share certificates and similar property deposited with them for that specific purpose. These loans were from account day to account day, and it was understood that, if they were not repaid, the defendants were to be at liberty to dispose of the securities so lodged with them as security, and to repay themselves out of the proceeds.

The plaintiff also kept certain boxes containing securities with the defendants, his bankers, and the explanation as to those boxes was also contained in the evidence, viz., that the defendants allowed the plaintiff, *William Leese*, while he had an account with them, to keep at their banking-house several boxes, in which he, from time to time, for more safe and convenient keeping, deposited various deeds and other documents, as well such as were entrusted to him by customers for purposes connected with his business, as others which were his own property. The defendants did not keep the keys of these boxes, or any of them, nor were they informed what the same contained; but the contents of the boxes were, from time to time, without let or hindrance on the part of the defendants, and, in fact, without any

reference to them, removed, and dealt with by the plaintiff, William Leese, who kept the keys, and had constant access to the boxes as he pleased ; in fact, these boxes were kept at the banking-house of the defendants, merely for the convenience of the plaintiff, and the same were in the possession of the defendants for safe custody only, not as security for the repayment of, or with any reference whatsoever to, any advances made by the defendants. For such advances specific securities were lodged. No advances were made by the defendants upon the securities or property contained in the boxes, and the defendants never in any manner claimed any control over them. The boxes were opened almost every day, and the contents inspected, added to, or taken away.

Mr. Leese having become lunatic, the plaintiffs, the committees, applied to the defendants for the delivery up of the boxes. But the defendants, by their solicitors, represented that much of the contents of the boxes belonged to Messrs. Barnett & Co. and others customers of Mr. Leese, and insisted that the documents belonging to the customers of Mr. Leese must be delivered by the defendants to those customers ; and the plaintiffs, by their solicitor, Mr. Frost, insisted that they ought to be delivered to the committees. Messrs. Barnett & Co., to whom some of the documents belonged, gave notice to the defendants of their claim, but, on the 13th of April, 1871, they withdrew their notice, relying on the committees' duty to return the deeds. And various other notices sent to the bankers of similar claims were withdrawn previously to the filing of the original bill on the 18th of October, 1871.

But the bankers stated that in and about May, 1871, they had had distinct notice that the contents of the said boxes were the property of customers of William Leese, and not part of the estate of which the plaintiffs were the committees, and that, after receiving that notice, they were most desirous that the committees should co-operate and concur with them in the delivery over of the contents of the boxes to the parties who might be found entitled thereto, and that, with

that view, the boxes should be opened by the committees in their presence, and an accurate record be made of the contents thereof ; but that the committees refused to concur in any such course, insisting that they, and they alone, as such committees, were the persons to hand over the boxes to the owners. The bankers then gave notice to the plaintiffs that they should hold a meeting for the purpose of opening the boxes and examining and recording their contents, and delivering over to Mr. Leese's customers, or their representatives, such of the contents of the said boxes as upon examination they should be found entitled to receive, and that such customers would be asked to attend or to be represented at the said meeting for that purpose ; and that if the plaintiffs, or their solicitor, would not themselves open the said boxes, the bankers would do so in his presence, if he would attend, and, if not, in his absence. This meeting took place on the 15th of May, 1871, when they delivered one of the boxes to its owner, and called upon the solicitor of the committees to wait while the other boxes were opened. This he objected to do, and went away ; after which the other boxes were opened, and some of the deeds delivered to their owners ; and a list was afterwards made of the other securities and papers contained in the boxes so opened, and such last-mentioned securities and papers were replaced in the boxes in which they had previously been. The bankers submitted that the refusal of the plaintiffs' solicitor, Mr. Frost, to open the boxes and concur in making a list of the contents thereof, was vexatious and unreasonable, and that, under all the circumstances, and having a due regard to the interests of William Leese and of his customers, or the persons having any interest in the contents of the said boxes, and of themselves, the opening of the boxes was justifiable.

On the question of their general lien as bankers on the boxes deposited with them by William Leese, the statement of the defendants, in their answer, was to the effect that the contents of the boxes were deposited with them in the course of their business as bankers ; and though

William Leese was allowed, from time to time, without any hindrance on their part, to have access to and open the boxes, and to add to or take from the contents thereof, as he pleased, at all such times he was either not indebted to them, or was only indebted to them in an amount covered by the securities deposited by him expressly and specifically by way of security; and accordingly they claimed a lien for the full amount of what remained due to them, as bankers, from William Leese, not as acquired by or evidenced by any written document, but as a lien to which they were by law and custom entitled, independently of any special or express contract. They contended that these boxes came into their possession in the ordinary course of their business as bankers, part of which was to accept and receive from their customers, securities and other property for safe custody. They did not dispute that the boxes and their contents, from time to time down to the date of the inquisition, had come into their possession, and were deposited or left at the bank for safe custody; but they claimed a right, which they said was customary, to retain boxes of deeds so left with them for custody, as a security for an overdrawn account; and they said that, the customer having deeds either as securities for a specific debt, or generally for safe custody, would be permitted to have access to them, and open the boxes from time to time; but that, on the specific security becoming deficient, they would have a right to detain his deeds deposited for safe custody.

The remaining defence of the defendants was that of the charging and garnishee orders. As to this, the following statements were contained in the defendants' answer, viz., that, "Being unable to obtain from the committees of the estate of William Leese payment of all or any portion of the balance (1,337l. 2s. 4d.) due to them from William Leese, and being unable also to obtain from them any satisfactory or reasonable arrangement or provision for the discharge of such balance, or any part thereof, notwithstanding repeated applications for that purpose, on the 27th day of September, 1871, they commenced an action

in Her Majesty's Court of Common Pleas for the recovery of the amount then due to them from William Leese. In this action William Leese appeared by his solicitor, but did not plead thereto; and on the 6th December, 1871, they obtained judgment against William Leese for the sum of 1,359l. 11s. 7d. debt, and 6l. 1s. 2d. costs." They declined in their answer to state the manner in which they acquired the information through which they obtained the subsequent garnishee and charging orders, but the Vice-Chancellor considered it clear, from the evidence, that such information was derived from an affidavit made by the plaintiff in this suit.

Mr. Dickinson and *Mr. Ingle Joyce*, for the plaintiffs, contended that the charging and garnishee orders would not justify the retention of these boxes and their contents, unless the bankers had a lien on them by law; but the defendants had received the boxes and their contents for safe custody only, for William Leese, as their customer, and not as a security, for they admitted that they did not know what the contents were, and that the keys remained in the hands of the depositor; therefore, they had no right to a lien. They referred to the following cases—

- Davis v. Bowsher*, 5 Term Rep. 488;
- Jones v. Peppercombe*, Johns. 430;
- s. c. 28 Law J. Rep. (N.S.) Chanc. 158;
- Inman v. Clare*, Johns. 769;
- Jeffries v. Agra & Masterman's Bank*, 35 Law J. Rep. (N.S.) Chanc. 686;
- s. c. Law Rep. 2 Eq. 674;
- Brandao v. Barnett*, 12 Cl. & F. 787;
- Bock v. Gorrisen*, 2 De Gex, F. & J. 434; s. c. 29 Law J. Rep. (N.S.) Chanc. 673;
- Wylde v. Radford*, 33 Law J. Rep. (N.S.) Chanc. 51;
- Biddle v. Bond*, 6 B. & S. 225; s. c. 34 Law J. Rep. (N.S.) Q.B. 137;
- Doe v. Oliver*, *Smith's Leading Cases*, 6th ed. 769;
- Giblin v. McMullen*, 38 Law J. Rep. P.C. (N.S.) 25; s. c. Law Rep. 2 P.C. 317;
- In re The United Service Company, Johnston's Claim*, 40 Law J. Rep.

(N.S.) Chanc. 286 ; s. c. Law Rep. 6 Chanc. 122 ;
Bellamy v. Marjoribanks, 7 Ex. Rep. 399 ; s. c. 21 Law J. Rep. (N.S.) Exch. 70 ;

Mr. Green and Mr. Stevens, for the defendants, contended that it was their duty to preserve such securities as were not the property of William Leese beneficially, but of his customers, and the committees had no right to have them delivered up to them, for the customers might have brought actions against the bankers for the recovery of their property—

Buxton v. Baughan, 6 Car. & P. 674 ;
Cooper v. Willomatt, 1 Com. B. Rep. 672 ;

Fenn v. Bittleston, 7 Exch. Rep. 152 ;
 s. c. 21 Law J. Rep. (N.S.) Exch. 41.

Then as to the bankers' own lien, it was the fact that the defendants always considered that all the securities which they received from William Leese would be liable for any just and lawful debt which might be due to them from him, and the law was not against them—

Davis v. Bowsher (*ubi supra*) ;
Jones v. Peppercombe (*ubi supra*).

The law was that bankers have a general lien upon all property, no matter what kind, deposited with them in the ordinary course of business, except there be an agreement, express or implied, to the contrary. As to the argument that these boxes and their contents were deposited with the defendants for safe custody and not in the ordinary course of business, it was the ordinary course of bankers to receive and take care of boxes and contents placed in their strong rooms for safe custody, and this was recognised in the decision of

Giblin v. McMullen (*ubi supra*), and there was no special contract in this case with William Leese. Even if the bankers had not originally a general lien, they were entitled to it by virtue of their judgment, and the charging and garnishee orders.

HALL, V.C., after stating the facts, as to which he said there was no contest, first considered the defence set up by the

bankers, that third parties had an interest in the documents which they as bankers were bound to defend.

Referring to the notices which had been sent by such third parties, and the subsequent withdrawal of such notices, he said that the defendants had asserted that the notices were only withdrawn upon the assumption that the securities so claimed should be handed over to them by the committees of the estate of William Leese, which could only be done by opening the boxes and taking therefrom the securities. But so far as he could see, the withdrawal was really without any qualification whatever. It contemplated, no doubt, that the documents which were claimed by Messrs. Barnet & Co. would, when the boxes which contained the documents came into the hands of the committees, be delivered over to them. They were quite satisfied to rest upon the instructions and authority of the Master in Lunacy that that should be done.

The law applicable to such cases was laid down in *Biddle v. Bond* (*ubi supra*), according to which the general rule was, that one who has received property from another, as his bailee, agent or servant, must restore or account for that property to him from whom he received it ; it was not enough that the bailee has become aware of the title of a third person, or that an adverse claim was made upon him, so that he might be entitled to an interpleader. The estoppel, however, ceased when there was an eviction by title paramount.

He did not think that there was any ground for contending that, as regarded the documents belonging to customers of Mr. Leese, the delivery of the boxes to the committees would not have been so effectual a discharge to the defendants as a delivery to Mr. Leese himself, had he not become of unsound mind. It had, however, been contended that the defendants if they could have safely delivered the boxes to Mr. Leese, the lunatic, could not safely deliver them to his committees. He considered that the committees' duty was to obtain possession of the boxes which the lunatic had deposited, and the customers of the lunatic must be taken to have authorised the placing of

their securities in the boxes of the lunatic, which boxes, when deposited with the bankers, would be considered to be and would be dealt with as the lunatic's own boxes and property, and, as a consequence, would have to be handed over to the committees, should Mr. Leese become lunatic.

Several cases had been referred to to shew that if a bailee parted with the possession of the property in his possession, the principal may bring trover or detinue against the person to whom such property has been so delivered. These authorities were not at all opposed to the rule of law as laid down in the case to which he had referred. The first defence of the defendants, therefore, altogether failed. The opening of the boxes at the meeting was unjustifiable. The plaintiffs had a right to object to the opening of the boxes, and to require them to be delivered up to them, unless, indeed, the defendants had the lien claimed by them.

He proceeded next to consider the defence that the defendants had a general lien on such of the contents of the boxes as belonged beneficially to Mr. Leese. The defendants had denied that they agreed to deliver up to William Leese his boxes or the contents thereof upon demand without regard to the state of his banking account, and claimed a general lien; but that the boxes in question were only deposited for safe custody was clear; and that the bankers, there being no special duty undertaken by them, or contract entered into with them in respect of the boxes or their contents, were merely gratuitous bailees seemed also to be clear—*Giblin v. McMullen (ubi supra)*.

There not being here, as in the case of *The United Service Company—Johnston's Claim (ubi supra)*, any arrangement for the bank receiving the dividends interest or income payable on any securities contained in the boxes, the bankers being merely gratuitous bailees, and Mr. Leese being allowed to open the boxes from time to time, and even to take them away, how could the defendants maintain their alleged lien? They had nothing to do with the contents of the boxes in the way of receiving either the principal or the income to which the documents related;

they were wholly ignorant of what the boxes contained. The lien, if any, could not extend to such documents as belonged to Mr. Leese's customers; the defendants never asserted such a lien in any other case, and they were not able to mention any other case in which such a lien had been asserted by any other person. The defendants, relying as they did on the general law that a banker has a lien on the securities of every one of his customers coming into his possession as banker, said that the boxes did come into their possession as bankers in the ordinary course of their business as bankers, because they and other bankers (they did not say "all other bankers") in London allowed their customers to deposit boxes in their strong rooms. But this statement fell short of alleging a general custom applicable to all bankers, or even to all the bankers in London. He, therefore, apprehended that the defendants ought to have clearly alleged and proved a special custom if they intended to rely upon that as a defence in this case—*Bellamy v. Majoribanks (ubi supra)*. The general rule as to the banker's lien was clear, and formed part of the Law Merchant, of which the Court took judicial notice. The previous authorities were, as observed by Vice-Chancellor Wood in *Jones v. Peppercorne (ubi supra)*, all examined in the case of *Brandao v. Barnett (ubi supra)*. In that case, "A. was the London agent of B., a Portuguese merchant, and in that character purchased exchequer bills for him, received interest on them, and at proper intervals got them exchanged for others. He acted in the same manner for several other foreign customers. A. kept an account with C. as bankers, at C.'s banking house, and had several tin boxes in which he deposited these exchequer bills, of which he kept the keys. On the 1st of December, 1836, A. took out of the tin box several exchequer bills which he delivered to C. requesting C. to get the interest due on them, and to get the exchequer bills changed for others. C. did so. Before A. came to take back the exchequer bills, acceptances of his, beyond the amount of his cash credit account, were presented at C.'s bank and paid. A. afterwards became bankrupt:—it was held that C.

had not a lien on the exchequer bills in his hands for the balance to him on A.'s account." That case was a much stronger case in favour of the bankers than the present, because in that case exchequer bills were taken out of the boxes in the bankers' hands, and they received the interest on them and exchanged them. It was admitted in the argument in that case, and such admission was approved in the judgments, that the original bills in the boxes were not subject to a lien, and the case of the respondents was rested on the distinction, that the exchequer bills had been taken out of the box and placed in the banker's hands. Lord Lyndhurst in his judgment in that case stated the general rule in this way—"With respect to some of the points in this case, no doubt whatever can be, I think, for a moment entertained. There is no question that by the Law Merchant a banker has a lien for his general balance on securities deposited with him. I consider this is part of the established law of the country, and that the Courts will take notice of it. It is not necessary that it should be pleaded, nor is it necessary that it should be given in evidence. Therefore, as to that part of the case, I think it is entirely free from doubt." Then he proceeds to state this—"The only question, therefore, which remains to be considered is whether the facts in this case bring this deposit within the general rule. I think that the circumstances of the case are not within the general rule. The deposit in this instance was not such as to give the banker a lien upon the exchequer bills. They were deposited in a box; they were kept under lock and key; the key was not kept by the banker but it was kept by the party depositing them. From time to time he called for the purpose of taking the exchequer bills out of the box in order that he might receive the interest upon them, or, if the bills were called in by the Government, in order that they might be exchanged for others. He himself attended upon these occasions, took the bills out and delivered them for that special purpose to the banker. They were always returned almost immediately. The first time that he applied at the bank after a transaction

of this kind, they were delivered to him, and were replaced under lock and key in the same place of deposit. It is impossible, considering how this business was carried on, that we can come to any other conclusion than this, that it was an understanding between the two parties that the new bills were to be returned after the interest was received, or after the old bills had been exchanged. If so, if that was the understanding, or if that was the fair inference from the transaction, it is quite clear that there could be no lien, it does not come within the general rule, and he thought that this case was not distinguishable from that of securities in a sealed up parcel; and that where a sealed up parcel was deposited as the boxes were in the present case, such a parcel would not be subject to the banker's general lien."

As to the third defence, viz., the obtaining of garnishee and charging orders against William Leese, he said that the action under which such orders were obtained had been brought before the bill was filed, but the orders in question were obtained long after the bill was filed, and the defendants were only enabled to get those orders after they got the list of the documents and ascertained what there was in the boxes. He thought it clear that the defendants, to obtain the orders in question, had availed themselves of an affidavit of the plaintiff, Richard Leese, filed in the cause for the purposes of the injunction, which affidavit never would have been filed had the defendants not rendered this suit necessary, and he could not allow them to set up orders so obtained as an answer to relief, to which the plaintiffs but for those orders would be entitled.

The plaintiffs by their bill asked for damages in addition to the delivery up of the documents; but under the peculiar circumstances of the case, Mr. Leese having become lunatic, there was not evidence of damage entitling the plaintiffs to an enquiry to ascertain the damage, and assess the compensation in respect thereof.

He therefore declared that the defendants were not entitled to a lien upon the boxes in the plaintiffs' bill mentioned, or

any of the contents thereof, and he ordered that such three boxes with the contents thereof should be delivered up to the plaintiffs, the committees, and that, if necessary, the defendants should concur in such delivery up, and that the defendants should be restrained by injunction from taking any proceedings upon the charging and garnishee orders in the pleadings mentioned, but this was not to extend to the defendants taking such new proceedings for enforcing their judgments as they might be advised. The defendants to pay the costs of the suit.

Solicitors—Mr. John Frost, for plaintiffs;
Mr. C. W. Stevens, for defendants.

JESSEL, M.R. }
1874. } FORSTER v. ABRAHAM.
Jan. 20, 21. }

New Trustee—Tenant for Life—Validity of Appointment—Intention of Settlor.

A testator left real estate on trust for his wife for life, and, after her death, for his son for life, with further trusts, and made his wife and son executors, and appointed strangers trustees, giving the trustees a power of sale and power to appoint new trustees, the latter exercisable with the consent of the tenant for life for the time being. Shortly after his death the last remaining trustee appointed the wife and son to be trustees, and he and the wife died. The son then contracted to sell the estate under the power:—Held, That he could validly exercise the power of sale, for, though the Court will not appoint a tenant for life to be trustee, such an appointment out of Court is valid; and there was nothing here in the will specially disqualifying the son from becoming trustee.

This was a demurrer to a vendor's bill for specific performance, arranged for the purpose of deciding whether it was a valid objection to his title, that being tenant for life under a will, he had been subsequently appointed a trustee under the power to appoint new trustees con-

tained in the will. The bill, after shortly stating its object, proceeded as follows—

"The plaintiff's late father, Charles Smith Forster, Esquire (since deceased), duly made and executed his last will, dated the 29th of June, 1847, and thereby devised all his real estate (which included a moiety of the said hereditaments so contracted to be sold) unto and to the use of his brother, John Forster Charles Emery (since deceased), Philip Perks Pratt, and George Bradnock Stubbs, their heirs and assigns, upon trust to pay to his wife, Elizabeth Forster (since deceased), the rents and profits thereof for her life, and, after her decease, to pay the same to his only son, the plaintiff, or permit him to receive the same for his life, but subject to certain trusts therein declared, for raising the sum of 10,000*l.* out of the said real estates, and, after the plaintiff's decease, on certain trusts for the plaintiff's issue, and other trusts. And it was thereby declared that, in the discretion and of the proper authority of the trustees or trustee for the time being of his said will, all or any part of the hereditaments so devised by him should or might be absolutely sold for an estate in fee simple; and he gave power for the trustees or trustee for the time being to give discharge for the purchase-money; and he thereby bequeathed the residue of his personal estate to the same trustees, upon trust to invest the same at interest, and to pay to his said wife the dividends, interest and income thereof, during her life, and, after her decease, upon the trusts therein mentioned. And he thereby appointed his said wife, Elizabeth Forster, and the plaintiff, and the said Philip Perks Pratt and George Bradnock Stubbs, his executors; and it was thereby provided that, if the said trustees nominated and appointed by his said will, or any or either of them, should die in his lifetime, or should at his decease decline to accept, or become incapable of accepting, the trusts therein contained; or if the said trustees, or any or either of them, or any future trustee or trustees to be appointed under that provision in their or either of their place, should at any time or times after his decease die or desire to be discharged from, or neglect, or refuse, or

become incapable to act in the aforesaid trusts before the said trusts should be fully performed, then and so often and as soon as the same should happen, it should be lawful for the surviving or acting trustee or trustees for the time being of his said will, or the executors or administrators of the last surviving or acting trustee, with the consent of the person or persons who should for the time being be entitled to the rents and profits of his said real estate, and the dividends, interest and income of the said trust moneys, and his personal estate respectively, if adult, or otherwise, at the discretion of such trustee or trustees, or the executors or administrators of the last surviving or acting trustee, to nominate a fit person or persons to succeed the trustee or trustees respectively so dying, desiring to be discharged, or refusing, neglecting, or becoming incapable to act as aforesaid, and that, immediately after every such nomination or appointment, the trust estates, moneys, effects and premises which by virtue of his said will should have been vested in the trustee or trustees so dying, desiring to be discharged, or refusing, neglecting, or becoming incapable to act as aforesaid, and should then be subject to the trusts thereof, should, at the cost of his said trust estate, be so conveyed, assigned and transferred in such manner that the same might legally vest in such new trustee or trustees, jointly with the surviving or continuing trustee or trustees, or solely, as the case might require, and in his or their heirs, executors, administrators and assigns, upon the trusts thereinbefore expressed and declared of and concerning the same, or such and so many of them as should be then subsisting and capable of taking effect. And that every such new trustee, either before or after such conveyance or assignment should be made, should have and might exercise the same powers, privileges and authorities, as if he had been appointed a trustee by the said will.

"The said testator duly made and executed a codicil to his said will, dated the 26th of November, 1849, whereby the said testator revoked and annulled the said charge of 10,000*l.* upon his said real

estate and certain other legacies, and also revoked the appointment of the said Philip Perks Pratt and George Bradnock Stubbs, but did not otherwise affect the said devise of his said real estate.

"The said testator died on the 17th of November, 1850, without having revoked or altered his said will and codicil, which were duly proved by the said Elizabeth Forster and the said plaintiff, on the 15th of January, 1851.

"At the date of his death the said testator was seised in fee simple in possession of an equal undivided moiety of the hereditaments hereinafter described, and comprised in the contract for sale hereinafter stated, and such moiety is now part of the estate, subject to the trusts of his said will.

"The said John Forster, Philip Perks Pratt, and George Bradnock Stubbs, by a deed poll dated the 15th of September, 1851, duly disclaimed the devises and trusts of the said will.

"By an indenture dated the 1st of January, 1852, and made between the said Charles Emery of the first part, the said Elizabeth Forster and the plaintiff of the second part, and Samuel Wilkinson of the third part, after reciting that the said Charles Emery, as the sole acting trustee of the said will and codicil, in pursuance and execution of the said power reserved to him in that behalf, had, at the request of the said Elizabeth Forster, being the person then entitled to the rents and profits of the said testator's real estates, and the dividends, interest and income of the trust moneys of the said testator's personal estate, agreed to appoint the said Elizabeth Forster and the plaintiff to be trustees of the said will, to succeed the said John Forster, Philip Perks Pratt and George Bradnock Stubbs, and that they had agreed to become such trustees accordingly; it was witnessed that the said Charles Emery, by virtue and in execution of the said power given to him by the said will, and of all other powers enabling him in that behalf, did, with the consent of the said Elizabeth Forster, testified by her being party to and executing the said indenture, nominate and appoint the said Elizabeth Foster and the plaintiff to be

trustees in the place of and to succeed the said John Forster, Philip Perks Pratt, and George Bradnock Stubbs, for all the trusts and purposes, and with all the powers and authorities expressed and contained in the said will, so far as the same were then subsisting and capable of taking effect. And the said Charles Emery, in pursuance of the statute for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties thereby released or otherwise assured unto the said Elizabeth Forster and the plaintiff, and their heirs, all the hereditaments, and parts or shares of hereditaments, then vested in him, the said Charles Emery, as such acting trustee of the said will as aforesaid, to hold the same unto the said Elizabeth Forster and the plaintiff, their heirs and assigns, to the use of the said Charles Emery, Elizabeth Forster, and the plaintiff, their heirs and assigns, upon the trusts and for the intents and purposes, and with, under and subject to the powers, provisoes and declarations expressed and declared in and by the said will of the said Charles Smith Forster, concerning his freehold hereditaments thereby devised, or such and so many of the same trusts, intents and purposes, powers, provisoes and declarations as were then subsisting and capable of taking effect, and thereby and by a subsequent deed the trust estates, mortgage estates and personalty then subject to the trusts of the said will, were duly vested in the said Charles Emery, Elizabeth Forster and the plaintiff, as such trustees, as aforesaid.

"The said Charles Emery died on the 5th of May, 1864.

"The said Elizabeth Forster died on the 8th of January, 1869.

"Save as hereinbefore stated, no new trustee has been appointed of the said will or codicil."

The bill then proceeded to state the contract for sale of some of the land, subject to the trusts of the will by the plaintiff to the defendant.

Mr. Fry and Mr. P. Beale, for the demurrer, submitted that it was a breach of trust to appoint as trustees two tenants for life of the estates whom the testator

had expressly abstained from appointing as trustees, though he made them executors. Even apart from such an indication of intention, the Court would never appoint a tenant for life trustee; and could it be maintained that, if such an improper person was actually appointed, he could exercise the powers of the trustees?

There was, indeed, a *dictum* in *Lewin on Trusts* to that effect, but it appeared on the authorities that it was too broadly laid down. This sale might be stopped by any of the *cestuis que trust*, and the purchaser therefore could not be compelled to complete.

They cited—

Re Tempest, 35 Law J. Rep. (N.S.)
Chanc. 632; s. c. Law Rep. 1
Chanc. 485;

Ex parte Clutton, 17 Jurist, 988;
Rede v. Oakes, 4 De Gex, J. & S.
505; s. c. 34 Law J. Rep. (N.S.)
Chanc. 145;

Dance v. Goldingham, 42 Law J.
Rep. (N.S.) Chanc. 777; s. c.
Law Rep. 8 Chanc. 902;

Lewin on Trusts, 5th ed. p. 470.

Mr. Southgate and Mr. W. H. G. Bagshawe, for the vendor, were not called upon.

THE MASTER OF THE ROLLS—I won't trouble you, Mr. Southgate. I take it that it is the duty of the Court to give an opinion whether a title is good or bad, the notion of a doubtful title having been exploded by *Alexander v. Mills* (1). I decide, then, that the title is good. It is not disputed that the appointment was warranted by the express terms of the power; but it is urged that it is bad on one or both of two grounds. First, it is said that, in the case of trustees with a power of sale, it is not allowable to appoint a tenant for life in possession to be a trustee. I am not aware of any authority for such a proposition, nor do I think it founded on reason or the practice of conveyancers. Not long ago the common form of settlement was not to vest the power of selling, strictly speaking, in the trustees, but in the

(1) 39 Law J. Rep. (N.S.) Chanc. 407; s. c. Law Rep. 6 Chanc. 124.

tenant for life, the form being a direction that the trustees should sell at the request, in writing, of the tenant for life. The only use of putting in the trustees was to secure the due application of the purchase money. Now power is generally given to the trustees to sell with the consent only of the tenant for life; but formerly the trustees had no discretion in the matter. Therefore, this supposed disability on the part of the tenant for life to determine the exercise of the power of sale had no existence according to the old usage. And a consideration of that kind must weigh very much with the Court. Then the time and necessity of a sale are not different to the tenant for life and those in remainder. Is there any conflict of interest? I think not. It is true that now and then a tenant for life may desire a sale to increase his income; but, as a general rule, there is no one more anxious than the tenant for life to keep the estate unsold, no one more anxious to see it sold on a proper occasion and for the highest price. On the reason of the thing, the tenant for life is the person most likely to be the best judge.

Then as to practice and usage. According to my experience, it is usual for the tenant for life to enter into the contract and afterwards apply to the trustees to join. In reality the trustees do not determine the time of sale. I have known many cases in which the tenant for life has signed the contract without ever saying a word to the trustees. It is, of course, more polite to ask them first; but, almost universally, the initiation of a sale proceeds from the tenant for life. Therefore, on practice and usage, the appointment of a tenant for life to be trustee is not improper; and, though as a rule the Court exercises a discretion, as to which I cordially assent to the expression of the Lord Justice Turner in *Re Tempest (ubi supra)*, that the Court will not in general appoint a tenant for life, it may do so, and sometimes has done so. Therefore, such an appointment is not necessarily an insuperable objection.

That disposes of the more important ground.

The other ground taken was this—

that that being the rule, here it appears on the will that the testator did not wish the tenant for life to be appointed. That, however, is not made out. The indications in the will are not of a binding character, so as to establish that. *Re Tempest (ubi supra)* was referred to on this point; but it has not a direct bearing on it, for that was an appointment by the Court, which, though not bound by such an indication, would, nevertheless, follow it. The Court might have appointed the gentleman named there, but it did not do so. The appointment, if made, would have been valid, but the Court refused to make it. It looked to the testator's wishes in exercising its discretion. A testator may, of course, give directions which the Court will not disregard; but is there anything on the face of this will shewing that distrust for the tenant for life indicated in *Re Tempest (ubi supra)*? Why, here there is the greatest trust and confidence reposed in the tenant for life! So far from excluding him from control of the property beyond the enjoyment of a life interest, the tenants for life are made executors, and control the investment of the personal estate. That shews the testator believed they would act properly. That is strong evidence that they might be trusted with the sale of the real estate and the application of the moneys to arise from it. Then there is a power to appoint new trustees, and I find that the consent of the tenants for life is required for the exercise of that power. Here, again, the testator has trusted them to select new trustees. I can find no evidence of distrust or want of confidence involving exclusion from trusteeship, from the fact that the testator has not appointed them trustees in the first instance. He has merely omitted them because the first trust was to pay them the income; it does not shew that he considered them not individually fit. I am of opinion, therefore, that there is nothing at all in this will to induce the Court to exclude these particular tenants for life. I will not say that the Court would have made this appointment; but still, the power having been exercised, the appointment is valid. The demurrer must therefore be overruled, and, without

prejudice to any arrangement made between the parties, it is the regular course, and it is best for the protection of the purchaser, that it should be overruled with costs.

Solicitors—Messrs. Pearce & Son, agents for Messrs. Wilkinson & Gillespie, of Walsall, for the plaintiff; Messrs. Beale, Marigold & Beale, for the defendant.

[IN THE HOUSE OF LORDS.]

1873. }
July 10, } LAMARE v. DIXON.
11, 31. }

Specific Performance—Misrepresentation—Delay—Acquiescence.

Misrepresentation whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it be not such a clear and direct misrepresentation as would afford a good ground for a suit to set the agreement aside or for an action for damages upon it.

If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of which the defendant entered into the agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession.

D., a builder, agreed in writing to construct certain cellars and to execute a lease of them to L., a wine merchant, who agreed to accept the lease and to pay D. 100l. on completion. The agreement provided that the walls and floor should be of concrete, but it made no further mention of or provision for dryness in the cellars, but D. knew that L. wanted the cellars only for the purpose of his business as a wine merchant, and L. swore that he told D. that it would be necessary that the cellars should be dry, and that D. assured him that the concrete provided for in the agreement would keep the cellars dry. L. also swore that he was induced by this representation to execute the agreement and to enter into

possession. D. however denied this. L. entered into possession before the cellars were finished. Finding that they were too wet for his business he remonstrated with D. But D. refused to do anything more than he had done towards making the cellars dry. L. then threatened to do the necessary works himself and to charge D. with the cost. He did not do this, but after having continued in possession two years, paying his rent under protest, he abandoned the cellars altogether. L. never paid the 100l. mentioned in the agreement nor did he execute the lease, and D., though he sent him a draft lease for approval, never demanded the return of the draft or the payment of the 100l. D. having filed his bill against L. for specific performance,—Held, that D. was affected with knowledge not only as to the purpose for which the cellars were required, but also that for this purpose it was necessary that they should be dry; that there was evidence that it was on the faith of D.'s representations as to the effect of the concrete, that L. signed the agreement and entered into possession; that as the cellars were wet L. was entitled at the first to repudiate the contract, and that this right to repudiate was not affected by the lapse of two years during which L. had refrained from exercising it, because D. had also during the same time delayed in enforcing the contract; nor by the occupation of the premises by L. during that period, he paying rent under protest, for such payments were to be considered as for use and occupation rather than as rent; nor by L.'s threat to do the necessary works himself. For considering the loss and inconvenience L. would have suffered if D. had persisted in neglecting his part of the agreement L. was justified in making the threat with a view to compelling D. to do what he ought to have done.

As there had been delay on both sides the plaintiff's bill was dismissed without costs.

This was an appeal from a decree of Lord Chancellor Hatherley for the specific performance of an agreement between the parties, which reversed a decree of the Master of the Rolls dismissing the respondent's bill, filed for the purpose of compelling such performance.

The respondent was the lessee of a piece of land in Eaton Lane, Pimlico, upon which he was about to build. The appellant, who was a wine merchant, was in want of vaults for his business; and in the year 1867, negotiations took place for an agreement between the parties, that the respondent should build cellars, and the appellant take them upon lease. In the discussions as to the terms of the lease, the necessity of dryness of the cellars was mentioned, and the respondent assured the appellant that the concrete on the outer walls and on the floor, which was provided for by the agreement, would keep the cellars perfectly dry. On this point the evidence given by the defendant in the suit was as follows—"During the negotiations, and before the signing of the agreement, I on different occasions pressed upon the plaintiff the necessity of making the cellars quite dry and well ventilated, and it was with the view of making the cellars quite dry that the agreement contains the provision that the floor and walls of the said vaults should be well concreted, and in reply to my remarks upon this subject, I have more than once been assured by the plaintiff that the cellars would be quite dry, and that no water could come in." Mr. Bartlett, also, the defendant's solicitor, gave evidence as follows—"From what passed between the plaintiff and the defendant in my presence, I am able to say positively that the plaintiff well knew at the time of signing the said agreement that the said vaults were required by the defendant for the purpose of storing his wine, and that it was of the greatest importance to the defendant to have possession of the said vaults at the earliest moment in order that he might take his stock there." "I also recollect that the necessity of dryness of the cellars was discussed between the plaintiff and the defendant in my presence at the interview before mentioned; and the plaintiff assured the defendant the concrete in the outer walls and on the floors, as provided for in the said agreement, would keep the said cellars quite dry, and this discussion is what I referred to in my letter to the plaintiff's solicitor, dated the 20th of October, 1869." Neither the defendant nor Mr. Bartlett

were cross-examined. On the other hand the plaintiff in the suit, in his evidence, swore as follows—"The defendant never informed me that the vaults must be dry, and I never assured him that they should be so, and he never stipulated that they should be drained. He was always fully aware that the vaults were not drained. I never assured him that they should be dry. I absolutely deny that I ever said to the defendant, as stated by him in his affidavit, that the cellars should be quite dry, and that no water could come in or anything to that effect. I knew that cellars generally could not from their underground construction be quite dry." And in cross-examination he said, "The defendant said nothing to me as to the reason why the walls should be concreted. He never mentioned it to me at all. It was my suggestion to my builder. I suggested it to keep the walls dry. My showroom for bright goods was over the cellars. I was anxious that the cellars should be as dry as possible, and I was anxious to keep the cellars dry, but I did not think it was necessary for a wine merchant. I did not tell the defendant and Mr. Bartlett at the solicitor's office, before signing the agreement, that the concrete on the outside of the walls and floors would keep the cellars dry. I did not conceive it possible to keep the cellars quite dry. I do not recollect saying anything at that interview about keeping the cellars dry." Indeed he knew that the cellars would not be dry, for he said that in January, 1867, the agreement being made in April of that year, he called at the Local Board of Works, "to know the depth of the main sewer in reference to building my house, and Mr. Richmond, the surveyor, told me the depth from the crown of the road. This was before I intended to construct the cellars. I knew the depth of the sewer, but I never informed the defendant; he never asked me."

Such being the nature of the evidence on either side with reference to the negotiations for the agreement, the agreement was prepared and signed upon the 10th of July, 1867. By this agreement the respondent, in consideration of 100*l.* paid immediately down, and of another 100*l.* which was to be paid upon the exe-

cution of the lease, agreed to "construct, erect and completely finish on and under the site of the messuages and premises," in King's Row and Eaton Lane, Pimlico, "a messuage, coach-houses and stable, with rooms and loft above the said coach-houses and stable, and the said vaults thereunder, according to the elevations and measurement shewn upon a plan signed by both parties," and to grant a lease to the appellant, which was to commence upon Christmas-day following at the rent of 130*l.* a year. It was agreed by the respondent that the premises should be fit for occupation on Christmas-day, 1867, the day upon which the lease was to begin. The agreement contained a clause that Dixon, the respondent, should be "at liberty from time to time to enter the premises to be demised at all reasonable times, to open, repair and cleanse all or any of the drains or sewers under the said premises." And it was agreed by Dixon that he would construct the vaults to be "of the height of eight feet six inches at least," and that he would "cause the floor and exterior side of the walls of the vaults to be well concreted." Although from this reservation to Dixon of the right to enter and repair drains, it would appear that at the date of the agreement it was contemplated that there would be drains to the premises, yet as there was to be a coach-house over the wine vaults, and the vaults by the agreement were to be eight feet six inches in height, it was found necessary, in order to give the requisite height to the vaults, and also to provide for convenient access to the coach-house, to lower the vaults, and thus to bring the bottom of them to a depth of two or three feet below the level of the main sewer. A system of self-acting drainage therefore became impossible.

The appellant entered upon the premises before the day fixed, and while the works to be done were in an incomplete state. Shortly after the occupation by the appellant commenced, it was found that the premises were far from being in the dry state, the necessity of which had, as the appellant alleged, been pressed upon the respondent's attention. On this point both the Master of the Rolls and the

Lord Chancellor concurred in opinion that the cellars never were in a proper state for occupation by the appellant in his business as a wine merchant. The evidence upon this subject, chiefly relied on, was that given by two servants of the appellant and also by two wine merchants. John Sanders, who had been in the employment of the defendant for upwards of nine years, said, "During the whole of the time of the occupation of the defendant, after the first two months there was always water running down the walls of the cellars and coming up through the floor to such an extent that I have myself, more than once, laid down boards to walk on when working in the cellars, and I have also seen other persons lay down boards for the purpose when working in the said cellars." And Edward Prieux, also in the service of the appellant, said: "At the time the said defendant stored the said hogsheads of wine upon the said premises there was no appearance of dampness in the said cellars, but after the defendant had been in occupation for some time the water commenced to come into the said cellars in considerable quantities; it used to drip from the ceilings, and to pour down the walls and run in little streams under the wine bins; and I have sometimes seen the water standing on the floor of the said cellars to a depth of about two inches at different parts, on which occasion I have had boards put along for persons to walk over." George Ridley, a wine-merchant, said: "I know the cellars in Eaton Lane lately occupied by the defendant, and I well remember visiting them in the early part of the present year, when the condition of the said cellars was such as to render them utterly unfit for use as wine cellars. The walls were very wet and the water seemed to me to be oozing through the floors whereon in some places it stood in little pools. The sawdust throughout the vaults was saturated with water and I noticed little streams of water trickling under the bins of wine towards the centre of the said vaults. I did not see any means of getting rid of the water I saw in the said vaults. I am enabled to say with confidence from my very long experience in the

trade that the said vaults are utterly unfit for use as vaults for the storage of French wines," and Pannot, another wine-merchant, said: "I have no hesitation in saying that the said cellars are quite unfit for the storage of wine and that great damage may have been occasioned to the wine of the defendant by the wet during the time it was stored in the said cellars." On the other side the respondent called skilled witnesses who said that some wines were very little affected and some not at all by storage in a wet vault. The appellant being thus dissatisfied with the construction of the cellars called the attention of the respondent to the objection arising out of their inefficient drainage, and in the month of April, 1868, his solicitor wrote to the solicitor of the respondent insisting that the drainage should be amended. In the same month a builder inspected the premises and suggested that catch-pools or wells should be constructed into which the wet might run and from which it might be pumped. But the respondent refused to construct these works. The appellant having stored much wine in the cellars was unwilling to quit the premises; his doing so then would have occasioned him great loss. He continued therefore to occupy them and he paid his rent at first with reserves as it was called and afterwards under protest; and on the 9th of July, 1868, he stated that he should continue to pay in the same manner until the respondent had performed his agreement. The respondent sent back the letter with these words written upon it, "I have done all I agreed to do and shall do no more." Matters remained in this state until the 30th of September, 1868, when the appellant wrote to the respondent this letter: "Being just returned from my usual two months' journey in France and finding that my premises are still incomplete and wanting in many matters mentioned to you and to your solicitor by myself and by my solicitor, and in other matters not specifically mentioned, but which present themselves at once upon inspection of the premises, and particularly that the cellar must be drained before the winter to make it at all fit for my business, I beg hereby to

give you notice that if you do not cause all the above matters to be done upon the premises, or at least commenced before this day fortnight, I shall myself do what is necessary and charge you with the amount of my outlay." From that time, the 30th September, 1868, till about a year afterwards, nothing was done on either side except that the appellant paid the rent, 130*l.* per annum, under protest, reserving his claims against the respondent in respect of the non-completion of the premises. On the 14th October, 1869, owing to the bursting of a water-pipe in the adjacent premises, the vaults were flooded, and, there being no sufficient means provided for the water to escape, it remained there for several weeks till it sank through the floor.

On the 27th of October the appellant gave the respondent notice of his intention to quit the premises, and he soon after did so, removing all his wine from the respondent's cellars to other vaults which he had engaged.

On the 23rd of December the respondent filed his bill against the appellant, praying that the latter might be ordered specifically to perform the agreement of the 10th of July, 1867, and to execute a counterpart of a lease in conformity with its terms. The cause was heard before the Master of the Rolls, and on the 3rd of July, 1871, his Lordship made a decree dismissing the plaintiff's bill with costs. On appeal, the Lord Chancellor Hatherley reversed that decree and made a decree for specific performance directing an enquiry, first, As to what was due from the defendant to the plaintiff in respect of the 100*l.* premium mentioned in the agreement of 10th July, 1867, with interest thereon; second, Whether the catch-pools and pump suggested by the defendant's builder were necessary for the fit occupation of the premises by the defendant, and if so, what compensation ought to be made by the plaintiff to the defendant in respect of the formation of such catch-pools and pump; and ordering that the amount of such compensation should be deducted from the amount due in respect of the said sum of 100*l.* and interest.

The defendant now appealed from this decree.

Mr. Southgate and Mr. Kekewich appeared for the appellant. The argument of the learned counsel sufficiently appears in the opinions of their Lordships printed below. They cited

Myers v. Watson, 1 Sim. N.S. 523, on the question as to how far a decree for specific performance was a matter of absolute right; and on the question of a decree of specific performance with compensation in respect of a matter of enjoyment they cited

Burnell v. Brown, 1 J. & W. 168, and the cases mentioned in

Sugden, Vendors and Purchasers, pp. 311, 312,

and

Dart's Vendors and Purchasers, p. 106,

also

Jeffery v. Stephens, 6 Jur. N.S. 947.

Mr. Kay and Mr. W. Pearson, for the respondent.—The argument on the other side, was, first, that there was a representation made by the intended lessor to the intended lessee as to something which was intended to be done, the not doing of which entitled the latter to resist a suit for specific performance. But it is not the fact that the respondent entered into a collateral agreement to do something which he has not performed. The representation was as to a matter of opinion, namely, as to whether the concrete would or would not keep out the wet, and there is no case in which the fact of such an opinion turning out to be erroneous has been held to afford a good defence to a suit for specific performance. The case of

Haywood v. Cooks, 27 Law J. Rep. (N.S.) Chanc. 468; s. c. 25 Beav. 140,

is against any such proposition.

There was a catch-pool and a pump fitted to these cellars by the respondent at first, and this and the putting the concrete shewed water was expected, and that it was desired to keep it out and to remove it. If the appellant had wished for and the respondent had been willing to give a guarantee that the means resorted to would have the required effect, this ought to have been mentioned in the agreement. But there is an entire absence from the agreement of all mention or allusion to

drainage. It cannot be shewn, therefore (certainly not from the agreement), that the respondent has been guilty of any breach, unless it can be shewn that he ought to have known what would be requisite for a wine merchant's business, and also that he failed to erect a place fit for such a business; and this introduces the second branch of the appellant's argument, namely, that the respondent did know the purpose for which the cellars were required, and that he ought to have made them fit for that purpose and failed to do so.

The answer to this is that the cellars were to be built of a very unusual depth, namely, eight feet, six inches, and the appellant and his surveyors knew that in that locality cellars of that depth could not be made so as to be drained by any self-acting power. Moreover, as a rule, wine cellars are not drained, and it is quite a question how far it is good to have cellars dry for storing wine. The respondent built the cellars to the order of the appellant, given by him with full knowledge of the locality. Therefore the respondent has done all that he ought to have done; and he has omitted nothing which it would have been better that he should have done. And the conduct of the appellant since he entered on the premises precludes him from resisting on that ground the claim for specific performance.

LORD CHELMSFORD. — [His Lordship stated the nature of the case, and the facts, and that the respondent had agreed that the cellars should be fit for the occupation of the appellant in his business as a wine merchant, and after reviewing the evidence of John Saunders, Edward Prieux, George Ridley and Pannot, that the cellars were not fit for that business, said]: Upon this ground the appellant would undoubtedly have succeeded in resisting the specific performance of the agreement before the Lord Chancellor as he had done before the Master of the Rolls, but that the Lord Chancellor held that the appellant by remaining upon the premises, and insisting upon the performance of the agreement, had deprived himself of the defence to

the suit which he would otherwise have had. I apprehend that upon an objection that delay has taken away a person's right to resist a suit for specific performance, it must be a delay under such circumstances as to amount to a presumption of acquiescence. Now it appears that after taking possession the appellant was continually complaining that the respondent had not performed his agreement.

The Lord Chancellor says that the appellant's letter of the 30th of September, 1868, was an adhering to and insisting on the agreement, and in a sense this is correct. But we must have some regard to the situation in which the appellant was placed. He had upwards of 30,000 bottles of wine in the vaults. The inconvenience and expense of stock being removed would have been very great, and he was most anxious to remain and willing to do so if the respondent would have put the premises in a proper state. The letter of the 30th of September was intended to compel the respondent to perform his agreement by the appellant threatening to do what he could have no right to do under the agreement.

Then, although from September, 1868, to October, 1869, there was a pause on both sides, yet, as Mr. Kekewich very tersely observed, quiescence is not acquiescence. But the appellant cannot be said to have been entirely passive, as he continued to pay his rent under protest. This was intended to warn the respondent that he must not consider the payment of the rent as a submission to the agreement. The appellant was bound to pay and could have been compelled to pay for the use and occupation of the premises, and in an action of this description the rent would probably have been taken as the measure of his liability. The respondent by his conduct might well have led the appellant to believe that the question as to the agreement was still open. He accepts the rent paid under protest, without objection. He never pressed for payment of the 100*l.* originally payable, and he did not insist upon the return of the draft lease accepted, so that on delivery of the lease the other 100*l.* might become due.

The exercise of the jurisdiction of

equity as to enforcing the specific performance of agreements is not matter of right in the party seeking relief but of discretion in the Court; not an arbitrary or capricious discretion but one to be governed as far as possible by fixed rules and principles, and the conduct of the party applying for relief is always an important element for consideration. The respondent from first to last had not performed the agreement by making the vaults fit for the occupation of a wine merchant. Of this opinion were both the Master of the Rolls and the Lord Chancellor. He has, therefore, no merit in himself to entitle him to the consideration of the Court. His claim rests entirely upon the assumed acquiescence of the appellant. The appellant took possession before all the works were done, but he did so upon the faith that they would be afterwards completed according to the agreement. His position would have been different if he had waited to take possession of them upon the assumption that everything had been completed which the respondent was bound to do. If the appellant, without ascertaining for himself whether this was so or not, had entered upon the premises, and had placed his wine in the vaults, and had kept possession of them after finding out that the agreement had not been performed, his case would have been very different. But relying upon the agreement being performed on the respondent's part he was placed in a situation in which he was almost under duress as to remaining in the premises. He held on, hoping from time to time that something would be substituted for self-acting drainage. The respondent admitted his obligation to do something by putting up a catch-pool and pump which were quite insufficient to keep the vaults dry. If he had put up sufficient catch-pools the appellant would only have been too glad to remain in the premises. And the Lord Chancellor in his decree for specific performance directs enquiry whether the catch-pools suggested on behalf of the appellant were necessary for the fit occupation of the cellar. Looking to the fact that the agreement has never been performed on the part of the respondent and that he permitted the

appellant to take possession under the belief that he would complete what was necessary to be done, which he has not done, and having regard to the difficulties in which he has placed the appellant, which made him anxious to quit the premises if the respondent would not render them fit for his occupation; though the appellant may have delayed too long insisting upon his extreme right to abandon the agreement, yet the respondent, never having from first to last performed his part, he comes before a Court of Equity with no merit of his own to entitle him to relief; and assuming that there are faults on both sides, the appellant, who is upon his defence, is in the more favourable position of the two. I do not think, upon the exercise of a fair and just discretion, that this is a case in which specific performance ought to have been decreed.

I submit, therefore, that the decree of the Lord Chancellor ought to be reversed. But I would suggest that the Master of the Rolls, in dismissing the respondent's bill, ought not to have dismissed it with costs, I would therefore suggest that, reversing the decree of the Lord Chancellor, the case should be remitted with a declaration that the respondent's bill ought to be dismissed without costs.

LORD COLONSAY concurred.

LORD CAIRNS.—My Lords, the decree in this case, which is under appeal, has been framed, I have no doubt, with the most scrupulous desire to do exact justice between the parties; but it has adopted a form which appears to me both to be unusual in cases of specific performance and to be attended with considerable danger. The decree declares that the agreement ought to be specifically performed, and it orders the defendant to pay the costs of the suit. The Lord Chancellor at the same time expressed an opinion that it was an essential part of the agreement that the premises, the subject of the agreement, should be fit for occupation by the appellant, and directed the enquiry whether the catch-pools and pump suggested by the defendant's surveyor were necessary and proper for the fit occupation by him of the premises, and if so, what compensation ought to be made. It is abundantly clear that these

catchpools and pump were suggested on behalf of the appellant at a very early period, also that they were refused on the part of the respondent, and that it was only after that refusal had been repeated more than once that the appellant claimed the right (I do not at present speak of the question of delay) to relinquish the premises and to repudiate the agreement.

If, then, on taking the enquiry which has been ordered, it should be found that the catchpools and pump were necessary for the fit occupation of the premises by the appellant, the result would be this: there would be a claim made by the defendant to have that done which was found necessary for the proper occupation of the premises, there would be a refusal on the part of the plaintiff before the suit was instituted to do that which was thus found to be necessary, and then after the plaintiff had in consequence relinquished the premises, there would be a decree against him for specific performance, and that with costs.

But now let me consider the facts of the case as far as they appear to me to be material. At the time the agreement was entered into, the cellars were not constructed, but we find from the evidence of the respondent himself that, having made enquiry at the Local Board of Health, he had himself become aware of what depth the main sewer was, and that at the depth at which it was proposed to construct the cellars the floor of the cellars would be below the level of the sewer, and he must consequently have known that no self-acting plan of drainage could be put into operation in those cellars.

In that state of things the defendant in this suit, the present appellant, in his evidence, says that this was the statement made to him, and upon this part of his evidence I ought to observe that the defendant has not been cross-examined. [His Lordship here read from the evidence of the plaintiff and of Mr. Bartlett, his solicitor, before set out, also the evidence of the respondent denying that the appellant had pressed upon him the necessity of making the cellars dry, and continued:] Upon this balance of testimony (without resorting to the rule which used

to obtain in the Court of Chancery, that great and unusual weight should be given in a suit for specific performance to the oath of the defendant), and seeing that the contradiction by the respondent dwindles down, on his cross-examination, to his not recollecting saying anything at the interview with Mr. Bartlett about keeping the cellars dry, while the statement of the appellant and of Mr. Bartlett the other way is positive; seeing too that the statement of the respondent, that the idea of having concrete on the walls was his own, and was never mentioned by the appellant at all, and that he put it into the agreement for his own sake in order that, there being concrete below, he might have his own dry stores in a proper condition above, is one that I cannot accept, because if he had been building only for his own sake he could have used the concrete perfectly well without stipulating for it in the agreement, I arrive at the conclusion that the representation was made, as stated by the appellant and by his solicitor Mr. Bartlett.

I quite agree that this representation was not a guarantee. It was not introduced into the agreement on the face of it, and the result of that is that, in all probability, the appellant could not sue in a Court of law for a breach of any such guarantee or undertaking, and very probably he could not maintain a suit in a Court of Equity to cancel the agreement on the ground of misrepresentation. At the same time, if the representation was made, and if the agreement would not have been made, if the representation had not been made, it appears to me upon all the authorities, that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled.

That brings me to the next question, namely, were the cellars, in point of fact, wet? That question may be dealt with very shortly, because I observe that the Master of the Rolls pronounced an unhesitating opinion upon the subject, and the Lord Chancellor stated what appears to me to sum up entirely this part of the case. "I also hold, so far, with the defendant, that a place which is constantly

damp and submerged in water—to six inches in water in some cases on the floor—would not be a fit place for a wine merchant's cellar. I do not need go much into the evidence on that, and I shall not comment. Certain people have been brought to shew that to a certain peculiar class of wines it did not signify; others have been called to prove that to a certain class of wines it did signify a great deal. I apprehend this Court would not say that a place which was liable to be submerged in water to the extent of six inches would be a fit place for a wine cellar."

I have marked the evidence in the subject of *Ridley, of Pannot, and of Fenwick*, all wine cases. They speak to the condition of the cellars, and they are not contradicted, and they are examined upon it. But I will ask your Lordships to observe the evidence on cross-examination of the named *Chapman*, one of the witnesses for the respondent himself. He says that he went over the cellar with Mr. Bartlett and another gentleman. They walked with them, holding lanterns. Water was not at that time seen on the floor of the cellar, except at the eastern end. I lit the gas, and Mr. Bartlett the water tricked down the walls. I remember telling Mr. Bartlett that the inner cellar was a bit wet, but not that the water was under the bins in the front cellar. I remember Mr. Bartlett saying to me, "you sure it is not wine?" He said so, but I do not remember being then said as to the water under the bins in the front cellar. The catchpit had been emptied twice a day that day. I cannot say what is the size of the pipe. On two occasions we took the boards down into the cellar to see if it was wet. That is the evidence in witness for the respondent himself.

In addition to this, I will observe upon what was suggested in argument that some of this wet was to be accounted for by the fact that the appellant had let the concrete by letting down a

partitions for bins into the floor. I do not think that that explains the evidence which I have read. It clearly would not explain the water trickling down the walls, and moreover, there is not one witness who says that breaking the concrete for the purpose of letting down that which might operate as a plug into it would itself allow the water to come into the cellar. But I go further than that, and say that it must have been perfectly well known to the respondent that if these premises were to be used as cellars and bins fixed in them, it would be absolutely impossible to fix the bins in any way without in a greater or less degree puncturing the floor, and of course puncturing the concrete on the floor.

That being so, the representation being such as I have mentioned, and facts as to the cellars being such as proved by the evidence, it appears to me that there would be entirely an end of the case as to specific performance, unless the right to object has been given up by the appellant. That it was given up by taking possession is out of the case. Possession was taken before the time appointed for the completion of the works, at a time when the works were clearly incomplete. And without entering upon the question whether the words that are stated by the appellant were actually used, viz., that he took possession without prejudice to his rights under the agreement, the law would imply that incident to his taking possession from the mere fact that he took possession before the works were at an end. Clearly nothing was settled, nothing was accepted before the month of April, 1868. The appellant says that the want of drainage was objected to by his surveyor in January of that year. The respondent denies this; but he admits that in the month of April, when the rent was first asked for, and thenceforward, till the appellant finally left the premises, it cannot be denied that objection was continually being made by or on behalf of the appellant as to the state of the premises. It is admitted also that the appellant always paid his rent under protest, by which is meant, I take it, that the person so paying indicates that he pays the rent for the use and occupation of the premises, not as

recognising the validity or binding character of the agreement, and it is also admitted that nevertheless, and notwithstanding that the rent was always paid under protest, the respondent never asked for the return of the draft lease nor for the payment of the 100l.

But then a great deal of reliance was placed on the letters from the appellant of the 7th of July and the 30th of September, 1868. [His Lordship here read those letters, and continued.] It is quite true that the appellant said in this letter that he would do the work and sue for damages. I do not at all hold him to be concluded by that. I apprehend that he was perfectly free a week after that letter, as he was free a week before, to maintain and hold this position on the non-performance of the agreement, and to say that, although he had used the threat of doing the work and suing for damages, he was not bound to pursue that course, but was at liberty to repudiate the agreement *in toto*.

We then come to the only part of the case which appears to me to present any difficulty. From that time, the 30th of September, 1868, till about a year afterwards, there occurred nothing, except the payment of the rent when it became due in the following year under protest. During the whole of that time the appellant took no further steps. But during the whole of that time the respondent likewise took no further steps. He took no steps to have the draft lease returned to him for the purpose of execution. He took no steps to demand or require the payment of the 100l. which remained due under the agreement. There is no doubt that there is this delay on both sides, but the question is, against whom does the delay operate most severely? In my opinion clearly against the respondent. The appellant had a perfect right to say, "As long as I am allowed to do it, I will continue here, not holding under the agreement, but holding either as tenant at will or tenant from year to year. I will pay my rent for use and occupation from time to time as it is demanded, but I will keep up my protest that I do it, not admitting the validity of the agreement." But the respondent had the matter entirely in his own hands. If he was dissatisfied

with the state of things, if he was dissatisfied with having a tenant in that equivocal position, if he wished to have it decided once and for all that the appellant was there under the agreement, and not holding upon terms of use and occupation, he had nothing to do but to insist upon the return of the draft lease and the payment of the money, and in default of that demand being complied with, to have instituted at that time his suit for specific performance, if he was in a condition to maintain it. He thought fit not to do so; and I am of opinion that the delay which accrued at that time operates most severely against him.

Although agreeing that there has been a delay, yet I hold that at the commencement of that delay, the appellant clearly had a right to repudiate the agreement and throw up the premises, and I am of opinion that he did not lose that right by remaining on the premises, and paying his rent with the protests to which I have referred. The delay from that time onwards was more peculiarly the delay of the respondent, and the respondent, as it appears to me, cannot obtain a right to specific performance grounded upon the delay of the appellant, when he clearly would not have had that right at the commencement of the period which is called the period of delay.

The only alteration that I should have thought ought to have been made in the decree of the Master of the Rolls would be this, viz., that inasmuch as the delay which occurred was chargeable, though in different proportions, to both parties, I should have thought that the more usual course would have been to dismiss the bill for specific performance without costs, and I think your Lordships would act rightly in making that alteration in the decree of the Master of the Rolls.

Decree appealed from reversed, and the case remitted to the Court of Chancery with a declaration that the bill ought to be dismissed without costs.

Solicitors—Messrs. Nicholson & Herbert, for appellant; Mr. Joseph Needham, for respondent.

BACON, V.C. }
1873. }
July 31. }

PLEWS v. BAKER.

Articles of Partnership — Arbitration Clause—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11.

In this case two partners gave to a third partner a notice of dissolution of partnership, which alleged breaches of the partnership articles. The articles provided that any dispute or difference of opinion between the partners should be referred to arbitration. The two partners filed their bill for dissolution, and on the same day the third partner gave notice that he required all the matters in dispute to be submitted to arbitration:—Held, on the motion of the third partner, that he was entitled to an order staying proceedings in the suit, and to have the matters in dispute referred to arbitration.

The plaintiffs in this suit and the defendant were partners, and the bill was filed to obtain a dissolution of the partnership. The defendant did not answer, but now moved to have all the proceedings in the suit stayed, in order that the matters in dispute might be submitted to arbitration pursuant to the Common Law Procedure Act, 1854, s. 11.

In July, 1868, articles of partnership were executed between Messrs. Lawrance, Plews & Boyer, solicitors, and the defendant, Baker, under which Baker on payment of 5,000*l.* became entitled to two-eighths of the profits of the business. Subsequently, on the death of Lawrance, in 1871, Baker became entitled to two-elevenths of the business.

Amongst the articles of partnership it was provided as follows—

Art. 17. That “the partners respectively shall from time to time during the continuance of the partnership enter into proper books to be provided for that purpose, a true, plain and full account of all business done, and of all moneys which shall be received or paid on account of debts due to and from the partnership and of all such other matters, transactions and things whatsoever as ought to be entered in the usual and regular course of business of attorneys and solicitors,

with such circumstances of names, dates, times and places as may be necessary to explain the same, and to enable bills of costs to be made out therefrom at any time."

Art 25. That if any of the partners should wilfully neglect or refuse to keep proper and just accounts or to make proper entries of all business done, then and in certain other cases mentioned, "the others or either of the other partners, if they or he shall think fit, shall be at liberty to dissolve the partnership by giving to the partner who shall so offend in any of the particulars aforesaid," and in manner therein mentioned, "a notice in writing declaring the partnership to be dissolved and determined, and the partnership shall from the time of giving such notice" absolutely cease and determine.

Art. 30. That "if at any time hereafter any dispute or difference of opinion shall arise between the partners," . . . "relative to any cause, matter or thing herein contained, or to the conduct of any of the partners, or upon any other point whatsoever, the same shall be referred to the arbitration of two indifferent persons," to be named as therein mentioned with an umpire in case the partners differed. And the partners agreed to obey the award in all things, and that the submission should be made a rule of the Court of Queen's Bench, and "that if any action, suit or other proceeding be commenced by any of the partners against the others or other of them, who shall have made such request for a reference as aforesaid, such request may be pleaded in bar to any such suit, action or proceeding."

The bill alleged that the defendant had neglected to make proper entries of business transacted by him during the years 1869 and 1870, in accordance with article 17; that remonstrances had been made by the other partners, but had not been attended to by the defendant. Finally, on the 17th of June, 1873, Plews and Boyer, two out of the three surviving partners, Lawrance being then dead, gave the defendant, Baker, notice in writing that the partnership would be dissolved as from that day. The defendant denied

the alleged irregularities, and refused to admit the validity of the notice of dissolution, and offered to submit the matter to arbitration. This offer was refused by the plaintiffs, who, on the 1st of July, filed their bill praying for a dissolution, that the accounts might be taken, and for a receiver. On the same day the defendant served the plaintiffs with formal notice that he considered the notice of dissolution invalid, and that he required all matters in dispute to be submitted to arbitration. He now moved to stay all proceedings in the suit.

Mr. Amphlett and *Mr. Marten*, for the motion.—The defendant is clearly entitled to have the case sent to arbitration instead of having it brought into Court—

Common Law Procedure Act, 1854, s. 11;

Willesford v. Watson, 42 Law J. Rep. (n.s.) Chanc. 447; s. c. Law Rep. 8 Chanc. 473.

There is no reason why the arbitration provision should not be enforced—

Wickham v. Harding, 28 Law J. Rep. (n.s.) Exch. 215.

This section has frequently been acted upon at Common Law—

Randegger v. Holmes, Law Rep. 1 C.P. 679;

Seligmann v. Le Boutillier, Law Rep. 1 C.P. 681;

Russell v. Pellegrini, 6 E. & B. 1020; s. c. 26 Law J. Rep. (n.s.) Q.B. 75;

and in equity in the case of

Willesford v. Watson (*ubi supra*).

The case of

Witt v. Corcoran, 6 Notes of Cases, 133; s. c. Law Rep. 8 Chanc. 476 n. was decided on its own particular circumstances.

The notice of dissolution was invalid—

Allhusen v. Borries, 15 W. R. 739, it would have been so even had there been a clause in the articles giving a power of expulsion—

Blisset v. Daniel, 10 Hare, 493.

The alleged irregularities so far as they are true occurred from pressure of business and were not sufficient to justify the notice of dissolution given.

Mr. Locock Webb (*Mr. Kay* with him).—An arbitrator if appointed would not

have under the articles any authority to decide on the validity of the notice of dissolution.

Section 11 referred to does not apply to a case where the terms of the articles of partnership have not been complied with—

Cook v. Catchpole, 34 Law J. Rep. (N.S.) Chanc. 60.

The ordinary jurisdiction of the Court is not ousted by the arbitration clause—

Cooke v. Cooke, 36 Law J. Rep. (N.S.) Chanc. 48 ; s. c. Law Rep. 4 Eq. 77 ;

Witt v. Corcoran (*ubi supra*).

The irregularities of the defendant in his conduct of the business amounted clearly to a breach of the articles, and this was sufficient to justify our giving a notice of dissolution.

BACON, V.C.—The Common Law Procedure Act, 1854, s. 11, has been the subject of repeated decisions, and none more pointed than that of *Willesford v. Watson* (*ubi supra*), not that I think the Act of Parliament contains anything ambiguous in its terms or questionable in its policy, because both of them, in my opinion, are perfectly distinct. When this Act of Parliament was passed it was thought that when parties who were competent had entered into a deliberate agreement that their differences should be referred to arbitration, they ought to be bound by the bargain they had entered into, and should not appeal to any other tribunal than that which they had themselves chosen for the purpose of settling their differences. In *Witt v. Corcoran* (*ubi supra*), as far as I recollect it, there had been quarrels between the partners ; one of them chose to say the partnership was dissolved, and was advertising that fact extensively ; the other partner, who denied that there had been any such dissolution, and who felt that his trade was being injured and his property affected by the conduct of the defendant, filed his bill to restrain the publication and circulation of those advertisements and thereupon the defendant bethought himself that by giving notice of arbitration he would stop the proceeding in that cause. He tried it, and in my

judgment he failed, and I restrained him from making in that suit an unjust use against his partner of the Common Law Procedure Act. My belief is, that that decision was perfectly right, and in no way conflicting with *Willesford v. Watson* (*ubi supra*). In this case, a partnership having been established, one of the stipulations was that if at any time thereafter any dispute or difference of opinion should arise relative to any clause, matter or thing therein contained, or to the conduct of any of the partners, or upon any other point whatsoever, the same should be referred. Then clause 17 provides, that the partners shall respectively from time to time during the continuance of the partnership enter into proper books to be provided for that purpose a true, plain and full account of all business done, and so on. Upon that a dispute and difference arise between the parties. The plaintiffs allege that the defendant has neglected his duty as a partner, and then, under another clause, they say that the right has accrued to them to put an end to the partnership by reason of his conduct, and by reason of his not having faithfully performed the 17th clause of the partnership articles. Nothing can come more plainly, in my judgment, within the terms of the stipulation as to arbitration, and the terms of the Act of Parliament which provides for what shall be the consequences of an agreement to refer. I have listened for hours together to statements on the part of the plaintiffs and answers on the part of the defendant as to his alleged infringement of the 17th clause. The plaintiffs say that he has infringed it ; he denies that he has done so. I will not go into this matter. If I did there would be a good deal to say, perhaps, on both sides. I find that there has been no great inconvenience sustained by this partnership by reason of the defendant's alleged misconduct ; nevertheless, he may have brought himself within the terms of the 17th clause, and whether he has or not I have not to decide, but that will be settled by arbitration. On the 17th of June, notice is given by the plaintiffs to determine the partnership ; that notice is disputed the moment it is given, and has been disputed from that time to this by

the defendant, and over and over again there is abundant proof in the evidence that the defendant had never acquiesced in that notice for dissolution, he has always protested against it, has always insisted that whatever was done by or between himself and his partners was done under protest by him and upon an assurance, not contradicted, that all that took place should be without prejudice. The defendant, in my opinion, has brought himself within the protection of the Common Law Procedure Act, which by this notice of motion he seeks to invoke, and he is entitled to have these matters of difference between himself and his partners, the matters of conduct, their ground of complaint under the 17th clause, or any other clause, now referred in the terms of the statute.

The defendant not objecting, the plaintiff, Plews, the senior partner, would be appointed receiver. All further proceedings in the suit to be stayed, except for the purpose of giving effect to the order appointing the receiver, with liberty to apply.

Solicitors—Messrs. Lawrance, Plews & Boyer, for the plaintiffs; Messrs. Lake & Co., for the defendant.

BACON, V.C. }
1873. } *Re* STRANTON IRON AND
July 26. } STEEL COMPANY.

Companies Act, 1862, ss. 22 and 35—Companies Act, 1867, s. 26—Registration of Transfers—Distribution of Shares for Voting Purposes.

Where there is no reason to the contrary under the articles of association of a company, it is the duty of directors to receive and register transfers at once, and this, although the object of the transfers is to distribute the shares and so to obtain a larger number of votes, and command greater influence at a meeting of shareholders already summoned.

This was a motion on behalf of the Crédit Foncier of England, Limited,

made by special leave, to compel the registration of nine transfers of shares in the Stranton Iron and Steel Company, Limited.

Among the articles of association of the Stranton Company were the following—

“19. The directors may decline to register any transfer of shares made by a member who is indebted to the company, or, in case of shares not fully paid up, to a transferee of whom they do not approve.”

“55. Every member shall have one vote for every share held by him up to 100, one for every five shares in the next 100, and one for every ten shares after 200.”

The Crédit Foncier Company were creditors of the Stranton Company for 19,000*l.* This amount was secured by debentures which were not yet due. They also held 1,000 fully paid up shares in the company. They were not indebted to the company.

On the 16th of July, 1873, the Stranton Company issued notices of an extraordinary general meeting of the company to be held on the 28th of July; the notice also stated that at the meeting resolutions would be proposed for voluntarily winding up the company, and for appointing liquidators.

The Crédit Foncier, in order to obtain greater voting power at the meeting, on the 23rd of July executed nine transfers of 100 shares each to nine persons who were clerks in the employ of the Crédit Foncier. On the same day these deeds were left at the company's office for registration, but the secretary declined to register the transfers. Accordingly the Crédit Foncier on the 26th of July, two days before the meeting was to be held, applied by motion to the Court for an order to register the transfers.

Mr. Kay and Mr. Jackson, for the Crédit Foncier Company.—We are entitled to transfer our shares *ex debito justitiæ*—

Companies Act, 1862, s. 22;

Weston's Case, 37 Law J. Rep. (N.S.)

Chanc. 559; s. c. 38 ibid. 49;

s. c. Law Rep. 6 Eq. 238; ibid.

4 Chanc. 20;

We are entitled also to distribute them so as to increase our voting power—

Fraser v. Whalley, 2 Hem. & M. 10.
We are right in applying to the Court by motion—

Companies Act, 1862, s. 35 ;

Penney's Case, 42 Law J. Rep. (N.S.)

Chanc. 183; s. c. Law Rep. 8 Chanc. 446.

The transfers must be registered at the request of either transferor or transferee—

Companies Act, 1867, s. 26.

Mr. Swanston, for the company.—It is inevitable that the *Crédit Foncier* should by this means evade clause 55 in the articles and obtain absolute control over the meeting.

The 35th section was only intended to apply in a case of unnecessary delay in registering, but here there has been none. Under this section it is entirely in the discretion of the Court to decide on the merits whether it will exercise its powers and interfere—

Parker's Case, Law Rep. 2 Chanc. 685 ;

Simpson's Case, 39 Law J. Rep. (N.S.) Chanc. 41 ; s. c. Law Rep. 9 Eq. 91.

The parties should be allowed to remain *in statu quo* until a bill has been filed and the matter brought forward in a more regular manner.

BACON, V.C.—In my opinion I cannot refuse to make the order which is asked. The applicants are the owners of shares, a class of property of which one of the incidents is a right to transfer, a right to make a present and complete transfer. It is the duty of the directors to receive and register the transfer (except in the cases which have been referred to in this particular instance, and which do not occur here), or to furnish some reason for refusing to transfer.

Now, has the secretary of the company in this case done his duty? No ground whatever has been assigned which will excuse non-registration, except a desire to exclude the applicants from the exercise of that which is their plain legal right.

I fully adopt the rule that was laid down in *Ex parte Parker* (*ubi supra*). I quite agree that I am not bound to

follow common law rules exclusively, and that the effect of the 35th clause is to admit equitable principles into the decision of questions arising under it. But where is there any plausible justification for directors saying that they will not register, on the ground that the result of the registration will be to control the resolutions which are to be proposed at the meeting on Monday next, one of which is that this company is to be wound up, and that upon the affidavit of the secretary, who swears that the company is perfectly solvent? If that be true, what pretence is there for summoning this meeting at all? Into that, however, I do not propose to enter. No suggestion has been or could be made why these transfers should not be registered; but, adopting *Mr. Swanston's* own phrase, if I am at liberty to do so, that it is my duty to keep things *in statu quo*, I think that if I were not to enforce the registration of these transfers, I should certainly be altering the *status in quo* of this company.

I must, therefore, grant the application to have these shares presently registered before the meeting of Monday next.

Solicitors—Messrs. Van Sandau & Cumming, agents for Mr. J. T. Belk, Middlesbrough, and Messrs. Mackenzie, Trinder & Co., for the *Crédit Foncier*; Mr. Frederick Heritage, for the *Stranton Company*.

JESSEL, M.R. }

1873.

Dec. 19, 20. }

COLLIER v. WALTERS.

Will before Wills Act—Estate of Trustees—Rule in Shelley's Case—Contingent Remainder—Res Judicata.

A testator, by will dated in 1827, devised his estate to trustees and their heirs upon trust that they and their heirs should stand seized of the same during the life of W. O., and until the whole of the testator's debts and the legacies were paid, upon trust, to set and let the same, and apply the rents and yearly profits, and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts

and legacies until they were paid, and from thenceforth to pay the rents to W. C. during his life; and after W. C.'s death, and payment of the debts and legacies and expenses, the testator devised the estate to the heirs of the body of W. C., and for default of such issue, to his own right heirs.

In 1830 the trustees by deed reciting that the debts and legacies were paid, conveyed the estates to W. C. for his life. W. C. shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to W.

In 1861 W. C., the father, and W., his mortgagee, had filed a bill for a conveyance of the fee against the heir of the surviving trustee and W. C., the son (W. C.'s heir-apparent). W. C., the son, instead of asking to be dismissed as not being heir during his father's lifetime, put in an answer disputing the plaintiff's title. In 1865 a decree was made for the conveyance of the fee to the plaintiff.

W. C., the father, had since died.

This suit was instituted in 1873 by W. C., the son, against W., the mortgagee.

Held, 1. That the trustees took a legal fee under the will, that the rule in Shelley's Case therefore applied, and that W. C. acquired a good equitable fee by the recovery.

2. That if they had only taken a life estate, their conveyance of it to W. C., the father, enabled him to suffer a recovery, and bar the contingent remainders at law and in equity, and was no breach of trust.

3. That W. C., the son, having chosen to answer in the former suit, was bound by the decree.

4. A general devise to trustees and their heirs *prima facie* gives the fee, and it lies on the parties alleging that they take a less estate to shew what less estate they take. A trust to set and let, and a direction to sell timber, are grounds for not cutting down the estate.

5. The decision on the same will in *Collier v. McBean* (34 Beav. 426; s. c. 34 Law J. Rep. (N.S.) Chanc. 555), that the trustees took a fee determinable when the debts were paid, disapproved of.

James Collier made his will dated the 23rd of May, 1827, which was, so far as is material, in the words and figures following, that is to say—

NEW SERIES, 43.—CHANC.

"I desire that my funeral expenses and the expenses of proving this my will may be fully paid and satisfied out of my personal estate. I give, devise and bequeath all that my freehold messuage, tenement or dwelling-house in the parish of Leigh aforesaid, wherein I now dwell, with the outbuildings, farm lands and appurtenances thereunto adjoining and belonging, containing by estimation about forty-five acres, together with all my farming stock, and all other the residue of my personal estate and effects whatsoever and wheresoever, unto my brother Joseph Collier and my sister Hannah Collier, their heirs and assigns, and to the survivor of them and his or her heirs upon the several trusts, and to and for the several uses, ends, intents and purposes hereinafter mentioned and expressed of and concerning the same (that is to say), as to, for and concerning all the residue and remainder of my said personal estate and effects (after payment made thereof as above mentioned) upon trust to sell and dispose of, collect and get in the same, and to pay and apply the money arising from such residue, as far as it will extend, in discharge of my just debts, and the interest thereon. And as to, for and concerning all my above mentioned real estate upon trust, that they the said Joseph Collier and Hannah Collier, and their heirs, and the survivor of them, and his or her heirs, shall stand seized of the same for and during the term of the natural life of my brother William Collier, and also until the whole of my just debts and all the interest due or to grow due thereon, together with the following legacies, be fully paid off and discharged to, for and upon the several uses, trusts, ends, intents and purposes hereinafter mentioned (that is to say) upon trust to set and let the same, and to pay and apply the rents, issues and yearly profits thereof, and the value of whatever timber may be considered at its best growth from time to time in further discharge of my said just debts, and of all interest due or to grow due thereon until the same shall be fully paid off and satisfied. Then upon further trust to pay and apply the rents, issues and yearly profits thereof from time to time in discharge of and until the whole

of the three following legacies which I hereby give and bequeath be fully paid and discharged, that is to say, to my said sister Hannah Collier the sum of 50*l.*; to my niece Mary Ann, the daughter of my said brother Joseph Collier, the sum of 50*l.*; and to my niece Sarah Stubbs the sum of 50*l.*, and from thenceforth upon further trust to pay over from time to time the rents, issues and yearly profits of the said premises unto my said brother William Collier or his assigns for his use and benefit for and during the term of his natural life, and from and immediately after the decease of my said brother William Collier and the payment of all my said just debts as aforesaid, and also the legacies above mentioned, together with all expenses which my said trustees or any or either of them may be at or put unto in the execution of this my will, I do hereby give and devise all my said real estate unto the heirs of the body of my said brother William Collier lawfully to be begotten, and for default of such issue, then I give and devise the same unto the right heirs of me the said James Collier for ever; and, lastly, I do nominate, constitute and appoint my said brother Joseph Collier and my said sister Hannah Collier executor and executrix of this my will, hereby revoking all other will and wills by me at any time heretofore made."

The testator left him surviving his brother William Collier, father of the plaintiff in the suit, and on the 25th day of October, 1827, the will was proved by the said Joseph Collier and Hannah Collier, the executor and executrix, in the proper Ecclesiastical Court.

The funeral and testamentary expenses, and debts of the said testator, and the legacies bequeathed by his will were paid in the lifetime of W. Collier, the father, before the execution of the indenture next hereinafter mentioned.

By an indenture of release dated the 5th day of June, 1830, and made between the said Joseph Collier and Hannah Collier of the one part, and the said William Collier, the father, of the other part, and grounded on a lease for a year, Joseph Collier and Hannah Collier (according to their estate and interest in the

said premises), and each of them bargained, sold and released unto the said William Collier, the father, and to his heirs, the hereditaments in question, "To hold the same unto and to the use of the said William Collier, the father, and his assigns for his life, and to and for no other use, intent or purpose whatsoever."

By an indenture of release dated the 24th day of June, 1830, and made between William Collier, the father, and Sarah, his wife, of the first part; Thomas White, of the second part, and Walter Sedgley, of the third part, for the purpose of barring and extinguishing all estates tail and the remainder and reversions expectant or dependant thereupon, the hereditaments were granted by W. Collier, the father, unto and to the use of the said Thomas White and his heirs, to the intent that the said Thomas White might become tenant of the freehold of the said hereditaments in order that common recovery might be thereof had. And it was declared the same should enure to such uses as the said William Collier, the father, should by deed appoint, and in default of, and until such appointment, and so far as the same should not extend, to the use of the said William Collier, the father, and his assigns for his life, and from and after the determination of that estate, by any means in his lifetime, to the use of the said Walter Sedgley, his executors and administrators during the life of the said William Collier, the father, in trust for the said William Collier, the father, and his assigns for his life, with remainder to the use of the heirs and assigns of the said William Collier, the father, for ever.

A common recovery was duly suffered in pursuance of the last stated indenture, Walter Sedgley being demandant, Thomas White, tenant, and William Collier and Sarah, his wife, vouchees.

By indenture of release and appointment, dated the 24th of March, 1855, William Collier, the father, conveyed the estate by way of mortgage to three mortgagees in fee to secure 500*l.* A further sum of 500*l.* was subsequently charged on the property, and by a deed of 29th of May, 1840, the mortgage was transferred

to Mr. Walters, defendant in the present suit.

Hannah Collier survived her co-trustee and died leaving Joseph Collier, the son of Joseph Collier, her co-trustee, her nephew, and heir-at-law.

On the 3rd day of July, 1861, after the death of Hannah Collier, the defendant, William Walters, and William Collier, the father, instituted a suit (*Walters v. Collier*) against Joseph Collier, the son, and William Collier, the son. The bill set out the will of the said James Collier, the testator, and the subsequent deeds before mentioned, and prayed that the trusts of the will of the testator might be declared, and that so far as the same were unperformed, they might be carried into execution by and under the direction of the Court. And that it might be declared that according to the true construction of the will the said William Collier, the father, became, on the death of the said testator, entitled to the hereditaments for an estate tail, subject only to the payment of the debts and legacies charged upon the said hereditaments by the said will, and that it might be declared that Joseph Collier, the son, was a trustee of all his estate and interest in the said hereditaments for William Walters and his heirs, subject to such equity of redemption as might be subsisting in the said hereditaments, and that Joseph Collier, the son, might be directed to convey all his estate and interest in the hereditaments to William Walters, his heirs and assigns, subject to such equity of redemption as aforesaid, and that the costs of the suit might be borne by the estate of the testator.

William Collier, the son, put in a voluntary answer in the suit of *Walters v. Collier*, and thereby submitted that he was tenant in tail in remainder expectant on the decease of the said William Collier, the father, of the said hereditaments, and that the estate and interest limited by the will to William Collier, the father, was an equitable estate for the term of his life and no longer, and that the execution by the said Joseph Collier, the elder, and Hannah Collier, of the indenture of the 5th day of June, 1830, was a breach of trust, and he

craved that a declaration to that effect might be made in or by the decree to be pronounced in that suit.

A decree in the suit of *Walters v. Collier* was made on the 3rd day of June, 1862. By it no declaration was made, but Joseph Collier, the son, was ordered to convey all his estate and interest in the hereditaments to William Walters, his heirs and assigns, subject to such right or equity of redemption as might be subsisting in the same hereditaments in the said William Collier, the father, his heirs, executors, administrators and assigns, under the indenture of the 29th of May, 1840.

In 1862 William Collier, the father, entered into a contract to sell the hereditaments. The purchaser refused the title, and a suit of *Collier v. McBean* (*ubi supra*) was instituted in the Court of the Master of the Rolls (Lord Romilly) to enforce specific performance of the contract. Lord Romilly dismissed the bill, holding that the title was bad, and that the trustee of the will took a fee simple determinable on the death of William Collier, the father, and payment of the testator's debts. The case came before the Lords Justices on appeal (35 Law J. Rep. (n.s.) Chanc. 144; s. c. Law Rep. 1 Chanc. 81). Lord Justice Knight Bruce expressed an opinion to the effect that the trustees took the fee simple, and consequently that William Collier, the father, took an estate tail under the will and could make a title, but the bill was dismissed on the ground that the title was too doubtful to force upon a purchaser.

William Collier, the father, died in 1871, leaving William Collier, the son, his only son and heir-at-law, him surviving.

William Collier, the son, thereupon filed a bill against William Walters, the mortgagee, praying for a declaration that under the will William Collier, the father, only took an equitable estate for his life, and that the devise to the heirs of his body operated as a legal contingent remainder, and a declaration that the joining by Joseph Collier, the father, and Hannah Collier, in the deed of the 5th of June, 1830, for the purpose of enabling William Collier, the father, to destroy the

legal contingent remainder was a breach of trust, and that William Walters was a trustee for the plaintiff and the heirs of his body, and praying for a conveyance from William Walters accordingly.

Mr. Southgate and Mr. Badnall, for the plaintiff.—The first question in this case is what estate did the trustees take under the devise to them contained in the will of the testator? If they took the legal estate in fee—as in such case the life estate of William Collier, the father, and the remainder to the heirs of his body would be both equitable—it is admitted that he would have taken, according to the rule in

Shelley's Case, 1 Coke, 936, an equitable estate tail, which was barred by the recovery. If on the other hand the only freehold estate taken by the trustees was an estate for the life of William Collier, the father, the interest of William Collier, the father, was an interest for his life only, and the words, "heirs of the body," in the devise in remainder were words of purchase and not of limitation.

[THE MASTER OF THE ROLLS.—What estate do you contend that the trustees took?]

We contend that the trustees took an estate for the life of William Collier, the father, and a chattel interest superadded for the purpose of paying debts.

[THE MASTER OF THE ROLLS.—But the trust to pay debts is the first trust; the chattel interest, if implied for that purpose, must have arisen at the death of the testator.]

They may have had a chattel interest concurrent with the estate in trust for William Collier.

[THE MASTER OF THE ROLLS.—I cannot understand how there can be a freehold interest and a chattel interest concurrent with it.]

At least they could take a freehold interest for the life of William Collier, and a further chattel interest, if necessary, until the debts were paid. Such an interest has been allowed—

Doe d. White v. Simpson, 5 East, 162, and will answer all the purposes of the will, and is, we submit, the estate given to the trustees by this will.

For the question has to be determined with reference to the law as applicable to wills before the Wills Act; and with respect to such wills, it is proper to look, when ascertaining the quantity of interest which trustees take under a devise to them,

First. Whether the testator has clearly indicated the limits of the estate he intended the trustees to take.

Secondly. Even though the testator has used words of limitation or expressions adequate to carry an estate of inheritance, whether the exigencies of the trust require the fee simple, for if they can be satisfied by any less estate the trustees only take such estate as is necessary for the purposes of the trust—

Jarman on Wills, vol. 2, 3rd edit. p. 282;

Jones v. Lord Say and Sele, 8 Vin. Abr. 262, pts. 19;

Carter v. Barnardiston, 1 P. Wms. 505;

Doe d. Kimber v. Cafe, 7 Exch. Rep. 675; s. c. 21 Law J. Rep. (N.S.) Exch. 219;

Doe d. White v. Simpson (*ubi supra*); *Adams v. Adams*, 6 Q.B. Rep. 860; s. c. 14 Law J. Rep. (N.S.) Q.B. 171;

Doe d. Cadogan v. Ewart, 7 Ad. & E. 636; s. c. 3 N. & P. 197; s. c. 7 Law J. Rep. (N.S.) Q.B. 177; *Ward v. Burbury*, 18 Beav. 190;

Hardson v. Williamson, 1 Keen, 33; s. c. 5 Law J. Rep. (N.S.) Chanc. 165;

Ackland v. Lutley, 9 Ad. & E. 879; s. c. 1 P. & D. 636; s. c. 8 Law J. Rep. (N.S.) Q.B. 164;

Ackland v. Pring, 2 M. & G. 937; s. c. 3 So. N.S. 297; s. c. 10 Law J. Rep. (N.S.) C.P. 231.

In this case the exigencies of the trust do not demand the fee simple. No power is given to the trustees to sell or mortgage, the only power of dealing with the corpus is a power to "set and let."

Mr. Jarman deduces from the cases that an authority to grant leases is not a sufficient ground for holding trustees to take a fee.

[THE MASTER OF THE ROLLS.—I rather

understand him to be of opinion that where the estate is devised to the trustees upon trust to lease, and that they must at least have a life estate, there they take a fee.]

Doe d. Kimber v. Cafe (ubi supra)

is not consistent with that view, and the later cases establish that the fee is not necessarily implied by a power to lease—

Ackland v. Lutley (ubi supra),

Ackland v. Pring (ubi supra).

[THE MASTER OF THE ROLLS referred to *Doe d. Tomkyns v. Willan*, 2 B. & Ald. 84.]

That does not establish that power to set and let gives the fee; it was cited in

Ackland v. Pring (ubi supra).

[THE MASTER OF THE ROLLS.—The Court distinguished the case of

Ackland v. Pring (ubi supra)

from

Doe d. Tomkyns v. Willan (ubi supra)

on the ground that the trustees were only directed to pay certain specific ascertained debts that distinction whether valid or not does not exist here.]

The direction to set and let is not a direction to grant leases, it may mean only to let from year to year.

[THE MASTER OF THE ROLLS.—I can see no legal difference between “set and let” and the word “demise” which was used in

Doe d. Keen v. Walbank, 2 B. & Ad. 554; s. c. 9 Law J. Rep. (n.s.) K.B. 276.

Then, too, the testator speaks of their cutting timber, which a tenant *pur autre vie* has no right to do. He does not purport to give them a power to do it, but appears to assume that they have an estate which will enable them to do it. Have they not also a power to sell—

Gibson v. Montfort, 1 Ves. sen. 485.]

We submit that it appears from the will that the charges were to be paid out of rents and profits *de anno in annum*, and for this purpose a power to sell or deal with the fee was in no way necessary—

Wilson v. Halliley, 1 Russ. & M. 590; s. c. 8 Law J. Rep. (n.s.) Chanc. 171;

Doe d. White v. Simpson (ubi supra);

Heardson v. Williamson (ubi supra);

and, therefore, on the authorities above

cited the trustees only take such an estate as the exigencies of the trust require.

And further in the present case, we submit that the testator has, in terms, limited the duration of the trustees' estate. They are to stand *seized* of the property “for and during the term of the natural life of William Collier, and also until the whole of the testator's debts and all interest due or to grow due thereon, together with the legacies, be fully paid.” It amounts to the same thing as if he had said for that period and no longer, and this intention further appears by the terms in which the testator has devised the estate in remainder to the heirs of the body of William Collier instead of declaring a trust for such heirs which would have been more consistent had the intention been to vest the whole fee in the trustees.

Doe d. White v. Simpson (ubi supra)

is an instance of the precise construction for which we contend being adopted.

[THE MASTER OF THE ROLLS.—There the limitation was to the trustees, their executors and administrators, which would not give them a fee, unless it could be affirmatively made out from the rest of the will that they were intended to have it.]

The testator has here said how long the trustees are to hold the estate, and the Court will not carry their legal interest beyond that period.

If this be so, and our construction correct, it follows that the remainder devised to the heirs of the body of William Collier, the father, was a contingent remainder supported by the estate of freehold in the trustees for the life of William Collier, and the effect of the recovery was to destroy such remainder.

The question, then, is, in the second place, whether the trustees were justified in placing the estate—upon the existence and continuance of which the contingent remainder at law depended—under the control of William Collier, the father. It is true that there is no express trust to preserve contingent remainders; but we submit that such a trust is implied. If the fact be that the contingent remainder was at law preserved only by means of the particular estate in the trustees, we

must assume an intention, on the part of the testator, that it should be so preserved; and, this intention assumed, we say that it was not competent for the trustees to disappoint it.

It has been held that a trustee, though properly appointed only to preserve contingent remainders, is, in effect, a trustee for all vested as well as contingent remainders—

Barnard v. Large, 1 B. C.C. 534;

Moody v. Walters, 16 Ves. 283;

from which we must infer that equity will require trustees to look at the consequence of their acts, and will hold them responsible, as for a breach of trust, if, by any act of theirs, the testator's intention is disappointed. If, then, a trust to preserve the contingent remainder was implied, their conveyance to William Collier, the father, by means of which he was enabled to destroy the contingent remainder, was a clear breach of their trust, and the trust, and the breach thereof, followed the land into the hands of the defendant, who had notice of both—

Pye v. Gorge, 1 P. Wms. 128;

Mansell v. Mansell, 2 P. Wms. 679;

Else v. Osborn, 1 P. Wms. 387;

Roake v. Kidd, 5 Ves. 647.

As regards the decree in the suit of *Walters v. Collier*, we submit that, as *nemo est hæres viventis*, the present plaintiff was improperly made a defendant, and was in no way bound by it—

Beitoley v. Carter, 38 Law J. Rep.

(N.S.) Chanc. 92; s.c. on app. *ibid.*

283; s.c. Law Rep. 4 Chanc. App. 230.

Whether or not he could voluntarily bind himself by estoppel is not the question: the question is whether or not the Court could bind him against his will. We submit that the Court had no such jurisdiction; and, although the proper course for him was to have insisted on being dismissed from the suit, the mere fact of his filing a voluntary answer did not give to the Court possession of the subject matter of the suit, so as to enable it to say that the decree which obviously would not bind the heir of William Collier, the father, should some other person than the present plaintiff

become heir, shall nevertheless bind the present plaintiff, if he shall become such heir.

Mr. Fry and *Mr. Cadman Jones*, for the defendant, were not called on.

THE MASTER OF THE ROLLS.—I must say that I have seldom seen a case come before the Court under more singular circumstances.

There are three questions in the cause which I will deal with separately. The first question is whether, under the will of a testator of the name of James Collier, who died in 1827, the trustees of the will took a legal estate in fee, or whether they took a life estate and a chattel interest. If they took a legal estate in fee, William Collier, the father, became tenant in tail; if they took an estate for life with a chattel interest, he was then tenant for life, with a legal contingent remainder to the heirs of his body.

The history of the case after that is very short. In 1830, by deed, the trustee conveyed to William Collier, senior, the life estate, which he certainly had at law, if he had no more, and thereupon (the usual form was gone through), in 1830, William Collier suffered a recovery which, if he had an estate tail, would have barred it. If he had not an estate tail, he would certainly have destroyed the contingent remainder at law, and prevented, therefore, the heir of his body ever recovering the estate, at all events, at law. Then, by an indenture which, for this purpose, I will call a mortgage, made in 1835, William Collier, the father, mortgaged the property to certain persons. That mortgage was transferred, and a further sum lent; and, by a deed of the 29th of May, 1840, it was mortgaged to the present defendant, Walters. The question is, whether William Collier, the present plaintiff, who is the eldest son and heir of the body of William Collier, the father, who files this bill, has any title, or whether the title of William Walters, the mortgagee, is not a good title. That is the question which I now have to decide.

Now, as I said before, the case comes before me under very singular circumstances; and I will state why. A good many years ago William Collier, the

father, attempted to sell the estate; the purchaser objected to the title, and therefore a suit of *Collier v. McBean* (*ubi supra*) was instituted, which came on to be heard before my predecessor, Lord Romilly, and is reported in the 34th volume of *Beavan's Reports*, p. 426. Upon the hearing of that suit, which was for specific performance, his Lordship determined two things; first of all, that the purchaser was not to take the title, because it was bad; and secondly, that, according to the true construction of the will, the estate taken by the trustees was what I may call a determinable fee. His Lordship says, at p. 430, "I am of opinion that, though the estate taken by the trustees was a fee simple estate, still that it was one determinable on the payment of the debts and legacies and the decease of William Collier." So that he decided that the title was bad, and because they took a determinable fee. The case went upon appeal, and is reported in the 1st *Chancery Appeals*, p. 81; and there I am sorry to say the Lord Justices appear to me to come to a decision quite as contrary to law as the decision of Lord Romilly was, because they decided that they could not force the title on the purchaser, one Lord Justice being of opinion that the title was good, and the other does not seem to have dissented. I may say so now without difficulty, because that class of decisions has been since overruled by a decision of the Court of Appeal in *Alexander v. Mills* (1); therefore I am entitled to say that the decision in *Collier v. McBean* (*ubi supra*), in the Appeal Court, was not according to law. Now comes the singularity of the case. In that state of authorities I felt a difficulty (though I thought the decision altogether erroneous) in overruling a decision come to upon a former occasion by my predecessor, and I declined to do it. The case was, therefore, at my request, taken before the present Court of Appeal, and they gave me leave to consider the case as if I was not bound by the decision of Lord Romilly or the opinion expressed by Lord Justice Knight

Bruce on appeal; therefore I was free to consider it as if there were no authority on the question.

Now comes another singular point. When the case was on before, the counsel for the plaintiff naturally asserted that I was bound by the decision of Lord Romilly, and I thought I was until I was freed from it; but when the case came to be argued on the footing that I was not to be bound by that decision, neither counsel asserts that that decision is right; but both positively abandon it, both the leading counsel and the junior counsel, on consideration, say, that they cannot support the decision of the Master of the Rolls. That is a very strong and a very peculiar circumstance. His Lordship having determined, according to the true construction of the will, that there was a determinable fee, neither of the counsel for the plaintiff will argue in support of that proposition at all. In fact, there is no case at all to be found like it; no such determinable fee was ever heard of; and it appears to me that the whole decision was founded on a simple misapprehension of what the law as to real property is when applied to the case of such devises as we are now dealing with. I should not, perhaps, have expressed myself so strongly if it had not been for the singular fact that neither counsel has even endeavoured to support it. There is not an authority to be found for any such determinable fee. I have looked at an enormous number of cases (I am afraid to count them) to see if I could find it, but I have been quite as unsuccessful as the counsel for the plaintiff, and I think there is no such case to be found. I think, therefore, I may dismiss the interpretation of the will given by Lord Romilly as being utterly untenable.

The next question is, what is the proper interpretation of the will; and I agree that the testator has done his best to puzzle the lawyers. One is bound to interpret it, and bound to interpret it according, as I think, to rules which are well established; and the only question is, how far those rules apply to the present case. Now the first observation to be made upon the will is this: that there

(1) 39 Law J. Rep. (N.S.) Chanc. 407; s. c. Law Rep. 6 Chanc. 124.

is a gift to trustees and their heirs, and that the trustees and their heirs are to stand seised (they get legal seisin of something, and it was not denied; they must get an estate of freehold of some kind or other) "for and during the term of the natural life of my brother William, and also until the whole of my just debts, and all interest due thereon, have been paid." Now the rule is this: the trustees under a devise to them and their heirs, *prima facie* take a fee. I would rather put the rule in the language in which it has been put in two cases. It is very important that these rules should be observed, for they are rules of real property law, and are not to be set aside at the mere caprice of a Judge; but they must govern him in interpreting these wills. And it is important to see what the rules are. They have been properly called subordinate rules, because the primary rule is to ascertain the meaning of the expression in the will from the will itself; but, in so ascertaining it, these subordinate rules become of importance. In the case of *Doe Davies v. Galacre* (2), Mr. Justice Pattison lays down the rule in this way. "If the devise be for purposes which are to last only for a certain time, the use of the word 'heirs' will not give a fee; the devise will be cut down to the time necessary to the purpose (that is, a certain time); but if a fee be given in terms with trusts which, by their nature, extend over an indefinite time, it is not so." Now here we have trusts for the payment of debts which, of course, by their nature, extend over an indefinite time. "If no particular time can be fixed at which the trusts shall end, the estate cannot be cut down." That is the rule. Then Mr. Justice Williams gives the rule almost in the same terms. He says, "The estate being given to the trustees for particular purposes, it cannot be deemed immaterial what terms are used in giving it; if the words are such as pass a fee, it lies upon those who contend for a less estate to cut down their import. It is true, according to the cases which have been cited, that the word 'heirs' is not decisive if the

purpose of the devise clearly cuts down the estate. That is not so here. It is only to raise 80*l.*—a sum certain in this cause." I only read so far to shew what the rule is.

Now this kind of case was again considered in *Poad v. Watson* (3), where Mr. Justice Coleridge puts the rule in this way: "The permanent rule is to look to the intention as appearing on the whole will; but there are sundry rules, one of which is that the words of devise to trustees and their heirs are to have their natural effect to give a fee simple, unless something shews that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shown, it remains an estate in fee." Then Mr. Justice Erle says, "There are words clearly meaning that the testator gave the trustees a fee simple; but as a less estate would certainly enable the trustees to fulfil all the trusts, the fee simple would be cut down to that estate. I examined this will, and I found several trusts which go beyond the life of Elizabeth; consequently, no certain estate less than a fee simple will do." That rule is, therefore, a rule which I think is fairly and clearly settled by authority, and should govern me in construing this will. Now there is another rule, and that is this—a rule which will be collected from all the authorities—that you cannot cut down the estate in fee simple, unless you can point out on the face of the will what less estate the trustees take. Upon that there is immense difficulty here. So great is the difficulty that Mr. Southgate, who opened the case for the plaintiff, first of all proposed one estate, then he proposed another; and Mr. Badnall, who followed him to-day, if I may say so, in a very able argument, has proposed a third. The first proposal of Mr. Southgate was that the trustees took an estate for the life of William Collier, with a chattel interest superadded, until the debts, &c., were paid. His second proposition was, not that they took a life estate with a chattel interest superadded, but that they took a concurrent chattel interest and life estate;

(2) 5 Bing. N.C. 639.

(3) 6 E. & B. 619.

that is, they took the two estates concurrently. I suppose whichever should last longest; but they were both concurrent, and that the second estate would last until the debts were paid. I will examine Mr. Badnall's proposition after I have disposed of those two. The first, that they took an estate for life, with a chattel interest superadded, clearly will not do. I pointed that out to Mr. Southgate in argument, and he abandoned it. The trust to pay the debts is the first trust, and the tenant for life is to have nothing until the debts and legacies are paid. If you are to imply a chattel interest, therefore, from a gift to the trustees upon trust to pay debts and legacies, that chattel interest will be implied from the moment of the testator's death; and it is impossible, therefore, to hold that they took during the life of William Collier, and then took a superadded estate, by implication upon trust to pay debts and legacies. I need say no more about that. Then as regards the concurrent chattel interest and life estate. Did anybody ever hear of such a thing as taking a chattel interest and a freehold estate together? It is a novel idea; and, whether they can subsist together, or whether the doctrine of merger or extinguishment would apply, I do not say. It was said that you could have such an estate; but the notion is repugnant that they should take a chattel interest and a freehold interest at the same moment, both to subsist together; and, in the absence of any authority, I decline to recognize the possibility of implying any such estate.

Now then, those two being rejected, Mr. Badnall to-day suggested a third, that they took a freehold interest for the life of the tenant for life, and, if necessary, a further chattel interest until the debts were paid. That is a possible interest; and, in fact, *Doe d. Kimber v. Cafe* (*ubi supra*) shews such an interest. There it was an estate, *pur autre vie*, for the life of a lady, and then a chattel interest, until the infants should attain twenty-one. That is quite a possible interest; but I cannot find it here. That would be an estate during the life of the tenant for life, and then, if at his death the debts

were not paid, until they were paid. I agree, if those were the words, Mr. Badnall's suggestion would be admissible; but they are not the words. That would give a new estate arising after the cessor or determination of the estate for life, in case the debts were not paid by perception of rents and profits during the life of the tenant for life. The words are, in the first place, to pay the rents and profits, and then to pay the surplus to the tenant for life, shewing that, instead of raising a new contingent estate, the testator thought that William Collier would live long enough to allow the rents and profits to pay off the whole of the debts and legacies during his life; therefore I cannot see on this will that I am at liberty to imply the estate suggested by Mr. Badnall. That being so, it is reduced to this, that nobody can suggest any less estate.

The fourth suggestion, the terminable fee of Lord Romilly, the two suggestions of Mr. Southgate, and the one of Mr. Badnall being out of the way, I think I am at liberty to say that human ingenuity cannot suggest a fifth. Therefore we are actually reduced to this. The first rule being that those who say they do not take a fee shall point out what estate they take; they cannot suggest any estate which, in my opinion, can be fairly and properly implied from the words in the will. The second rule, that to which I adverted also, I think applies. Not only can I find nothing to cut down the estate in fee beyond the words, "shall stand seized for the natural life, and also until" (those words were very much and very properly relied upon); but I find a great deal the other way. The first is that there is a trust to let and set the same, that is, the property. Now it was urged that that only meant to let it from year to year. I cannot so construe the words. I construe them in their legal and proper meaning, and I cannot restrict them in that way. A trust to set and let, or a trust to lease for that, is what it means *prima facie*, as was put in *Doe d. Tomkyns v. Willan* (*ubi supra*), and a number of authorities bearing upon the subject shew that the persons who are to lease under a trust have not a bare power, but have got an estate, and consequently that the estate being of in-

definite duration must be a fee in order to allow a leasehold interest to take effect out of it. In the next place I find this, that they are to apply, not only the rents and profits, but the value of whatever timber may be considered at its best growth. Now the person who penned that will could not have supposed the trustees could apply the value of the timber without their having the power to cut it. You cannot apply the value of timber in payment of debts unless you cut it, and in order to cut it you must have power to cut it. Now, if they took only an estate *pur autre vie*, or only a chattel interest, they have no power to cut it by law; but if they take a fee simple they have, and therefore as there is an implied right (that is, the right is implied that they could cut the timber) it appears to me to shew that these trustees, in order to cut the timber, must take the fee. That is another reason in support of their taking the fee on the construction of the will, and quite independent of the rule that those who say they do not take a fee must shew a definite and certain period for which they take the estate, which cannot be done.

For these reasons I am of opinion that these trustees took the fee, and consequently that William Collier took an equitable estate tail which has been well barred by recovery.

Now there was a second point about it—a point of some curiosity—on which I have heard a most ingenious argument; supposing that was not the true construction, supposing that William Collier took an estate for life only, and there was a legal contingent remainder, the trustee has conveyed the life estate to William Collier, and the effect of his recovery has been according to the case of *Doe d. Davies v. Gatacre* (2), and in fact according to what was considered well-settled law long before that case, a destruction of the contingent remainder. That, so far, is admitted. Then it was said, though the contingent remainder has gone at law, it remains in equity, and the argument submitted in support of that contention was this. It was said that a trust to A during the life of B to pay the rents and profits to B, and after the decease of B,

then a limitation to contingent uses, which are legal uses, makes A a trustee, not only for B, but by implication a trustee for the purpose of supporting the contingent remainder; in other words, a trustee for the persons entitled to the contingent remainder, and that being such an implied trustee to support contingent remainders he was guilty of a breach of trust in conveying the legal estate to the tenant for life, and thus enabling him, by recovery according to the then state of the law, to destroy the contingent remainder. All I can say is that this is a wonderful discovery to make in the year 1873. These trusts for contingent remainders are very old; they were invented because, without the protection of the trustees, and the express trust to preserve contingent remainders, the tenant for life, with the concurrence of the trustees when they had the legal estate, or without their concurrence when he had the legal estate, could, as the law then stood, destroy the contingent remainders. If any such doctrine of implied trust to preserve contingent remainders had ever existed or been recognised in this Court, we should have found some authority upon it, and having regard to the ingenuity of conveyancers, which has been exercised at various stages and in various ways to prevent this destruction, I cannot find a trace of any such authority. I am clearly of opinion, therefore, that there is no such implied trust whatever, that there was no breach of trust, and that the contingent remainders being destroyed at law were destroyed in equity also.

Now there is a third ground upon which I am of opinion the plaintiff must fail, and it is because there are so many grounds I have not thought it necessary to call on the defendant, and that is this. Mr. Walters in the year 1861 instituted a suit of *Walters v. Collier*, and the object of *Walters v. Collier* was to get from the surviving trustee of the original will the legal estate in reversion which was left in him—that is, on the construction I have mentioned, would be left in him because he took the fee when the former trustee conveyed only a life estate to William

Collier, the father. The mortgagee was the plaintiff with William Collier, the father, and the trustee, one Joseph Collier; and William Collier, jun., the present plaintiff, who was then of course only the expectant heir of the body, was also a defendant. The bill asked that the trusts of the will might be performed; that, according to the true construction of the will, the plaintiff took the estate tail; that it might be declared that the defendant, Joseph Collier, was a trustee for Walters, and that there might be a direction to convey. The defendant, William Collier the younger, in an answer set up the very claim he sets up now. He contested the title of the plaintiff, William Collier the elder, as tenant in tail, insisting that he was only a tenant for life, and he set up the exact claim made by this bill. Upon that there was a decree. Now, according to my view of the case the defendant, William Collier the younger, was entitled to say, "I will be dismissed. I am only expectant heir of the body. You have no right to make me a party at all. I have nothing to do with it. If you can get a decree against the trustees, that will not bind me, and ought not to bind me. If the Court thinks it very clear they may bind expectant heirs in their absence. They may do that if they think fit, but I will not be bound." He did not do so. A decree was made, and the decree made by Wood, V.C., in 1862, was this: The Court doth order that the defendant, Joseph Collier, do convey all the estate and interest in the messuages, lands, &c., comprised in the will of James Collier, the testator, in the cause named vested in him under the said will to the plaintiff, William Walters, his heirs and assigns, subject nevertheless to such right or equity of redemption as may be subsisting in the same messuages, &c., in the said William Collier, his heirs, executors, administrators and assigns, under and by virtue of the indenture of 25th of May, 1840, that is, the indenture of mortgage. "And it was ordered that the plaintiff do pay the defendant his costs of the suit." Now, that decreed two things. That first of all decided that Joseph Collier had a legal estate to convey, be-

cause the Court ordered him to convey the estate vested in him, and of course no Court would order a man to convey if he had nothing in him. And, secondly, it decided that when the conveyance of the legal estate was made, it was, first of all, for the benefit of the mortgagees, and subject to that for the benefit of William Collier the elder, his heirs and assigns; that is, it decided the equity to the ownership of the estate was then vested in William Collier the elder. To that suit William Collier the younger was a party, and received his costs. He now says that the decree was erroneous. I think the answer is conclusive. Right or wrong you are bound by it, and if you have not appealed, or if now by its enrolment you cannot appeal, you, not making any case of fraud or surprise, or even any attempt in this bill, although the decree is properly pleaded, to impeach it, you cannot now say that the decision of the Court in the case of *Walters v. Collier* was wrong, and being bound by it you are entirely deprived of any beneficial interest in this estate. I think this objection good also.

I think upon all these grounds the plaintiff has failed to make out his title, and that the bill must be dismissed, and of course with costs.

Solicitors—Mr. Tyrell, agent for Messrs. Clarke & Hawley, Longton, for plaintiff; Messrs. Tucker & Lake, agents for Messrs. Welby & Son, Uttoxeter, for defendant.

BACON, V.C. }

1874.

Jan. 29. }

PINCHARD v. FELLOWS.

Mortgagee's Suit for Sale and Administration—Devisee—Priority of Costs—Practice.

In a suit by legal mortgagees of real estate for sale of mortgaged property, and for the general administration of the mortgagor's estate, the proceeds of the mortgaged property will be applied in payment to the mortgagees of their principal interest and costs, in priority to the payment to devisees

or executors, who had been made parties, of their costs of the suit.

The plaintiffs were legal mortgagees of real estate of a deceased mortgagor, and filed a bill on behalf of themselves and other creditors for sale of the mortgaged property and general administration of the mortgagor's real and personal estate making the executors and devisees of the mortgagor's will parties.

The cause came on on motion for decree on the 10th of December, 1873, and a decree was then made which provided for the sale of the mortgagor's property, and payment into Court of the proceeds, and for the payment of the plaintiff's debt, interest and costs thereout in the first instance, and then for the ordinary administration accounts, inquiries and directions.

The defendant Legg, who was the husband of one of the devisees under the will of the mortgagor, now moved to vary the minutes which had been drawn up by providing for taxation of the defendants' costs and for a direction to be inserted that, in case as was probable the sale moneys should prove insufficient to satisfy the plaintiff's debt, interest and costs of suit together with the defendants' costs, the defendants' costs should be paid in the first instance out of the fund in Court, and the residue be paid to the plaintiff.

Mr. Staffurth, for the motion.—When mortgagees instead of simply filing a bill to enforce their securities, institute a suit for a general administration and the estate proves deficient, the costs of the suit are to be paid in the first instance out of the estate—

Armstrong v. Storer, 14 Beav. 535;
Re Spensley's Estate, 42 Law J. Rep. (N.S.) Chanc. 21; s. c. Law Rep. 15 Eq. 16.

Mr. T. A. Roberts, for the mortgagees.—We are entitled to principal interest and costs out of the mortgaged property, before any costs of suit are paid to the defendants—

Cook v. Hart, Law Rep. 12 Eq. 459.

BACON, V.C., held that the mortgagees were entitled to have their principal

interest and costs paid in the first instance out of the mortgaged estates, in priority to the costs of suit of the executors or devisees, but not so as to prejudice the right of the executors or devisees to costs out of any other estate of the testator.

Solicitors—*Mr. H. G. Field*, agent for Messrs. H. & J. E. Underhill, of Wolverhampton, for the motion; Messrs. Smith, Fawdon & Lowe, for the mortgagees.

JESSEL, M.R. }
1874.
Jan. 30.

BROWN v. EYE.

County Court Act of 1867, ss. 5, 7, 29, 33—Mortgage for 50l.—Foreclosure Suit—Concurrent Jurisdiction—Costs.

A plaintiff who sues in Chancery for a sum within the County Court limit, and obtains a decree, is entitled to the usual costs, and not merely to those which he would have been allowed in the County Court.

This was a suit for foreclosure of an equitable mortgage to secure 50l. created by deposit of deeds and memorandum of deposit.

The parties lived more than twenty miles from each other, but no stress was laid upon this either in the argument or the judgment.

Mr. A. Dixon, for the plaintiff, asked for the usual foreclosure decree with costs. He said that the mortgagor objected to the costs, but that the Court had concurrent jurisdiction with the County Court, and that, in fact, just as much expense would have been incurred in the County Court as in this Court—

Picard v. Hine, 18 Law Times, 755, decided in July, 1868, after the County Court Act of 1867 had come into force.

Mr. Badnall, for defendants in the same interest as the plaintiff.

Mr. Oswald, for the mortgagor.—The plaintiff is not entitled to any other costs

than he would have had in the County Court—

Scotto v. Heritage, 36 Law J. Rep. (N.S.).

Chanc. 123; s. c. Law Rep. 3 Eq. 212, appears to be against this view; but *Scotto v. Heritage* was decided before the County Court Act of 1867 came into force, and on the ground of the distance of the parties from each other by analogy to the practice then in force in the Common Law Courts in such cases, but the County Courts Act of 1867 has altered this practice at law.

The 29th section of that Act indeed shews the intention of the legislature to restrict the costs in all Courts to those that might be obtained in the County Courts.

[THE MASTER OF THE ROLLS.—I understand that section only to apply to the various inferior Common Law Courts, such as the Stannaries, &c.]

Admitting that to be the case, the fifth section has altered the practice at law in analogy to which *Scotto v. Heritage* (*ubi supra*) was decided; and accordingly in

Thompson v. Dallas, 37 Law J. Rep.

(N.S.) Q.B. 133; s. c. Law Rep. 3 Q.B. 358,

it was held that the distance parties resided from each other, however great, was no ground for a certificate being given for full costs in a case beneath the limit fixed by that Act for actions in superior Courts; and the Courts of Chancery will, by analogy to that practice, only give County Court costs in this case, which comes within the principle of

Simons v. MacAdam, 37 Law J. Rep.

(N.S.) Chanc. 751; s. c. Law Rep. 6 Eq. 324.

[THE MASTER OF THE ROLLS.—Vice-Chancellor Malins in that case treated the jurisdiction as concurrent, and decided on the discretion as to costs which a Judge undoubtedly has; but I only exercise that discretion according to certain rules.]

I do not dispute that the Court has jurisdiction to give the costs, but only that it is a case in which the Court will only give County Court costs.

THE MASTER OF THE ROLLS.—Before the County Court Act of 1867 was passed the right of a plaintiff to come to this Court

in any case was indisputable. If that right has been taken away, it must have been done by clear words. I cannot find them in the Act. What the legislature did is clear. It gave a concurrent jurisdiction in Equity to the County Courts. The Act contains no prohibition whatever or restriction as to existing equity jurisdiction; but more than that, it does restrict the Courts of law in certain cases. This is a clear indication of the intention of the legislature that in Courts of Equity things should go on as before, and the plaintiff having obtained a decree, is entitled to the usual costs.

Mr. Henry Fellows, *amicus curiæ*, referred to a case in 1868 of

Richard v. Wicks, R. 123, unreported, where Vice-Chancellor James had made a similar decision (1).

Mr. Northmore Lawrence, *amicus curiæ*, referred to

Grandin v. Haines, Law Rep. Weekly Notes for 1873, p. 12,

where Vice-Chancellor Wickens had given full costs, and the Lords Justices had refused to interfere—

Law Rep. Weekly Notes, 1873, p. 92.

Solicitors—Messrs. G. Brown, for plaintiff and defendants; Messrs. Crook & Smith, for the mortgagor.

LOORDS JUSTICES. }

1873.

July 12, 14. }

BURTON v. GRAY.

Guarantee—Deposit of Deeds—Memorandum—Condition Precedent—Construction—Non-compliance with Condition—Acquiescence.

Certain title-deeds, which had been handed by the plaintiff to his brother, F. B., to enable the latter to borrow 600l. from H. for seven days, were deposited by F. B. with a bank, with a memorandum purporting to be signed by the plaintiff, and stating that the deposit was made in

(7) *Richard v. Wicks* was a redemption suit. Principal sum 85l. The plaintiff and defendant were within twenty miles of each other. Both lived in London, the property was in Erith.

*consideration of the bank lending F. B. 1,000*l.* for seven days. The bank made him no loan for seven days, but, during the seven days next after the deposit, they allowed him to draw by cheques to an amount exceeding 900*l.* Upon a bill filed by the plaintiff against the bank for the delivery up of the deeds, on the grounds, first, that the memorandum of deposit was a forgery; and second, that the bank had not lent F. B. 1,000*l.* for seven days:—Held, that the question of forgery was one for a jury only, but that, assuming the memorandum to be genuine, the bank had no right to retain the deeds, inasmuch as they had not fulfilled the condition on which the deposit was made.*

This was an appeal by the London and County Banking Company—who were represented by the defendant Gray, as their registered public officer—from a decree of Lord Romilly, Master of the Rolls, ordering the bank to deliver up to the plaintiff certain deeds belonging to him, which had been deposited with them as a security by the plaintiff's brother, Frederick Burton.

In September, 1869, the deeds were handed by the plaintiff to Frederick Burton, for the purpose of enabling the latter to borrow a sum of 600*l.* for seven days, from a Mr. Hawkins. At the end of the seven days the plaintiff asked his brother to return him the deeds, but the latter made various excuses, and the plaintiff did not discover what had become of the deeds until May, 1870, when he learned that they had been deposited by Frederick Burton with the bank on the 25th of September, 1869. The plaintiff, however, did not then apply to the bank, being afraid of injuring his brother. In April, 1871, Frederick Burton was arrested and convicted on a charge of forgery. Upon his arrest the plaintiff applied to the bank, and then learnt, for the first time, that the deposit of the deeds had been accompanied by a memorandum purporting to be signed and sealed by himself, of which the material part was as follows :

"In consideration of your Banking Company lending to Mr. Frederick Burton the sum of 1,000*l.* sterling for seven days

from this date [25th Sept. 1869] I deposit with you the several documents mentioned in the schedule hereunder written, which I agree shall remain with you, or other the public officers, for the time being, of the said company, as a security for the payment to you, or other such public officers as aforesaid, of all money due, or to become due, from the said Frederick Burton to the said company . . . on any account whatsoever, including charges for interest, commission, and all costs, charges and expenses which you may incur in enforcing or obtaining payment of such money, or in realizing this or any further security. And I agree to pay you, or such public officers as aforesaid, upon demand, all such money; and I hereby charge the hereditaments and premises comprised in such documents respectively, and all fixtures now or hereafter thereon, with the payment thereof."

The plaintiff stated that this document was a forgery. The bank claimed to be entitled to hold the deeds under it for a balance due from Frederick Burton to them, of more than 2,000*l.* The plaintiff then filed this bill for the delivery up of the deeds, alleging that the memorandum was a forgery, and that the bank did not in fact lend to the said Frederick Burton the sum of 1,000*l.*, or any other sum, for the period of seven days, from the 25th of September, 1869. The defendant Gray, by his answer, insisted that the memorandum was genuine, and that the bank had, in fact, lent Frederick Burton 1,000*l.* by placing it to his credit, and that he had drawn cheques thereon to the amount of 900*l.* and upwards, and that the bank did thereby, in fact, lend him 1,000*l.* for seven days, from the 25th of September, 1869; and further, that, if the document was not genuine, the bank was still entitled to the benefit of the deposit, inasmuch as the plaintiff had lent the deeds to his brother, for the purpose of enabling him to borrow money upon them.

It did not appear that any sum of 1,000*l.* had been carried to the credit of, or otherwise lent to Frederick Burton by the bank, for or within seven days after the 25th of September. But the bank had, within such seven days, paid cheques

drawn by him for over 1,000*l.* His banking account also shewed that, on the 4th of October, 1,000*l.* had been advanced to him on a promissory note.

The Master of the Rolls had declined to try the question of the forgery of the memorandum of deposit, saying that was a question for a jury; but he held that, even assuming the document to be genuine, the terms of it had not been complied with, and the plaintiff was entitled to have the deeds delivered back to him. The bank appealed from this decision.

Mr. Fry and *Mr. W. W. Cooper*, in support of the appeal, argued that the plaintiff had given his brother a general authority to deal with the deeds, and had acquiesced in the deposit of them with the bank, and waived his right (if any) to recover them. They cited—

Perry v. Holl, 2 Giff. 138; 2 De Gex, F. & J. 38; s. c. 29 Law J. Rep. (N.S.) Chanc. 677.

Mr. Southgate and *Mr. Waller*, for the respondent, were not called upon.

LORD JUSTICE MELLISH said—The bill proceeded upon two different grounds: 1st. That the memorandum of deposit was a forgery; and, 2ndly. That, if it was not a forgery, nevertheless the bank had not complied with the condition stated in it, so as to make it binding on the plaintiff. The Master of the Rolls had held that, if the question of forgery was necessary to be tried, it ought to be tried by a jury, and they, the Lords Justices, entirely agreed in that opinion. They decided the case on the second ground, that, even admitting the memorandum not to be a forgery, the bank had not complied with the condition contained in it, and the agreement for suretyship failed. Unless 1,000*l.* were advanced for seven days, in accordance with the terms contained in the memorandum, the guarantee and mortgage never came into existence. The bank, when they saw the words in the memorandum, ought to have known that the transaction was this: that the plaintiff had been informed, truly or falsely, that his brother had some pressing necessity for a sum of 1,000*l.*, to be advanced im-

mediately, for a period of seven days, and that he had entered into this security for the purpose of enabling his brother to obtain the 1,000*l.*, which, he supposed, was to be returned in seven days. The bank must have known that if the brother did not come for and did not get the 1,000*l.* for seven days, the ground for the plaintiff becoming surety never existed, and he was not bound. It was impossible to put any other construction on the words than this: "If you will advance him 1,000*l.* instantly for seven days, then, and not otherwise, I agree to give the deposit of title-deeds, and to become security."

It was quite clear that no such advance was made. There were, no doubt, certain sums advanced in the ordinary way upon cheque, which, on the 30th of September, made a balance of 810*l.* against Frederick Burton; but 510*l.* of that was paid back on the 1st of October. In no way was there anything like 1,000*l.* advanced until the 4th of October, when 1,000*l.* was advanced upon a promissory note. That note was not produced; but it appeared to have been a note at three or four months' date. Such an advance as that on the note could not possibly be a compliance with the memorandum. If an action had been brought against the plaintiff on the guarantee contained in the memorandum for the amount advanced, and an action had been brought by the plaintiff in detinue for the recovery of the deeds, the action on the guarantee must have failed, and the action in detinue must have succeeded, on the ground that the consideration, which was a condition precedent to the guarantee and mortgage taking effect, had never been complied with. A case was attempted to be made in Equity, that the plaintiff, having notice that the bank had got the deeds, did not come and demand them. It was a complete answer to this, that the plaintiff did not know that the 1,000*l.* had not been advanced.

Then this case was set up, that, although the plaintiff might have a case if the deed were genuine, he had no case if it were a forgery, because, by not claiming the deeds from the bank, he had waived his rights, and acquiesced in

his brother's raising money upon the deeds. The plaintiff was entitled to put his case in both ways, as he does by his bill, viz.: That the memorandum was not genuine, but, if it was genuine, its terms had not been complied with. But the bank were not entitled to set up that this memorandum, on the footing of which they received the deeds, was not a genuine instrument. If they were not entitled to the deeds under the memorandum (and they were not, because they had not complied with the condition of it), they were not entitled to the deeds at all. The decision of the Master of the Rolls was right, and the appeal must be dismissed, with costs.

LORD JUSTICE JAMES concurred.

Solicitors—Messrs. Heath & Parker, for plaintiff;
Mr. A. E. Francis, for the bank.

JESSEL, M.R. }
1874. } LEECH v. SCHWEDER.
Jan. 20. }

Light and Air—Practice—Personal Inspection of Buildings by Judge.

A Judge of the Court of Chancery ought not to make a personal inspection of buildings in order to ascertain whether a material diminution of light and air is caused in any case.

This was a common light and air case. The premises were situated in St. Mary Axe, in the city of London, and the parties were at issue on the question whether certain alterations made by the defendant caused a material diminution of light and air to the plaintiff.

Mr. Southgate and Mr. Locock Webb appeared for the plaintiff.

Sir R. Baggallay and Mr. Dundas Gardiner, for the defendant, asked the Master of the Rolls to make a personal inspection of the premises.

THE MASTER OF THE ROLLS said that he had previously refused such an application in vacation time, and he was glad

now of having an opportunity of stating his reasons for such a refusal in open Court.

In the first place, it was not right to ask a Judge of the Court of Chancery to go to a distance to inspect buildings, and so take him away from his very important duties in Court and in Chambers.

In the second place, there was not the same safeguard against individual peculiarity in the case of a Judge that there was in the case of a jury. Jurymen were taken from classes with ordinary common sense and experience, and any peculiarity of one or two of them was balanced by the absence of such peculiarity in the rest. You got, therefore, average knowledge and capacity in a jury. But you could not rely on the same thing in a single Judge. He might be an old man; he might have defective vision, and be unable to tell what was a material abstraction of light; or he might be colour blind.

Then there was a third objection to the course proposed, namely, that the parties could not well appeal from a decree made by a Judge after a personal inspection. He would not have decided upon materials which the Court of Appeal could see. In Chancery an appeal went on law and fact together, and it would not be clear to what extent the Judge below had been influenced by his own observation, and in what he had trusted to the written evidence. The Judges of the Court of Appeal would then be asked to make an inspection also, and they might have a dark day, while the Judge below had had a bright day—or *vice versa*—and their judgment might be different on that account.

His Honour therefore refused to grant the application.

Solicitors—Messrs. Lumley & Lumley, for the plaintiff; Messrs. Travers, Smith & Co., for the defendant.

BACON, V.C. }
1873. }
Dec. 12, 13. }

HATHESING v. LAING.

Bill of Lading—Negotiable Instrument
—Mate's Receipt—Chose in Action—Assignment—Notice—Custom.

Brokers delivered goods on board a ship and took mate's receipts in the name of their principals, who afterwards endorsed the receipts to the brokers. The captain signed bills of lading without notice of the endorsement:—Held, that the holders of the bills of lading were entitled to the goods.

Held, also, that the captain was justified in signing the bills of lading, and that the brokers had no claim for indemnity from the owners.

Notice to the captain would not have affected holders of the bills of lading for value without notice.

A local custom making mate's receipts negotiable would not bind the goods elsewhere.

The plaintiffs in this cause were the partners in the firm of Currumchund Tremchund, brokers, at Bombay. In the year 1870 they purchased a quantity of cotton for Messrs. Harbord & Co., two lots of which formed the subject of the suit. On the 1st of June, 1870, the plaintiffs delivered the two lots in question on board the steamship *Alabama*, and received mate's receipts; these receipts were taken by them to the office of Harbord & Co., and without parting with possession of them they obtained the endorsement of Harbord & Co. on the receipts. The plaintiffs claimed a lien on the goods by virtue of their possession of the endorsed receipts; they alleged the receipts were negotiable by reason of a custom among merchants at Bombay, and that bills of lading could not properly be given by a captain without his having such receipts given up to him. There was some conflict of evidence as to what actually took place at Bombay beyond what has been above stated.

The material facts as stated in the bill were as follows—Messrs. Harbord & Co. tried to induce the plaintiffs to give up the receipts, and on failing to do so, they being the agents of the ship, induced the

captain to sign bills of lading without the receipts; that the plaintiffs tendered proper bills of lading to the captain to sign in exchange for the receipts, but he refused on the ground that he had already signed other bills of lading. According to the evidence of the captain, on the other hand, he received no notice from the plaintiffs, and signed no bills of lading without seeing the mate's receipts. The details of evidence, so far as they are necessary to this report, appear in the judgment.

The defendants to the bill were James Laing & Mary Gourley, the shipowners, Zeden, the ship agent at Liverpool and consignee, the Comptoir d'Escompte de Paris, assignees of the bills of lading for value, without notice of any of the matters in dispute, who were made parties by amendment, two of the partners of Harbord & Co., and the assignees in bankruptcy of the third partner.

The bill was filed on the arrival of the ship at Liverpool, and prayed that the plaintiffs might be declared entitled to the cotton or a lien on it, or in the alternative, that the shipowners might be decreed to make good to them the value of the cotton.

The cotton was sold in the interval and the purchase-money paid into Court.

Mr. Eddis and *Mr. Morshead*, for the plaintiffs, contended, in the first place, that they had a right to stop the cotton *in transitu*—

Craven v. Ryder, 6 Taunt. 423;

Ruck v. Hatfield, 5 B. & Ald. 632.

The mate's receipt was a good negotiable instrument, and gave the holders the property in the goods—

Evans v. Nichol, 4 Sc. N.R. 43; s. c.

11 Law J. Rep. (N.S.) C.P. 6.

The bills of lading having been issued fraudulently did not give the holders, though innocent, a title—

Schuster v. McKellar, 7 E. & B. 704;

s. c. 26 Law J. Rep. (N.S.) Q.B. 281.

At any rate the shipowners were personally liable, the fraudulent acts having been committed by their agents.

Mr. Kay and *Mr. B. B. Rogers*, for the Comptoir d'Escompte.—The receipts had been given in the name of Harbord & Co.,

the bills of lading were therefore properly signed, if not, the property in the cotton passed by the bills of lading—

Pease v. Gloaher, 35 Law J. Rep. (N.S.) P.C. 66; s. c. Law Rep. 1 P.C. 219.

The question of the retention of the mate's receipts was immaterial on a question of stoppage *in transitu*—

Cowasjee v. Thompson, 5 Moore, P.C. 165.

The plaintiffs, however, were not vendors and could have no right to stoppage *in transitu*. If they ever had any right over the goods it was a broker's lien, and that was gone on their delivery on board.

Mr. A. E. Miller and *Mr. Edward Beaumont*, for the shipowners, said they were ignorant of the whole alleged fraud, and could not in any way be made liable, they were innocent stakeholders.

Mr. Buckley for Zeden.

Mr. H. A. Giffard for other parties.

Mr. Eddis, in reply, referred on the question of stoppage to

Lickbarrow v. Mason, 5 Term Rep. 367;

Turner v. The Trustees of the Liverpool Docks, 6 Exch. Rep. 543; s. c. 20 Law J. Rep. (N.S.) Exch. 393;

and on the negotiability of mate's receipts to

Gurney v. Behrend, 3 E. & B. 632; s. c. 23 Law J. Rep. (N.S.) Q.B. 265.

BACON, V.C.—This case is very important if the several topics which have been urged have any application to it or ought to regulate the decision, but, in my opinion, it can be disposed of upon much shorter grounds; and for the consideration of those legal grounds, I turn first to the bill itself, and I there find that the course of business between the plaintiffs and the firm of Harbord & Co., was that the plaintiffs should purchase and pay for the cotton and have it delivered to themselves. "And that afterwards they should load it on board ship at Bombay, taking the usual receipts for the cotton from the mate or officer in charge of the ship, which receipts were retained by the plaintiffs and taken by them to the firm of Harbord & Co., in order that the re-

ceipts might be endorsed to the plaintiffs by the firm of Harbord & Co., without the said firm of Harbord & Co. at any time having possession of the same." That they say is the course of their business—"The plaintiffs so kept the receipts as aforesaid in order that they might preserve their right to the possession of the said cotton, and the receipts so kept and endorsed to them were retained by them till the cotton represented by the said receipts was paid for by the said firm of Harbord & Co. Upon such payment the receipts were handed over to the said firm of Harbord & Co., in order that they might present them to the captain of the ship and obtain bills of lading without the production of the said receipts." That is the course of trade as it is described, and that, as I read, is that the plaintiffs were brokers for Harbord & Co., and bought on behalf of Harbord & Co. the cotton in this case, which they had a right to retain until they were paid their charges, which charges as brokers included the amount that they had laid out for their principals, and that that would give them a lien is beyond all doubt; but any other title than that of a lien is not pleaded and cannot, according to the circumstances of the case, exist. If the value of the cotton after the plaintiffs had bought it for Harbord & Co. had increased, no matter to what extent, can it be doubted that Harbord & Co., upon this statement of the course of business, would have been entitled to the increase upon paying the price contracted for? If there had been any diminution in the value the plaintiffs would have suffered no part of the loss occasioned by that diminution. Brokers they were according to their own statement, brokers with a lien; and brokers generally, if not always, have a lien upon the goods which they purchase for their principals, and the possession of which they retain. Other rights than that they do not allege they have, and it would be inconsistent with every fact of the case to suppose they had any other right.

Then they go on to say—"Among the said cotton were two lots of eighty and eighty-two bales" and so on, and in accordance with the usual course of business

"they were respectively put on board the said ship." Whatever their possession, their right being only to a lien, that lien was discharged as to the possession of the property in the bales of cotton when they put them on board Harbord's ship. There is no question about stoppage *in transitu*. They were Harbord & Co.'s goods from the beginning, subject to Harbord & Co. paying the price; they were by Harbord & Co.'s agents, the brokers, put on board Harbord & Co.'s ship, and a receipt was taken from the mate in the name of Harbord & Co. The brokers' lien was then gone. I am at a loss to see that they had any other lien or right, or that they can by any perversion of terms be called vendors.

Now the bill does not state when that was done nor do the affidavits. And when that was done appears to me to be a point of vital importance in this case, because, from the statements and from the nature of the transaction, it is quite clear that the plaintiffs thought the mere possession of the receipts was nothing. The possession of the receipts by them was simply an act of agency, and in proper course the receipts ought to have been handed to Harbord & Co., and so the plaintiffs thought. They felt they had parted with their lien, that the receipts held by them were good for nothing, for they were Harbord & Co.'s receipts, and therefore they procured an endorsement to be made upon them. What is the effect of that endorsement? It is a transfer of the right which Harbord & Co. had by virtue of the delivery of the mate's receipts to the plaintiffs; and it is upon that that they claim. Upon that the whole of their complaint against the present defendants is founded. It is the endorsement on the receipts, and the possession of the receipts upon which they found their claims; nor could they claim otherwise, for in every one of the cases that have been referred to in which the mate's receipts are mentioned, they are mate's receipts taken by the true owner of the property in order that his right to and possession of that property may not be questioned or disturbed by the fact of his having deposited the goods on board somebody else's ship. All that the shipper has

to do under those circumstances is to satisfy himself that the receipt expresses no more in quantity and description than the goods which are then received by him. Having done that, he has discharged his duty—he has given vouchers which prevent him ever thereafter saying he did not receive these bales of cotton. That is the extent of his liability; and if he discharges himself from that liability, the possession of the mate's receipts by somebody else than Harbord & Co. does not signify at all, and as between himself and Harbord & Co., it is not necessary even to produce them. The goods were delivered as Harbord & Co.'s goods, he acknowledged the receipt of them for Harbord & Co., and gave it to the man who came alongside that he might carry it to whoever it belonged to. It went into the hands of the plaintiffs, and it was held by them to be of no earthly use to them until they got a transfer of Harbord & Co.'s right.

Now, in my opinion, it would add greatly to the perils of the sea and the perils of commerce if I were to hold, in opposition to every principle which regulates such transactions in this Court, that they acquired that title which they say they had acquired by means of endorsements of which they gave no notice to the captain, or to anybody else until after it was too late for the captain to do anything for them. Without such notice being given, I am of opinion that their right cannot avail against the rights which the defendants acquired through the bills of lading. See to what mischief it might lead. Without saying at the present moment a word about the custom, what difference is there between the mate's receipts taken as the plaintiffs took them, and any other *choses in action*? A book debt, a policy of insurance, or anything else of the kind, may be well assigned in equity, but the assignment is of no avail except notice is given to the person who is to be charged with it. The captain from the time he receives the goods is chargeable with those goods. If he has no notice that any other owner in the world exists but the man in whose name he has given the receipt, what liability does he incur when he as-

signs the bills of lading to the person who, as far as he is concerned, is the sole owner? It is the universal principle, and in my opinion it is directly applicable to the transaction in this case. If I were to consider that that principle required any support from the facts of this case, nothing can by any possibility be stronger than they are. Here is a captain sailing from the port of London going to Bombay for the first time, knowing nothing about local customs or any other customs, but knowing very well what his duty as skipper is. He is for fourteen days in the port of Bombay, half of which time is occupied in delivering the cargo that he brought there, and the other half in taking in the new cargo. During that time, as I gather (it is not very distinctly stated in the evidence that I can see), a great many things were done. The plaintiffs here say that for 965 bales they got bills of lading, and yet upon no one of those occasions, when those bills of lading were applied for, was any notice given to the captain or any intimation to him that they had any claim upon those goods. They were assigned it is said by the endorsement. Surely, for the common protection of innocent persons in mercantile transactions, it was incumbent upon them to give him notice. They saw him sign bills of lading daily. They knew he might sign a bill of lading at any time, and there was not the slightest intimation or notice given to him at any time until, according to their statement, the 13th of June. The bill of lading bears date the 30th of May. On the 30th of May, when the goods were in the possession of the captain, he upon the request of the only person he knew in the transaction (for it is not pretended he knew anything of the present plaintiffs), at the place of business of Harbord & Co., the proper place for the transaction of such matters, is called upon to sign and he does sign a variety of bills of lading, 965 bales comprising the bills relating to the cotton in question.

Now, the captain's account of what he did upon that is very clear, and I shall mention it a little hereafter when I come to deal with the evidence. But looking at the case only as a matter of law, what

is there to induce me to say that by the transfer of Harbord & Co. by endorsement of the mate's receipts, no notice having been given to the captain, he is in the slightest degree in default? I can apply no principle to the case as the plaintiffs themselves state. Then the evidence is not to be disregarded, and the evidence stands thus—With the mate's receipts in their possession, the plaintiffs' agents go to Harbord & Co. to desire them to endorse the receipts. I have already said to what end the endorsement was required. The mate's receipts, if they were the things that had the effect the plaintiffs here contend for, no endorsement in the world would make them good. They go to the plaintiffs for endorsement and they get the endorsement made. Then between the 30th of May and the 13th of June, it appears by the evidence that the ship was loaded. There is no pretence that any application was made to Captain Bland till the 13th of June, and upon that there is a conflict of statement. During that period the bills of lading were signed, as I have said, and the ship is ready to sail and it did sail, I suppose, on the 13th of June.

Then, the evidence on the part of the plaintiffs is, that having these notes so endorsed they never did part with the possession of them. That expression is not satisfactory, since they were getting these other bills signed. Considering the nature of the transactions, the hurry with which they were performed, as appears by Captain Bland's evidence, in a crowded shipbroker's office, with a quantity of natives there, his sole business being to see that he did not incautiously or improperly sign bills of lading, the business of Harbord & Co. being that they should produce to him the mate's receipts for the goods for which they required bills of lading, he says that he never signed any bills of lading, the receipts for which were not before him at the time he signed them. That is not inconsistent with the facts stated by the plaintiffs that they never parted with the possession of them. As it is, contrasting their evidence with Captain Bland's, and treating it as I am invited to do as a jury, I do not hesitate to say, as a jury, I should find in favour of the

facts stated by Captain Bland. If it had been otherwise, and if the demand had been made personally upon Captain Bland, how could he have complied with it? He had already a fortnight before signed the bill of lading. He could not sign two bills of lading—he could not sign a second bill of lading having signed the first, because that would have exposed him to personal consequences, and perhaps have imperilled the interest of the owners.

Then the case of the plaintiffs is endeavoured to be supported by the evidence of two gentlemen who say they have been merchants in Bombay for six years, and they prove what they call a custom. Now, it is worth while looking at the terms in which they state it. "We say that, according to the usage and custom of merchants in Bombay, such mates' receipts represent the property in the goods therein specified, and are always negotiable in the Bombay market, and are sold and pledged and pass the property in such goods, in the same manner as bills of lading." But that must be read with the proper understanding of the custom. They represent what? That the holder of the note is entitled to the goods in question—not that the holder of the note, but that the person in whose favour the note is made, is entitled to the possession of the goods in question; and it is possible that some such pernicious and loose habit might prevail in the market at Bombay. But is that a custom I can adopt? Is it a local custom you can fix upon a captain from Stepney who saw Bombay for the first time in his life in 1870? That may be a custom between the parties concerned; but even taking it in the terms they express here, there is not a word about endorsing the mate's receipt, nor any suggestion that the indorsement, if it is of any use at all, does not create a new title of which title notice must be given. They go on to what is clear—"And that captains or masters of ships are bound to have the mate's receipts returned to them before they sign any bill or bills of lading for the goods mentioned in such mate's receipts." Why should I adopt that? It cannot be true. Suppose a mate's note to be lost, are the goods the captain's, so that he cannot be called upon

to sign a bill of lading? If the captain satisfies himself with his own hands and his own eyes that the goods are on board, then the mate's receipts become to him a matter of perfect indifference, if he can only satisfy himself whose goods they are. He is told and he knows they are the goods of Harbord & Co., therefore he signs the bill of lading. The evidence states—"It is the general practice in Bombay of such of the European firms there as employ brokers to buy goods in the name of their brokers, but to ship the same in the firm's name, the brokers meanwhile retaining the mate's receipts as their security, and by way of lien on the goods so shipped by them." The custom that the gentlemen talk about cannot override the plain well established law which is that to assert a lien you must have possession.—"And that in the event of the captains or masters signing any bill or bills of lading for such goods without the production and delivery to them of the mate's receipts, such captains or masters are bound on production of such mate's receipts to sign a fresh set of bills of lading, and to deliver the same to the person producing such mate's receipts, and that the goods mentioned in such mate's receipts ought to be delivered to the persons obtaining such last-mentioned bill of lading." It is purely nonsense, which Mr. Eddis did not by any means reply to. But this is what the witness says is a local custom which is to affect the shipowner at Liverpool, and the captain at Stepney, and the Comptoir at Paris, who take these bills of lading as a good security for the money they advanced. If these gentlemen have persuaded themselves there is such a custom, I cannot pay the slightest attention to what is alleged. It is a custom against common sense, because, what might happen in this case? What, indeed, is rather suggested, although I paid no attention to the suggestion, but I consider it for the purpose of trying this case. If this were the law, what is to prevent a fraudulent shipper transferring the notes after he had got the bill of lading; and I have no evidence here that the endorsement was not made after the bill of lading was signed. Frauds to any extent might be com-

mitted. The only protection against this is, that in the interval between signing the mate's receipts, and the period when the bill of lading is asked for, there shall be some notice given to the captain to make him hold his hand before he signs the bill of lading. If that had been done in this case, there would have been no such difficulty as has arisen here. The want of any such notice exposes the captain, and the owners, and the whole commercial world to any fraud that dishonest people might think fit to practise, and it is to guard against such frauds that the holder of the bills requires notice of any assignment of an equitable interest, which in all cases is required, I think, upon the evidence, I must adopt what Captain Bland says. As to the evidence on the part of the plaintiffs, I do not say that I cannot receive it, but I receive it with great misgivings, because there is nothing easier than for the solicitor to draw an affidavit which he thinks—I am not imputing to him any misconduct—best suits the case, and then to have that interpreted into Hindustanee or any other language, and take it to the man who is to swear to it—and amongst others, there is the attorney's clerk, a native, as I understand, who, without saying in his evidence that he ever had any personal knowledge of Captain Bland, says he was the man that he saw. I have disposed of that; because I say that if he had a knowledge of him, and he had known him, and had made the demand upon him, it was then too late for Captain Bland in discharge of his plain and proper duty to have done it, having taken Harbord & Co.'s cotton on board his vessel, giving them a receipt for it; he did not, as he says, sign the bill of lading without seeing the receipt, and if he had signed it without seeing the receipt at the instance of Hathesing, I think he would have been perfectly justified, and that nobody would have had any right to complain. Well, if that be so, and that is the law and conclusion to be drawn from the facts, what case is there as far as the *Comptoir d'Escompte* is concerned? In the most ordinary course of trade, without notice, I can see nothing which would at all affect the validity of the security in their hands.

But the owners are sought to be made liable upon the authority of *Schuster v. McKellar* (*ubi supra*). *Schuster v. McKellar* (*ubi supra*) does not furnish the slightest foundation for any such contention. In *Schuster v. McKellar* (*ubi supra*) the owners had given directions to the captain to do what he did in storing the goods at Calcutta, and it was by his unjust interference that he was held liable. The question was put by the jury, and it was found by the jury against the owners, and the judges were of opinion that that was properly so found, and they saw no reason to disturb it, it being a question of fact, and the law applicable to it being the result of the facts. But it has no kind of application to the present case, and so far from being any authority for it, in that case the only question considered was, whether Schuster who had shipped the goods was the real owner of the goods. He had bought them and paid for them, and warehoused them, and he agreed to sell them again to one Coles & Co.—I forget the exact name. Then, having sent the goods on board the particular ship, and having taken a mate's receipt which was an acknowledgment that the goods were his, and that the shipper held them for him, he is afterwards induced to part with the receipt for a short time. Then he gets them back, but Coles & Co. persuade the captain to sign the bill of lading. He had no more right than I have, or anybody else has, either with regard to the bill of lading or any other transaction, to assign or give away another man's property. But in all the cases that Mr. Eddis referred to, the validity of the mate's receipts were only in question, because they were title-deeds held by the owner of the goods. Here the plaintiffs never were the owners of the goods in the true sense—they were not their goods—they were not cotton merchants, but they were cotton brokers. They had bought for a particular price, that which they thought belonged to other people, which they thought was the right price, and they thought they had a right to retain these goods until they were paid their purchase-money; but they had parted with them.

Now I observed that the time when

Harbord & Co.'s transaction took place was of most vital importance. The plaintiffs have brought their case into Court without saying when that took place, and that it might take place afterwards is perfectly clear, and thereby a very gross fraud might be committed if I yielded to the claim that the plaintiffs have made. In my opinion there is no ground whatever upon which the suit can be sustained against the Comptoir d'Escompte—the Comptoir d'Escompte or the owners of the ship. The other parties who appear are merely ornamental parties. Zeden, the ship's agent, of course has nothing to do with it. He is made a party, but there can be no decree made against him, and none is asked against him. The same may be said of the assignee of Harbord, who became bankrupt in this country. Why they were made parties I do not know. The plaintiffs chose to make them parties, and ask no decree against them, and they are entitled to none. Therefore I must dismiss the bill with costs against the defendants whom I have mentioned, and they must also pay the costs of the other parties.

Solicitors—Mr. E. M. Hore, for the plaintiffs; Messrs. Lyne & Holman, for the Comptoir d'Escompte de Paris; Messrs. Lowless, Nelson & Jones, and Messrs. Phelps & Sidgwick, for the other defendants.

BACON, V.C. }
1873. }
Dec. 13. }

LAING v. ZEDEN.

Stakeholder — Interpleader — Parties — Costs.

A suit was filed against stakeholders; to this the persons entitled were not made parties, but an offer to make an arrangement to protect the goods, pendente lite, was made them. They, nevertheless, sued the stakeholders at law. They were made parties to the suit by amendment on an order made before the action was commenced. The stakeholders sued to restrain the action, not making the plaintiffs in the

first suit parties to their suit. The first bill was dismissed. The plaintiffs in the second suit were allowed their costs out of the fund.

The suit of *Hathesing v. Laing*, ante, p. 233, was instituted by the holders of mate's receipts for certain cotton shipped on board the steamship *Alabama*, owned by Laing and Gourley, the plaintiffs in this suit. They claimed, as holders of these receipts, to be entitled to the cotton. On the 17th of September, 1870, an interim injunction was granted in that suit restraining the shipowners and their agents from parting with the cotton till the hearing. The Comptoir d'Escompte de Paris, the holders of the bills of lading of the cotton, were not made parties to the suit of *Hathesing v. Laing*, as originally framed; but on the 11th of October, 1870, the solicitor for the plaintiffs in that suit wrote them a letter, of which the following was a part—

"I shall be glad to hear if you claim the cotton, because if you do, I am only desirous of considering the views of others claiming as well as my clients; and I shall be glad to enter into any arrangement, without prejudice to my clients, as to the sale of the cotton, if it should be considered desirable, and deposit of the money, until the decision of the Court as to who is or are the parties entitled to the same. I shall be glad to hear from you without delay, for if you claim the cotton, it would be better to make you parties to the suit."

The Comptoir, notwithstanding this letter, on the 29th of October commenced an action against the present plaintiffs, the shipowners, on the bills of lading. This suit was instituted to restrain the action at law. Zeden, the ship's agent, was made party, but the plaintiffs in the suit of *Hathesing v. Laing* were not made parties.

The Comptoir were made parties to the suit of *Hathesing v. Laing* by amendment dated the 4th of November, 1870, on an order obtained on the 11th of October, 1870. An injunction was granted in the present suit, and *Hathesing v. Laing* having been dismissed, this suit

came on for hearing on the question of costs.

Mr. A. E. Miller and Mr. Edward Beaumont, for the plaintiff, asked for their costs from the defendants, the Comptoir, whose conduct in bringing the action had been oppressive, and rendered the bill necessary; in such a case they, the plaintiffs, were entitled to indemnity from the Comptoir—

Nelson v. Barter, 2 Hem. & M. 334; s. c. 33 Law J. Rep. (N.S.) Chanc. 705.

Mr. Buckley, for Zeden, said he was an unnecessary party, and asked for costs.

Mr. Kay and Mr. B. B. Rogers, for the Comptoir, said, if the plaintiffs were entitled to costs, those costs should be paid by the plaintiffs in the other suit, who, if this was in the nature of an interpleader suit, ought to have been made parties. This was not a case for interpleader, as they had a title paramount. They asked for their costs from the plaintiffs, who, perhaps, might have them from the plaintiffs in the other suit on their undertaking as to damages.

BACON, V.C., said—I can do nothing in *Hathesing v. Laing* now, because the decree is made, and this subject was not mentioned when that was argued. I could not recall my decree, even if *Mr. Eddis* (counsel for the plaintiffs in that suit) were present. I have not heard a word or reason why the action was brought.

[Some discussion took place as to the dates and other facts.] His Honour proceeded, addressing *Mr. Kay*. I do not think, particularly after that intimation contained in the letter which *Mr. Miller* read to me, that you ought to have put them to any such trouble, because there was a suit properly constituted, in which every question could have been decided. I think, therefore, the plaintiffs must have their costs out of the fund.

Solicitors—Messrs. Lowless, Nelson & Jones, for plaintiffs; Messrs. Lyne & Holman, for defendants.

LORDS JUSTICES.

1873.

May 3, 5,
26, 27.

June 11.

MOXON v. PAYNE.

Fraud—Undue Influence—Confidential Relationship—Manager of Business—Gifts and Bargains—Agreement for Settlement of Questions—Condonation of Fraud—Evidence in support of Allegations of Fraud.

There can be no confirmation of a fraudulent gift or bargain obtained through undue influence by a donee or bargainees standing in a confidential relationship towards the donor or bargainor unless there be full knowledge on the part of the latter of all the facts and the rights arising out of them, and an absolute release from the undue influence by means of which the fraud was practised.

M., a young man, interested in a certain business, under the advice of his family solicitor, entered into an arrangement relating to the business with *P.*, who stood in a fiduciary position towards him, and at the same time unknown to his solicitor was induced by the influence of *P.* to enter into other agreements completely nullifying the effect of such arrangement. It was held that *P.* could not upon abandoning the fraudulent agreements set up the arrangement.

A bill alleged that the defendant had formed the design of possessing himself of the plaintiffs' property, and in pursuance of this design had perpetrated a series of frauds; there was no evidence to sustain this allegation to the full extent of it, but there was substantial proof of fraud in respect of several transactions:—Held, that the plaintiffs were entitled to relief.

This was an appeal from a decision of *Malins, V.C.*

In the year 1858 *Mr. Edward Moxon*, the well-known publisher, died having by his will provided that his business should be carried on for the benefit of his family. The testator, by his said will, authorised his trustees to carry on the business by themselves or deputies until after his sons, *Charles and Arthur*, should attain twenty-four, and his widow was to be at liberty to carry on the business during her widowhood notwithstanding both sons might die under twenty-four, or neglect or refuso

to purchase the business. The widow was to have the conduct of the business, and either of the sons upon attaining twenty-four was to be at liberty to purchase the business at a valuation, the amount thereof to be secured by a bond, and to become a part of the testator's residuary estate. During the life of his wife part of the profits of the said business was also to belong to the testator's residuary estate. The testator left his widow, his two sons and five daughters surviving him. Down to the year 1863 the business was managed for the widow by trustees under trusts for the purposes of paying creditors and providing an income for the widow and her family. Down to 1863 the business was a fairly profitable one. The year 1863 resulted in a loss of a considerable amount. The defendant, Payne, had been engaged as a clerk by the testator in 1858, at a salary of 80*l.* a year. Afterwards his salary was increased to 100*l.* He was enabled by certain acts done by him in relation to the private affairs of the family to earn the gratitude and confidence of the widow. In 1863 it was agreed by Mrs. Moxon and Payne that the management of the business should be withdrawn from the trustees and transferred to Payne. This arrangement was carried out by a deed dated the 11th of June, 1864, whereby Mrs. Moxon appointed Payne manager of the business as from the 1st of January, 1864, until Arthur Moxon should purchase the business, at a salary of 400*l.* per annum, and Payne was thereby authorised to sign cheques, &c., in the name of Moxon & Co., and in all other respects to act in the management of the business as if it were his own. And it was thereby stipulated that as soon as might be after Arthur Moxon should have attained the age of twenty-one, endeavours should be made to effect an arrangement with him for the admission of Payne as a partner in the business for the term of twenty-one years from the time when Arthur Moxon should purchase the business under the provisions of the testator's will, on the terms that Payne should be entitled to one equal half part of the net profits, and should not contribute more than 1,500*l.* to the partnership capital.

In 1865 (which was a prosperous year

for the business) a deed was executed by Mrs. Moxon and Payne agreeing that they should be joint partners in the business from January, 1864, during their joint lives or until Arthur Moxon should undertake the management of the business, Payne bringing in 1,500*l.* as his share of capital, and that as soon as Arthur Moxon should attain twenty-one endeavours should be made to make an arrangement with him for the carrying on the business by him (Payne) and Mrs. Moxon, in partnership for the term of fifty years from January, 1870, on the like terms as were therein contained, and it was thereby provided that, if for any reason, except Payne's death, no arrangement should be made for the business being carried on by Payne in partnership with Mrs. Moxon and Arthur Moxon or with Arthur Moxon alone on the terms therein mentioned, Mrs. Moxon should pay to Payne a sum of 5,000*l.* by way of damages. The 1,500*l.* to be brought in by Payne as above-mentioned was stated to be made up in part of 800*l.* alleged to be then due to him from the business, but which the Lords Justices, upon the evidence in this case, held was not in fact due. On the 26th of May, 1868, Arthur Moxon attained twenty-one, and on the 16th of September, 1868, a deed was executed between Mrs. Moxon, Payne and Arthur Moxon, by which Payne purported to sell to Arthur Moxon three-fourths of one-half of the business, and Mrs. Moxon and Arthur Moxon jointly covenanted to pay to Payne 11,000*l.* with interest at 5*l.* per cent. The deed recited that an account and valuation had been taken of the business, but such valuation was now held by the Lords Justices upon the evidence to have been altogether fallacious. The deed was prepared by Payne's solicitor, and Mrs. Moxon and Arthur Moxon had no independent advice concerning it. By another deed, dated April, 1869, Payne sold and conveyed all his share and interest in the business to Mrs. Moxon and Arthur Moxon for 11,000*l.*, which they covenanted to pay, and they mortgaged their copyrights and a large number of books to secure the amount. After this Payne continued to attend at the office and to superintend and act in the management of the business as before, and the Moxons

were entirely under his influence and dominion in all matters connected with the business. Besides the 11,000*l.* secured as above-mentioned, Payne claimed considerable specific portions of the property of the firm as belonging to him in return for special services. In 1871 the business proved to be insolvent, and it became necessary to make some arrangement with the creditors. Under these circumstances an agreement under seal, dated the 2nd of June, 1871, was executed by Mrs. Moxon, Arthur Moxon, Payne and Mrs. Payne (who had an interest in some of the copyrights) and Messrs. Ward, Lock & Tyler, the creditors, and thereby all the stock-in-trade, copyrights, &c., were (subject to certain claims of Messrs. Cowan) assigned to Ward, Lock & Tyler, for the purpose of an arrangement for carrying on the business. The eleventh clause of the agreement provided that Payne should retain certain royalties on some of the copyrights and by the thirteenth clause it was provided that, "As to the debt of 10,000*l.* for which Messrs. Moxon became liable to Mr. Payne, and which Messrs. Cowan hold as security, it is only to rank for a dividend until Messrs. Cowan's debt is satisfied, and as between Messrs. Moxon & Co. and Mr. Payne it is agreed that such a sum has been ascertained upon an incorrect basis and upon a mistake of facts, and the said Moxon & Co. and Mr. Payne agree (subject to Messrs. Cowan's claims and rights) to readjust the above amount, but Mr. Payne is not to make any claims against Messrs. Moxon in respect of the said 10,000*l.* until all the debts of the creditors, set out in the first schedule, are paid in full." The agreement also provided for referring to arbitration any matters in dispute between Mrs. Moxon and Arthur Moxon and Payne.

Previously to this time Mr. Allen had acted as the solicitor both of the Moxons and of Payne, but he declined to act any further for Payne, and acted in the matter of this agreement for Mrs. Moxon and Arthur Moxon only. The thirteenth provision set out above was inserted in the agreement by Mr. Allen contrary to the wishes of Mrs. Moxon and her son, and on the same 2nd of June, 1871, Arthur Moxon, at Payne's instance, executed two

other deeds, prepared by other solicitors, by which completely different arrangements were made as to the business and copyrights.

The bill in this suit was filed by Mrs. Moxon and Arthur Moxon against Payne and others for the purpose of setting aside the above-mentioned deeds, for a declaration that Payne was not entitled to any royalties on the copyrights or any interest in the business, and for accounts against him. The bill alleged (par. 10) that, shortly after the death of Edward Moxon, Payne had "formed the design of raising himself at the expense of the plaintiff, Emma Moxon, and her children, and possessing himself of her property, and in pursuance of this design he contrived and perpetrated between the years 1863 and 1871 a series of frauds" the details of which were therein stated. The bill then stated the several deeds and the circumstances under which they had been executed, and alleged that Payne had obtained unbounded influence over Mrs. Moxon.

The Vice-Chancellor considered that all the transactions prior to the deed of the 2nd of June, 1871, were vitiated by undue influence and miscalculation as to the value of the property. But he thought that all these transactions had been rectified and finally settled by the deed of the 2nd of June, 1871, in respect of which the plaintiffs had had the assistance of an independent solicitor, and he dismissed the bill with costs. From this decision the plaintiffs appealed.

Mr. John Pearson and *Mr. Daniel Jones* were for the plaintiffs, in support of the appeal.

Mr. Locock Webb and *Mr. Byrne*, for Payne.

Mr. Cotton and *Mr. Leeson*, for others of the Moxon family.

Mr. Glasse, *Mr. Higgins*, *Mr. Speed* and *Mr. Hadley*, for other defendants.

LORD JUSTICE JAMES stated the facts of the case at considerable length. Adverting to the deed of the 11th of June, 1864, he said—There is one clause in the deed which must not be passed without notice and reprehension. Arthur Moxon was at this time a youth of seventeen, who was

to be, and was in fact, brought up in the business under Mr. Payne, and it is difficult to conceive anything more improper than that the mother should be induced to bind herself to get her son the moment he attained twenty-one to make arrangements for giving Mr. Payne one-half of the profits of the business, which he, the son, was at twenty-four to purchase under the terms of the will. When it is borne in mind that under the will Arthur would only get half the profits, and that the other half was to be paid to the trustees of the will on the trusts thereof, the extravagance of the arrangements to which it was intended that Arthur should bind himself, become quite startling. The clause of course had no legal validity, and there apparently could have been but one object for its insertion, that is to say, that Mrs. Moxon should consider it an obligation binding in honour and good conscience, and that the son should have duly instilled into his mind the conviction that he ought, when he attained his age of legal competence, to fulfil that honourable obligation. It may well be that Mr. Payne was a person of ability, worth securing at a high price, but when the deed was made he was, so far as the management of the business was concerned, an untried man, a mere clerk at 100*l.* per annum. [His Lordship, after stating in detail the subsequent dealings and circumstances, proceeded as follows]—There really can be no manner of doubt that the deeds (subsequent to the first deed), arrangements, bargains, gifts and transactions so made and entered into were fraudulent and void. A Court of Equity would be abdicating its highest functions and would be unworthy of its name if it permitted such things to be done with impunity, and such profits and benefits to be quietly enjoyed. And up to this point we have the full concurrence of the Vice-Chancellor. But the Vice-Chancellor was of opinion that the plaintiff had lost all right to relief by what afterwards occurred. It is therefore necessary to consider what it was that so occurred. The dream of prosperity so indulged in at the outset was in a very few months rudely dispelled. The business which was supposed to have had surplus assets to the extent

of 30,000*l.* found itself in inextricable difficulties (the management be it noted being still in the hands of Mr. Payne), judgment was obtained in an action in which Payne also was a defendant, an execution was actually put in upon the business premises, and which, unless some arrangement were made, must have been followed in a few days by bankruptcy, in which case no doubt the judgment would have been enforced against the goods of the defendant, Payne. In this emergency it became necessary to make arrangements with the creditors in order to avert the absolute ruin which would have ensued on a bankruptcy. [His Lordship then stated the effect of the first deed of the 2nd of June, 1871.]

The Vice-Chancellor was of opinion that this was an answer to the plaintiffs' case. He thought that the solicitor knew or ought to have known all the facts of the case, and the agreement to refer to arbitration was a final settlement and compromise of all questions between them. It is difficult to conceive how this could, under any circumstances, have been sufficient. Frauds or impositions of the kind practised in this case cannot be condoned. The right to the property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts and absolute release from the undue influence by means of which the frauds were practised. To make a confirmation or compromise of any value in this Court the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection. In this case the solicitor was really acting almost officiously; he put in the protecting clause *ex mero motu suo*, not only without any instructions from, but actually against, the will of his clients, who continued to maintain their infatuated confidence in the defendant Payne. The agreement itself is of such a nature as to require the very strongest evidence of knowledge and freedom of will and deliberate purpose to sustain it in this Court. It is shortly this: a man fraudulently appropriates another man's property. He sells it to him for a fraudulent price. He

then agrees that there was a mistake as to the price, and that the real value of it should be ascertained and the property taken at that ascertained price, and then says to a Court of Equity, "Now I can hold fast what I so got, giving up the benefit of the second fraud in the sale. I have had my first fraud in the acquisition of the property condoned, and my right confirmed and established, so that you cannot deprive me of it." But in truth it does not stand even there. The plaintiffs in fact never got the benefit of the arrangement which the solicitor, Mr. Allen, had thought he had acquired for them. For while the agreement was signed apparently as the actual agreement between the parties, this transaction took place. Arthur Moxon was induced to think that this interference of the solicitor was very officious and very unfair and unjust towards the defendant Payne, and unknown to his solicitor he signed two other documents bearing date the same 2nd of June, 1871, in fact nullifying the whole agreement as to referring the questions to arbitration.

No justification was attempted of these documents. They cannot, of course, stand of themselves, but the defendant Payne, who obtained them, is absolutely precluded from setting up the agreement nullified by them, as being of any validity.

The Vice-Chancellor was of opinion that the defendant Payne had before suit given up all right under these deeds, and had submitted to be bound by the agreement, and was therefore entitled to stand in this Court as if no such deed had been executed. We are unable to concur with the Vice-Chancellor as to the fact that he had such right. The only foundation for it was an offer of arbitration made without prejudice. It is against good faith and common honesty to use an offer made without prejudice, which does not result in an agreement. It should not have been put in evidence, and it is the bounden duty of every Court wholly to disregard such evidence. But if the fact were so it would be inconsistent. The defendant, Payne, could not by such an offer set up the agreement, nor purge himself of the ad-

ditional fraud which these documents prove.

In *Bridgman v. Green* (1), on this class of cases Lord Chief Justice Wilmot says, "In cases of forgery instructions under the hand of the person whose deed or will is supposed to be forged to the same effect as the deed or will, are very material. But in cases of undue influence and imposition they prove nothing. For the same power which produces the one produces the other, and therefore instead of removing such an imputation is rather an additional evidence of it." The same principle applies to instruments obtained apparently ratifying and confirming the transaction.

In this case the influence was so continuous that it is impossible to say that Arthur Moxon had the advice and assistance which he ought to have had. He was not in truth relying on or being advised by Mr. Allen against the defendant, Payne, but was relying on and being advised by the defendant, Payne, against Mr. Allen. The right of the plaintiffs is not, therefore, affected by the arrangement of the 2nd of June, 1871.

A great part of the argument which was addressed to us on behalf of the defendant, Payne, was that the case alleged against him by the bill was one of gross and premeditated fraud, and that unless the actual fraud as alleged was proved, the bill must fail. It was contended that the plaintiffs were bound to make out, and had failed to make out, the case alleged in the tenth paragraph of the bill.

It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in the suit on any different ground. But the obtaining of property or of any benefit by the undue and unconscientious abuse of influence or by imposition practised by a person in whom trust and confidence is placed upon the person so trusting and confiding, is and always has been treated as a fraud of the gravest character. And if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out, is,

(1) 2 Ves. sen. 627; s. c. Wilmot, 58.

whether it be made out or not, of no material consequence in such a suit. It is at most a rhetorical exaggeration which a person who commits the frauds has no right to complain of. If a man robs his fellow traveller, the allegation that he became the companion of his victim with a pre-conceived design to rob him by the way is wholly immaterial.

Much the same line of defence was taken in the case of *Huguenin v. Baseley* (2), and it may be worth while to quote what Lord Eldon said in that case—"I agree further that the relief must proceed upon what is alleged and proved by the persons complaining, that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented. . . . I have, therefore, looked through this bill with reference to the form of it, and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment. Also that many circumstances might have been brought forward on behalf of the defendants which I am bound not to look at. But taking the case as it stands, although there is in this bill much foul allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to shew that this deed cannot stand if the whole transaction taken together cannot stand."

The plaintiffs have in our judgment substantially proved the material allegations of fraud in respect of the several transactions by which the defendant Payne has appropriated their property, and they are entitled substantially to the relief which they have prayed.

The bill must be dismissed so far as it seeks to recover the shares of the copyright purchased for Mrs. Payne. But as to the rest of the case there must be a declaration that all the deeds, bargains and gifts made with or obtained by the defendant Payne since the deed of the 1st of June, 1864, are fraudulent and void; that he is entitled to the salary of 400l. a year under that deed up to the

day when Arthur Moxon attained the age of twenty-four. There must be accounts taken on that footing, and Payne must pay all the costs of this suit.

Solicitors—Messrs. Allen & Edwards, for plaintiffs; Messrs. Benham & Tindell, for Mr. Payne; Messrs. West & King, for the incumbents.

LORDS JUSTICES.

1873.

Nov. 8, 15, 22,

Dec. 6.

BEALL v. SMITH.

Practice—Next Friend—Suit on Behalf of Person of unsound Mind—Subsequent Inquisition in Lunacy—Further Proceedings void—Liability of Solicitors—Costs.

A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in the status of the plaintiff. If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, and is thus placed under the protection of the Crown, the suit should be continued only with the sanction of the Court in Lunacy.

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void and a contempt of the Court in Lunacy. A suit on behalf of a trader who had become deranged, for an account against his agent and manager, and the appointment of a receiver of his stock in trade, &c., was instituted by solicitors who had occasionally acted for the plaintiff, but were not his ordinary family solicitors. A receiver was appointed in the suit with the concurrence of the family solicitor, who consented upon the understanding that no further steps should be taken without notice to him. The suit was proceeded with without such notice. A decree directing accounts and inquiries was obtained, the accounts were taken, the chief clerk made his certificate, and an order on further consideration was obtained directing taxation and payment of the costs of suit, which were paid out of the plaintiff's

estate. Meanwhile, previously to the last mentioned order, the plaintiff was found a lunatic by inquisition, but no committee was appointed until after the said order. The committee with the sanction of the master in lunacy presented a petition for the purpose of setting aside as invalid the proceedings in the suit subsequent to the finding in lunacy :—Held, that all proceedings after the appointment of the receiver were unauthorized and improper, and all after the finding on the inquisition were irregular and void, and that the solicitors of the next friend were liable to refund the costs so paid out of the lunatic's estate under the orders so irregularly obtained and to pay the costs of the petition.

This was an appeal from an order of Vice-Chancellor Wickens. Richard Beall, the plaintiff in this suit, was a warehouseman. In July, 1871, he was found by the police wandering about in the streets in a deranged state of mind and was put under confinement by a magistrate's order. On the 15th of August, 1871, this suit was instituted on behalf of the said Richard Beall, a person of unsound mind, not so found by inquisition, by Samuel Morris, his next friend, against Charles Frederick Smith, who was the agent and manager of the plaintiff in his business of warehouseman, and it prayed an account of the dealings and transactions of the defendant, as such manager and agent, and for the appointment of a receiver and manager of the plaintiff's business, until he should have recovered or until a committee should have been appointed. Morris, the next friend, was a stranger to the lunatic and his family, and was in fact found for the purposes of the suit by the solicitors who filed the bill. It appeared that the next friend had been shortly before a bankrupt, and shortly afterwards declared himself to be insolvent. It also appeared that the solicitors who filed the bill were not the plaintiff's ordinary family solicitors, although they had acted for him on several occasions, and that they filed this bill without communication with any members of the plaintiff's family or with Messrs. Heather & Son, his family solicitors.

In September, 1871, an application in

the suit was made by summons in chambers for the appointment of a receiver. The chief clerk required that notice of the summons should be given to the plaintiff's family. He also took the Vice-Chancellor's personal directions on the matter, and the Vice-Chancellor with the assent of Mr. Heather, the solicitor representing the plaintiff's wife and family, made an order for the appointment of a receiver. Mr. Heather's consent to this order was given upon certain terms, as to the purport of which there was now a conflict of evidence. But it was stated by Mr. Heather, and the Lords Justices concurred in believing, that he had given his consent upon the understanding and condition, that no further steps should be taken in the suit without notice to him. The cause, however, was set down to be heard as a short cause without notice of this step being given to Mr. Heather or to any member of the plaintiff's family. It came on to be heard as a short cause on the 16th December, 1871, when a decree was made directing an account to be taken of the defendant's dealings and transactions; ordering that the appointment of the receiver and manager be confirmed; directing an inquiry what steps ought to be taken as to the surrender, sale or other disposition of the leasehold property of the plaintiff used for the purposes of his business, and the rents due in respect thereof and as to the sale of his stock in trade and other effects; and an inquiry what steps (if any) ought to be taken to ascertain the mental condition of the plaintiff, and whether any proceedings ought to be taken in lunacy for the protection of the plaintiff's person and estate and by whom.

Subsequently the plaintiff's stock in trade was sold by the receiver, and the proceeds thereof were paid into Court to the credit of the suit. The accounts directed by the decree were taken, and on the 8th of January, 1872, the chief clerk made his certificate. By the accounts it appeared that the balance of 57*l.* only was due from the defendant to the plaintiff. But the only evidence in verification of this account was the defendant's own affidavit.

On the 17th of February, 1872, a peti-

tion in lunacy in the matter of the plaintiff was presented by his wife and some other members of his family. At the hearing of that petition, Messrs. Merriman & Powell, the solicitors, who had filed the bill on the plaintiff's behalf, appeared as representing him and asked for a jury. The Lords Justices refused the demand for a jury after a special inquiry by a medical man into the plaintiff's state of mind, and on the 25th of March, 1872, the plaintiff was found a lunatic by inquisition. Messrs. Merriman & Powell had notice of this finding. But on the 29th of June, 1872, they brought on the suit to be heard on further consideration when an order was made for taxation (as between solicitor and client) and payment of the costs of the plaintiff and defendant out of the moneys in the receiver's hands, including in the plaintiff's costs, any costs, &c., of and incident to the proceedings in lunacy.

Amongst the items of account so paid were the following: to an accountant for investigating the books, 246*l.*; to plaintiff's costs of suit, 207*l.* 6*s.* 5*d.*; to defendant's costs of suit, 51*l.* 17*s.* 4*d.*; to the receiver's costs, 39*l.* 1*s.* 8*d.*; to the receiver's commission, 144*l.* 6*s.* 8*d.* The total amount was about 700*l.* By an order made in lunacy on the 29th of July, 1872, the finding of the plaintiff to be a lunatic was confirmed, and his eldest son was appointed to be committee of his estate. This appointment, however, was not formally perfected until the 19th of December, 1872, owing to the committee not having before completed his recognizances.

The committee afterwards by the direction of the master, presented a petition in the suit, praying for a declaration that the proceedings in the suit subsequent to the finding in lunacy might be set aside for irregularity, and that Messrs. Merriman & Powell might be ordered to make good to the plaintiff's estate the sums paid out of it by the receiver under the orders in the suit. The Vice-Chancellor upon hearing the petition said, that upon the finding in lunacy the plaintiff's advisers should have considered their self-constituted committee-ship at an end, and he made an order directing the

following inquiries to be made. First: An inquiry whether any sum had been allowed against the lunatic's estate either in the account of the receiver or the account of the defendant, beyond what ought to have been allowed with liberty to the committee to surcharge and falsify the accounts already taken in the suit; Second: An inquiry what sum (if any) was paid to the defendant for costs, beyond what ought to have been paid for costs as between party and party; Third: An inquiry what sum was received by Messrs. Merriman & Powell for costs of the lunacy proceedings in excess of what costs (if any) ought to have been allowed to them on that account, and further consideration of the petition was adjourned. From this order the committee appealed.

Mr. Bristowe and *Mr. Freeling* were for the appellant.—They contended that no proceedings whatever ought to have been taken in the suit after the presentation of the petition in lunacy, and that all the subsequent proceedings were irregular and invalid. Upon inquisition found all the property of the lunatic vested in the Crown, and the jurisdiction of the Court of Chancery to administer it ceased. They cited—

Light v. Light, 25 Beav. 248;
and referred to on appeal in

Re MacFarlane, 2 Jo. and Hem.
673; s. c. 31 Law J. Rep. (N.S.)
Chanc. 335.

Mr. Green and *Mr. Bradford*, for Messrs. Merriman & Powell.—There was no abatement of the suit upon inquisition. The authorities shewed that the suit abated only upon the appointment of the committee, and in this case that appointment was not completed till the 19th December, 1872, after the suit had been wound up. The plaintiff's advisers were therefore quite justified in all they had done and they had acted *bona fide*. The suit had been properly constituted in the first instance, and it was necessary to bring it to a conclusion.

They referred to

Mitford on Pleading (5th Ed.), p. 32,
citing *Ex parte Maria Lepine*;
Hartley v. Gilbert, 13 Sim. 596;
Wartnaby v. Wartnaby, Jac. 377;
Nelson v. Duncombe, 9 Beav. 211;

s. c. 15 Law J. Rep. (N.S.) Chanc. 296.

Mr. Lindley and Mr. Horton Smith, for the defendant Smith.—The defendant was not to blame. He had offered to account again if the petitioners wished it. He could not have stopped the suit, nor obtained an inquiry if the next friend was a proper one, nor seen whether the plaintiff's solicitors were acting properly. The suit was not defective until a committee was appointed. It might have gone on till then at least with the sanction of the master in lunacy—

Pemberton on Revivor and Supplement, p. 26.

Mr. Bristowe in reply referred to—

Elmer on Lunacy, p. 1;

Shelford on Lunacy, 546, 547, 549;

1 Collinson on Lunatics, 158.

LORD JUSTICE JAMES.—This is an application by the committee of a lunatic made with the sanction of the Master in Lunacy, praying in effect that certain proceedings and orders in a suit instituted in the name of the lunatic by a next friend may be declared to be improper and unauthorized and that the solicitors by whom they were conducted and obtained may indemnify the lunatic's estate from the loss occasioned thereby. The gentleman in question was before the institution of the suit undoubtedly a lunatic. He was, found in the month of July, 1871, by the police wandering about the streets, was taken before the magistrates, and was, after the requisite medical examination, placed by them in a lunatic asylum, where he still remains. At this time his business and stock in trade were under the control of the defendant Charles Frederick Smith, as the confidential manager and agent of the lunatic. Notice was given to the defendant on behalf of the lunatic's family of his incompetency, with a request that he would give them an account of his receipts and payments and of the stock on the premises. In consequence of this notice the defendant consulted his solicitors who applied to Mr. Merriman, of the firm of Merriman, Powell & Co., who had in some instances previously acted as attorneys for the lunatic, to take some steps to relieve Mr.

Smith from the embarrassing position in which he found himself. The result of this application was the filing of the bill in this suit. The next friend was in no way connected with the plaintiff, was an entire stranger to him and to his family, and was, in fact, found for the purposes of the suit by the solicitor himself. There is some conflict of evidence as to the pecuniary circumstances of the next friend who appears to have been shortly before a bankrupt, and to have shortly afterwards declared himself insolvent. It is not material, however, to ascertain how the fact was in that respect. It appears at all events that the suit was not his; that he was a mere nominee of the solicitor, who was a large creditor of his, and that he never had or pretended to have any voice or control as to the institution or prosecution of the suit, which was to all intents and purposes the suit of the solicitor. On the filing of the bill an application was made in the vacation to the Vice-Chancellor's chief clerk for a receiver. The chief clerk required that notice should be given to the family who attended by Mr. Heather their solicitor. The latter protested against the suit as unnecessary, but appears to have at last acquiesced in the appointment of a receiver. The chief clerk, however, thought it necessary, and very properly so, to take the Vice-Chancellor's personal direction on the subject, and the Vice-Chancellor under the peculiar circumstances of the case thought a receiver might be appointed on the terms assented to by the family solicitor. There is some contradictory evidence as to what those terms were, but I am quite satisfied that Mr. Heather's version is accurate, namely, that he among other things stipulated that nothing should be done without notice to him. Another summons was then taken out before the chief clerk for an order directing the sale of the stock in trade and other property of the lunatic. Of this summons notice was given to Mr. Heather, who opposed it except so far as it related to the stock. There is again here some conflict of testimony as to what the verbal decision of the chief clerk was. No order was however drawn up as to any part of the application. Following

upon this, and without any notice to Mr. Heather or to any person on behalf of the family, the cause was set down for hearing as a short cause, and a decree was made. [His Lordship stated shortly the effect of the decree.] Afterwards the suit went on its regular course and the stock was sold, inquiries were prosecuted in chambers, accounts professed to be taken, a certificate was made, and on that certificate the cause was set down for further consideration and an order made thereon. [His Lordship stated the effect of the order.] The balance in the receiver's hands was afterwards arrived at by, among other things, charging him with the sum which he had himself received on his settlement of the accounts with the defendant Smith, and by discharging himself by items which amounted to nearly 700*l.* out of a small estate of 2,886*l.* It should be observed that the defendant Smith had in fact settled the accounts with the receiver in September, 1871, and it is not suggested or pretended that there was any further or other taking of the accounts of the defendant Smith in the suit except his formal affidavit verifying the accounts shewing such balance.

It was after the appointment of the committee for the first time discovered by him and by his solicitor, that the estate of the lunatic had been dealt with as before stated, and with the assent of the Master in Lunacy, the petition now for adjudication was presented to the Vice-Chancellor. [His Lordship stated the order made on the petition and continued:] It is difficult to see how that order can be right. The committee cannot go in that suit to surcharge and falsify the accounts without making himself a party to it and adopting and ratifying the suit and proceedings, the very things which he is complaining of and which he certainly could not do without the sanction of the Court in Lunacy. His case is that the whole proceedings were improper, and after a certain stage irregular. Is it then the law of this Court that any solicitor may institute any suit, and take any proceedings he may think proper so as to bind the estate of a person of unsound mind, and that by virtue or under colour of

orders of the Court obtained by himself of his own authority, without any check whatever, he may employ and pay an accountant at any rate of remuneration, pay himself and others any amount of costs to take and settle the accounts between the lunatic and the lunatic's agent or other debtor? It would be very startling if this were so, and still more startling if this could be done after the lunatic had been placed under the proper protection provided by the law by a petition for an inquiry, by the inquiry and the finding. The law of the Court of Chancery undoubtedly is that in certain cases where there is a person of unsound mind not found so by inquisition and therefore incapable of invoking the protection of the Court, that protection may be in proper cases, and if and so far as may be necessary and proper, invoked on his behalf by any person as his next friend. But every person so constituting himself officiously the guardian committee and protector of a person of unsound mind does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of the proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceeding. He takes the risk moreover of having his proceedings wholly repudiated by the lunatic if he should recover his reason, just as the next friend of an infant runs the risk of having his proceedings wholly repudiated on the infant attaining his full age. It is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants whom it makes its wards. The Court of Chancery is not the curator either of the person or the estate of a person, *non compos mentis*, whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency that the Court of Chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property, than it can the management or disposition of the property of a person abroad or confined to his bed by

illness. The Court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself if of sound mind. If there be a trust property in which the person is beneficially interested, the Court may no doubt deal with it in such manner as it may deem just, and it will if necessary ascertain the nature and extent of his interest, and will authorize and in a proper case compel the trustees to deal with the lunatic's interest in the trust property for his benefit. But that arises from its inherent absolute jurisdiction over trusts and trust funds. So in a case of partnership it may make the necessary orders with respect to the partnership and its assets notwithstanding the incompetency of a partner, but that again is a consequence of its ordinary jurisdiction in partnership matters which is not ousted or paralyzed by such incompetency. And perhaps the more common case of its interference is where the incompetent person by his next friend seeks to set aside instruments or other gifts obtained by persons taking fraudulent advantage of his mental weakness. But I know of no authority and no principle for the Court of Chancery taking into its care the estates or other property of which such a person is the legal owner, or appointing a receiver of rents or debts legally due to him, or settling or dealing with his legal creditors or debtors. It is not surprising therefore that the Vice-Chancellor at the outset hesitated even as to making the first order appointing a receiver and manager of the business and stock. But the Vice-Chancellor did, after his attention had been called to the facts of the case, make such an order, which may perhaps be justified by considering the defendant Smith as a quasi-trustee of the property in his hands by reason of his fiduciary position. But when that order had been obtained every legitimate object of the suit had been effected, and it is impossible to suggest any benefit that could possibly have occurred to the lunatic from its further prosecution, much less from hurrying it on as was done. It was quite clear that if the lunatic recovered he could act for himself, it was also clear that if he did not within a few months recover, it

would be necessary to obtain for him the legitimate protection of the Court in Lunacy. If the order for a receiver and manager was really within the jurisdiction of the Court, of course that order itself would enable him to get in the trade debts, and realize the trading stock which was all that could be done. Let us see, however, what was proposed to be done by the decree. First: "To take an account of the dealings and transactions." How could such an account be taken in the absence of any person legally authorized or really competent to represent the lunatic? Supposing it had, instead of shewing a balance of 50*l.* due to the lunatic, shewn a balance of 500*l.* or 5,000*l.* due from him, could the Court have made an order on him to pay it? The Court, of course, has no means itself *ex officio* of taking such an account, it can only deal with the matter brought before it. The solicitor could not have taken on himself out of Court to settle such an account, and the form of taking accounts in Court, where the solicitor had the sole conduct of the proceedings, was merely and necessarily a sham to give colour to what had been done out of Court. In fact the account so far as it was capable of being taken at all was taken before the decree between the receiver and the agent, and the sole practical result of all the proceedings in the suit was an affidavit of the agent swearing to the correctness of his own account. This is all that can be shewn as the fruit of hundreds of pounds of expense. The lunatic had no interest whatever in having this account ratified and confirmed by the Court. No doubt the defendant Smith had an interest in getting his own account so ratified and confirmed if he could. In fact, the suit which was originally instituted to relieve Smith from the embarrassment he was in, was continued in order to give him a final settlement, release and discharge. But what possible justification can there be for spending a lunatic principal's money in the relief and release of his agent? Take the inquiry which next follows, viz.: "An inquiry what steps ought to be taken as to the surrender, sale or other disposition of the leasehold property of the

plaintiff." What could be more idle than that, the Court could do nothing upon it. It could not sell, it could not surrender, it could not dispose of anything, except so far as was necessarily incident to the duties of a receiver even if so far as that. The next inquiry, "What steps (if any) ought to be taken to ascertain the mental condition of the plaintiff, and whether any proceedings ought to be taken in lunacy for the protection of the plaintiff's person and estate, and by whom," is also a most singular one. The Court of Chancery has no jurisdiction to direct or interfere with proceedings in lunacy. Some precedent might possibly be found for such an inquiry, but that must have been a *non-compos* *cestui que trust*, and with a view to the application of a trust fund or other fund under the administration of the Court as the result of such an inquiry. Further, how could such an inquiry or the previous inquiry be pertinent to a suit against the defendant Smith, who when he had handed over the stock to the receiver had nothing further to do with the lunatic's estate or affairs, except to settle his own balance? It may be said that the Court made the order, but I repeat that as between a person *non compos mentis*, who could give no authority or instructions, and a solicitor professing to act in his interest and on his behalf, the orders of the Court obtained by the latter give him no protection. They are as between them really the solicitor's own orders. All the subsequent proceedings with their ruinous costs flowed out of this decree, which in my opinion was most unnecessarily, improperly and recklessly taken.

Besides these considerations there is still another grave question to be dealt with. The bill purports to be the bill of a person of unsound mind, not found so by inquisition, suing by his next friend. It is essential to any such suit, that the plaintiff should be of unsound mind, and that he should not have been found so by inquisition. What is the effect of that state of things ceasing to be? I am of opinion on principle, and there is no authority to the contrary, that the suit is absolutely paralyzed thereby. If the plaintiff becomes of sound mind, the next friend can have

no pretext for continuing his intervention. If he is found lunatic by inquisition so as to be under the control and protection of the Crown, and of the Court in Lunacy, there is equally no pretext for continuing the officious protection of a self-constituted guardian or committee, when there is a legitimate protection in a proper tribunal. We were referred to some decisions or dicta to the effect that the suit becomes abated by the appointment of a committee, and it was contended from this, that there was no abatement until such appointment. But there is no decision that the suit can go on in the interval between the inquisition and the appointment, and Vice-Chancellor Shadwell expressed a clear opinion that going on even after the commencement of proceedings in lunacy would be a fraud on the jurisdiction. It is not suggested that such a bill could be filed in the interval between the inquisition and the final appointment of a committee, or in the interval between the death of one committee and the appointment of another. The committee is only an officer of the Court; the Court itself being only the delegate of the Crown's prerogative. It is not because a committee has been appointed, but because the Crown, by its proper tribunal, has the lunatic and all his affairs under its exclusive care and protection, that the power of any person to commence or prosecute any proceedings for his protection is taken away. There is no inconvenience or injustice in this. Application can at all times be made to the Court for anything that may require or may be just to be done, and no doubt if any person who has interfered for the protection of a lunatic, can satisfy the Court that he has acted *bona fide* and for the benefit of the lunatic, the Court will reimburse him as it would recompense any other person who had rendered services. I am satisfied therefore that every proceeding and every order taken or made in the suit after the inquisition, was irregular and void as much so as if it had been taken or made after the lunatic's death. Moreover, any such attempt to deal with the lunatic's property after the inquisition amounts to a gross contempt of the Court in lunacy.

It was strongly urged upon us that the proceedings of the solicitors were *bona fide*. I cannot accede to this view. They might have been *bona fide* in this sense—that they thought they might legally take them, but it is in my judgment impossible that they could have *bona fide* thought that the proceedings were prosecuted for the benefit of the lunatic, which was the only thing they had a right to regard. I am satisfied on the contrary that they were taken for their own purposes. They had resolved if possible to secure to themselves the administration and winding up of the lunatic's estate to the exclusion of his family. When the family's solicitor objected to an order sought from the Chief Clerk, they without any necessity or urgency set down the cause for hearing as a short cause, with the object of attaining the apparent sanction of the Court to their interference with the lunatic's property and affairs in a way for which there is no legal authority. When the inquisition was held and the plaintiff had been found a lunatic, a proceeding and finding which everybody must have known to have been inevitable, they proceeded with the inquiries, and to set down the cause on further consideration, obviously running a race with the proceedings in lunacy, in the hope and for the purposes of getting the matter finally disposed of in Chancery before the appointment of a committee, and so as to anticipate as they hoped any interference of the committee or any interposition of the proper jurisdiction in lunacy. They have failed in this and they must bear the consequences. In my judgment the committee—that is to say the lunatic by his committee—is entitled as of right to a declaration, that all proceedings after the appointment of a receiver were unauthorized and improper, and that all the proceedings after the finding of the inquisition were irregular and void. The solicitors are responsible for this, and the lunatic's estate must be made good by them. The proper order now to make, will be to direct the money in Court in the suit to be transferred to the credit of the lunacy; and to order the solicitors to pay into Court in the lunacy the sums paid for costs of themselves, to the defen-

dant's solicitor and to the accountant, deducting the costs of the suit up to the appointment of the receiver. The taxing master will have no difficulty in telling us the amounts of those costs before the order is drawn up. I say nothing about the receiver's poundage and costs, because as the estate takes the money in Court, it is perhaps not right to disturb the retention by him of his reasonable poundage in and for realising the stock and debts. As between the estate and the defendant Smith, the committee will be at liberty to take such proceedings as he may be advised for obtaining any better or other account from him. It is I trust probable that there will be no necessity for acting on this.

This being a case of improper proceedings on the part of solicitors of the Court, they must pay all the costs of the appeal, and as between solicitor and client, as in my judgment the lunatic is entitled to have his estate fully reimbursed and made good.

Solicitors—Messrs. Heather & Son, for the committee; Messrs. Merriman, Powell & Co., for the next friend; Messrs. Sole, Turner & Co., for the defendant Smith.

JESSEL, M.R. }
 1873. } FOTHERGILL v. ROWLAND.
 Nov. 4. }

Specific Performance—Injunction—Sale of Chattel—Special Article—Marketable Commodity.

The defendant entered into an agreement with the plaintiff, of which the material clause was in the following words—"Sold R. F., Esq., M.P., the whole of the get of the No. 3 coal out of the Newbridge Colliery property for five years, the quantity not to be less than at present delivered to his Taff Vale works, unless the coal should fail, at 6s. a ton; payment as usual." He afterwards sold some of the coal to other persons, and contracted to sell the colliery itself. On demurrer to a bill seeking to restrain him,—Held, that the agreement was, in effect, for the sale of a chattel, and that not one of specific value, but a marketable com-

modity; that the plaintiff's remedy was at law for damages, and not in equity for specific performance; and that being so, the Court would not extend its jurisdiction in granting an injunction to restrain a breach of a portion of an agreement when it could not enforce the whole.

This was a demurrer. The bill was filed by the owners of some iron works against the owner of some coal mines, who had agreed to sell them all the coal to be got from certain seams within five years at a certain price. Coal having risen, the coal owner had sold coal from the specified seams to other persons, and had contracted to sell the mines themselves to a Mr. Mayer. Mr. Mayer had no notice of the plaintiffs' agreement, but, immediately after signing the contract for purchase of the mines, he had agreed to resell them to three other persons, who were aware of all the circumstances. Mayer and these purchasers were parties to the bill, which prayed, amongst other things, for an injunction to restrain the coal owner from selling coal from the seams in question otherwise than in accordance with his agreement with the plaintiffs, and for an injunction to restrain him from selling the mines otherwise than subject to the plaintiffs' rights under the agreement.

The agreement was contained in a document in the following terms, the signature, Rich. Fothergill, being made by the first-named plaintiff on behalf of himself and his partner, and the signature, Richd. Rowland, being that of the coal owner.

"Aberdare Ironworks, Aberdare, Glamorganshire,
"Jany. 4th, 1872.

"Richard Rowland, Esqre.

"Dear Sir,—I have been excessively occupied since our interview last month, and have not found time to sit down and write out in detail that which we mutually agreed upon, beyond the simple sale of coal described in the pencil memorandum we drew up together in the following terms—

"6 December, 1871.

"Sold R. F., Esq., M.P., the whole of the get of the No. 3 coal out of the New-bridge Colliery property for five years,

the quantity not to be less than at present delivered to his Taff Vale works, unless the coal should fail, at 6s. per ton; payment as usual.'

"To which I desire now to add that we arranged, when so required, that you would deliver the said coal into our waggons on a siding of the Taff Vale railway, at such a reduction in price as you could obtain off the cost in comparison with the delivery into the Taff Vale works, provided that the Taff Vale Railway Company would provide such siding (which you had not been able to obtain), and to which you would forthwith make a road; in reference to which I am glad to inform you that I have seen Mr. Fisher and obtained his consent to his company providing the needful siding—a most valuable concession—in prospect of the possibly very large quantities of coal you talked of flooding me with. I also promised to lend you 1,000*l.* to aid you in opening and developing the said colliery, at the rate of five per cent. per annum interest, to be taken in such proportions monthly, as you require, in exchange for your acceptances, for six months' date; all which please confirm, and I remain

"Yours faithfully,

"RICH. FOTHERGILL."

"Aberdare, 6th Jany., 1872.

"It is understood between us that, besides the No. 3 coal named herein, that the Forest Vach vein is included in the foregoing contract; and further, that any other vein of coal worked shall be included, at the option of Mr. Fothergill or representatives.

"RICHARD FOTHERGILL.

"RICHARD ROWLAND."

And across the first part of the above document there was written,

"Richard Fothergill, Esq., M.P.

"Dear Sir,—I confirm and agree to the within, and

"I am, dear Sir,

"Yours resp'y.,

"RICHD. ROWLAND."

The plaintiffs had procured the construction of the siding mentioned in the agreement, and had advanced 1,000*l.* to Mr. Rowland, which sum, however, had been subsequently repaid him.

The 25th paragraph of the bill was in the following words—

"Coal of the description of that yielded at the said colliery is now much advanced in price as compared with the price thereof at the time of the making of the said contract; and if the said Richard Rowland were free to sell the produce of his said colliery in the market, he could obtain 13s. or 14s. a ton for it, instead of 6s. per ton, to which he is entitled under the said contract with the said Richard Fothergill and Ernest Thomas Hankey; and, on the other hand, the said contract is of great value to the said Richard Fothergill and Ernest Thomas Hankey."

All the defendants demurred to the bill.

Sir R. Baggallay and *Mr. Crossley*, for the defendants, the ultimate purchasers.—We do not rely on the fact that we are purchasers, but say that this bill could not be sustained against Rowland alone. The contract is for the sale of a chattel which is not alleged to be of any special value, and therefore specific performance is out of the question—

Pollard v. Clayton, 1 Kay & J. 462 (1854), settles the law on this point.

[THE MASTER OF THE ROLLS.—You may confine yourself to this argument—Assuming there can be no specific performance, can there be an injunction? You need not consider whether

Taylor v. Neville, cited in 3 Atk. 383, 4, is now the law of the Court.]

Sir R. Baggallay.—The leading case, then, on injunction without specific performance, is

Lumley v. Wagner, 1 De Gex, M. & G. 604; s. c. 5 De Gex & S. 485; s. c. 21 Law. J. Rep. (N.S.) Chanc. 898 (1852),

where, besides the existence of an express negative term in the agreement, there was no possible means of ascertaining the damages; while here, if the plaintiff has a right to 1,000 tons of coal at 6s. a ton, and he has to pay 10s. for them, the amount of damages is seen at once to be 4,000 shillings.

Mr. Fischer and *Mr. Freeling*, for Mayer.—Lord Cottenham, in

Heathcote v. The North Staffordshire Railway Company, 2 Mac. & G. 100; s. c. 20 Law J. Rep. (N.S.) Chanc. 82 (1850),

laid down that the Court would not interfere on a contract for the sale of a chattel to prevent the contractor from doing something which would prevent him from carrying out the sale. And

De Mattos v. Gibson, 4 De Gex & J. 276; s. c. 28 Law J. Rep. (N.S.) Chanc. 165 (1859),

which was a case of specific performance of a contract for the hire of a ship, was put on the ground of the ship being of special value to the charterer.

Mr. Roxburgh and *Mr. Gazdar*, for Rowland.

Mr. Fry and *Mr. A. G. Marten*, for the plaintiffs.—If we cannot attach the property in this suit we shall practically be without remedy, for the defendant Rowland may go, as we believe, indeed, he has gone, out of the jurisdiction, and we shall therefore be unable to recover damages from him. In

Holroyd v. Marshall, 10 H. L. Cas. 209; s. c. 33 Law J. Rep. (N.S.) Chanc. 193 (1861),

the House of Lords, reversing Lord Campbell's judgment in

The same case, 2 De Gex, F. & J. 596; s. c. 30 Law J. Rep. (N.S.) Chanc. 385,

practically granted specific performance of an agreement for sale of machinery.

[THE MASTER OF THE ROLLS.—Does not the judgment there go on the fact of its being machinery of special nature?]

Mr. Fry.—A contract to do a thing which is in its nature exclusive, implies a negative term not to do anything to the contrary. That is the case here; and there are many authorities for shewing that the Court will interfere to restrain a breach of one clause in an agreement, though it cannot enforce specific performance of the whole. The Court will exercise this jurisdiction whenever it can do so effectually; and we submit that it is not necessary for us to shew a special value in the subject of the contract, or that damages cannot be readily assessed at law. It happens, however, that damages cannot be readily assessed here, as it is

impossible to tell what the price of coal will be hereafter. Moreover, as the vendor is the owner of the colliery, this contract is of the nature of a contract for the sale of real estate. They cited—

Dietrichsen v. Cabburn, 2 Ph. 52 (1846);

Sevin v. Deslandes, 30 Law J. Rep. (n.s.) Chanc. 457 (1861);

La Blanc v. Grainger, 35 Beav. 187 (1866);

Thorn v. The Commissioners of Public Works, 32 Beav. 490 (1863);

Catt v. Tourle, 38 Law J. Rep. (n.s.) Chanc. 401; s. c. Law Rep. 4 Chanc. 654 (1869);

Wilson v. The Furness Railway Company, 39 Law J. Rep. (n.s.) Chanc. 19; s. c. Law Rep. 9 Eq. 28 (1869);

Greene v. The West Cheshire Railway Company, 41 Law J. Rep. (n.s.) Chanc. 17; s. c. Law Rep. 13 Eq. 44 (1871).

THE MASTER OF THE ROLLS.—This is a bill on which I entertain no doubt whatever, and will give my decision at once; for I never did at the bar, and I will not as a Judge, approve of the practice of not deciding a question fairly raised on demurrer. It is most beneficial for all parties that a question should be cheaply determined, and demurrers should, in fact, be encouraged.

Here no one can approve of the conduct of the defendants. The first of them has entered into a contract to sell a definite quantity of coal, to be raised from his mine, and has received advantages in consideration of his contract, and, because coal has risen in price, he won't perform it. Such conduct cannot meet with approval from anyone. But I have to determine whether the plaintiffs have come to the right Court to obtain compensation for the wrong they have suffered; and it appears to me that, as the law now stands, a Court of Equity cannot give them any relief.

The first question to be decided is, What is the contract for? Well, it is for the sale of coal. The words are, the get of coal; that is, coals to be got—a severed chattel—and it has, therefore, no relation to a contract for the sale of real

estate. It is for chattels of a very ordinary description, not alleged to be peculiar coal, or coal that cannot be got elsewhere; on the contrary, the true meaning of paragraph 25 is that it can be got elsewhere, though at a higher price. The result is that the plaintiffs will incur damages, their amount being the difference between the market price of such coal and that here agreed upon. Then it is said that, though you can ascertain the market price as to past non-deliveries, you cannot do so as to future defaults. But to say, gravely, that you cannot ascertain the damages for a breach of a contract for the sale of goods extending over three years, is limiting the power of assessing damages in a way which would rather astonish gentlemen practising on what is called the other side of Westminster Hall. It cannot be said that here damages could not be ascertained or estimated at law. What is there to distinguish this from an ordinary sale of chattels? It is said, the fact that the coals are part of a colliery of which the vendor is the owner. But then, if the coals are not delivered, there is no means of obtaining their delivery except by compelling the defendant Rowland to raise them; and it has been admitted that that is a contract of which you cannot obtain a decree for specific performance. Therefore, any relief to be obtained as compensation must be obtained at law. Indeed, I do not understand that the plaintiff is willing to abandon his claim at law. Then it is said that, though specific performance cannot be decreed, still this is a case in which the Court will restrain the defendant from breaking his contract by selling coal to any other person. Now, I have always felt very considerable difficulty how the Court could profess to refuse specific performance on the ground that it was difficult to enforce, and yet try to do the same thing by a roundabout method, by the help of an injunction; for if it is right to restrain the defendant from selling coal to any person contrary to his contract, why is it not right to compel him to get the coal, raise it, and deliver it? And I cannot find any line laid down as dividing the two classes of

cases in which the Court has no power to make a decree for specific performance, but will grant or refuse an injunction to restrain a breach of one of the terms of an agreement.

I have asked and obtained from counsel every assistance on this point, but no definition has been given me; and the answer to the question is, that there is no distinct line to be found in the authorities. The expressions used are, that the Court will grant such an injunction when it is convenient or the case is of sufficient importance (1). That being so, I think I can only administer justice properly if I confine myself to the authorities which I find already decided, and only act in those instances in which the Court has already acted; and if you cannot bring your case within them, you must fail, for this is a jurisdiction which is not to be extended. But I am not entirely without assistance from the authorities, for it appears to me that the very case has been put, by way of illustration, in *Heathcote v. The North Staffordshire Railway Company* (*ubi supra*), where Lord Cottenham says—

“If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods?”

Now that is the exact case I have to deal with, and, finding that case, and counsel not being able to produce to me any case in which an injunction has been granted, I think I shall do right in following that, and saying that, in a case of this kind, equity can afford no remedy.

As to costs, I cannot take the admission of the defendant in the demurrer as evidence against him of the truth of the statements in the bill; but the usual rule must be adhered to, and the demurrer allowed, with costs.

Solicitors—Messrs. Sharp & Ullithorne, agents for Messrs. Simons & Plews, Merthyr Tydvil, for the plaintiffs; Mr. T. P. Gosling; Mr. W. Kelly; and Mr. J. H. Wrentmore, for the various defendants.

(1) See the case of *The Wolverhampton and Walsall Railway Company v. The London and North Western Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 131; s. c. Law Rep. 16 Eq. 433.

MALINS, V.C. }

1874.

Jan. 26. }

THOMSON v. FLINN.

County Court Appeal—Subject Matter of Plaintiff exceeding 500l. in value—Dismissal of Suit, or Transfer to Court of Chancery—County Courts Act, 1865, s. 9—County Courts Act, 1867, s. 14.

A County Court plaintiff alleged that the subject matter of the suit was less than 500l. in value, but upon the suit coming on for hearing it was proved that the value exceeded 500l., whereupon the County Court Judge, acting under s. 14 of the County Courts Act, 1867, dismissed the plaintiff with costs. Upon appeal,—Held (reversing the decision of the County Court Judge), that he ought to have directed the suit to be transferred to the Court of Chancery, under s. 9 of the County Courts Act, 1865.

Sec. 14 of the Act of 1867 applies only to actions and suits relating to matters over which the County Courts have no jurisdiction.

Birks v. Silverwood (41 Law J. Rep. (N.S.) Chanc. 638; s. c. Law Rep. 14 Eq. 101) *observed upon.*

Appeal from Lambeth County Court.

The plaintiff was filed for the partition of a house, and alleged that the value of the house was under 500l. On the case coming on for hearing, the defendant's counsel raised a preliminary objection to its being heard, on the ground that the property to which it related exceeded the statutable value, and in support of the objection a surveyor was examined and cross-examined, who swore that the value was over 500l. Thereupon, the County Court Judge found as a fact that the property exceeded in value 500l., and, acting under sec. 14 of the County Courts Act, 1867, dismissed the plaintiff with costs. No application was made on the part of the plaintiff to have the case transferred to the Court of Chancery.

The plaintiff now appealed.

The question for the opinion of the Vice-Chancellor was whether the County Court Judge was at liberty to make the order dismissing the plaintiff, or whether

he was bound by the County Courts Act, 1865, sec. 9, "to direct the said suit to be transferred to the Court of Chancery, it having been ascertained during the progress of the suit" that the subject matter exceeded 500*l.* in value (1).

Mr. Cotton and Mr. T. L. Wilkinson, for the appellant.—As the value of the property exceeded 500*l.* it was the duty of the Judge, instead of dismissing the suit, to have transferred it to this Court. Sec. 9 of the County Courts Act, 1865, is imperative in its terms, and must be taken as controlling sec. 14 of the Act of 1867, which, to make it consistent with the former Act, must be treated as applying to actions only. We rely on your Honour's decision in

Birks v. Silverwood (ubi supra).

They also referred to secs. 33 and 34 of the County Courts Act, 1867.

Mr. Glasse and Mr. Cozens Hardy, in support of the order below.

In

Birks v. Silverwood (ubi supra), your Honour's attention was not directed to the Act of 1867 at all; if it had been, we submit, your Honour would have come to a different conclusion. It is clear, from the scope of the Act of 1867, that

(1) The County Courts Act, 1865, sec. 9, is (so far as material) as follows—

"If, during the progress of any suit or matter, it shall be made to appear to the Court that, as the subject-matter exceeds the limit in point of amount to which the jurisdiction of the County Courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the Court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the Vice-Chancellors' Courts as the Lord Chancellor may by general order direct; and such Vice-Chancellor shall have power to regulate the whole of the procedure in the said suit or matter when so transferred."

The County Courts Act, 1867, sec. 14, is as follows—

"Whenever any action or suit is brought in a County Court which the Court has no jurisdiction to try, the Judge shall order the cause to be struck out and shall, unless the parties consent to the Court having jurisdiction to try the same, have power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the Court had jurisdiction in the matter of such plaint, and the plaintiff had not appeared, or had appeared and failed to prove his demand."

NEW SERIES, 43.—CHANC.

the word "suit" in sec. 14 includes any suit in Equity.

[MALINS, V.C.—I am of opinion that sec. 14 applies to a suit in Equity as well as to an action at law.]

Taking sec. 9 of the Act of 1865 and sec. 14 of the Act of 1867 together, we submit that the Judge was right in dismissing the suit.

MALINS, V.C., said he had heard nothing to raise any doubt that the statement in the plaint that the value of the property was below 500*l.* was believed by the plaintiff to be true, but on the plaint coming on for hearing a witness was called, who swore that the value was over 500*l.*, and on that evidence the learned County Court Judge came to the conclusion that it was, in fact, worth more than 500*l.* It was, therefore, then clear that his jurisdiction was at an end. Then the question arose, What was his proper course to take? He (the Vice-Chancellor) was clearly of opinion that an application ought to have been made on the part of the plaintiff to the County Court Judge, under sec. 9 of the Act of 1865, to transfer the suit to this Court; but that was not done. The case was similar to that of *Birks v. Silverwood (ubi supra)*, where he decided that the County Court Judge having, after the commencement of the suit, and therefore during its progress, ascertained that the value of the property was over 500*l.*, was right in transferring the suit to this Court. But it had been contended by Mr. Glasse, that the 14th section of the Act of 1867 was not referred to in that case, and that if it had been the Court would have come to a different conclusion. It was true that he was not referred to that section, and if, on now referring to it, he thought that that decision was wrong, he should not hesitate to say so. Now, what was the object of the Act of 1867? The 34th section enacted that that Act, and the several Acts there mentioned, including the Act of 1865, should be construed together as one Act. [His Honour then read the 9th section of the Act of 1865 and the 14th section of the Act of 1867, and continued.] Now what was the meaning of the words in the 14th section, "When-

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ever an action or suit is brought in a County Court which the Court has no jurisdiction to try?" They referred to proceedings which might be brought in the Superior Courts, but not in the County Court, such as, for instance, actions for distress, assault, or seduction. If an action of that class were brought in the County Court, the Judge would order the proceedings to be stayed, and the person filing the plaint would have to pay the costs of them. If, in any case, where a person, in the absence of any *mala fides*, filed a plaint, stating that he verily believed that the property, the subject of it, was worth less than 500*l.*, he were to say that the County Court Judge was at liberty to dismiss the plaint, because some witness came forward to say, perhaps, that the property was worth 501*l.*, it would be inflicting a great hardship on the poorer class of suitors, for whose benefit, more especially, the County Court Acts were passed. The 9th section of the Act of 1865 and the 14th section of the Act of 1867 must be taken as standing together, and he read the 9th section now as he did in *Birks v. Silverwood* (*ubi supra*), and just as if he had been referred in that case to the 14th section, namely, that though it did not appear in the plaint, yet did appear upon the suit coming on for hearing, that the value of the property was over 500*l.*, it would thus appear, "during the progress of the suit," within the meaning of the 9th section. He was, therefore, of opinion that the County Court Judge, instead of dismissing the suit, ought to have transferred it to this Court; and if *Birks v. Silverwood* (*ubi supra*) had been cited to him (which it appeared was not the case), no doubt he would have done so; it was, in fact, owing to that case not having been cited to the learned Judge that the miscarriage took place. There must, therefore, be an order, discharging the order of the Court below, and substituting for it an order transferring the cause to this Court. As regards the costs, the general rule was that the successful appellant in a County Court appeal got his costs, but in the present case, as the appeal had been in consequence of the plaintiff's omission to call the Judge's

attention to the reported case of *Birks v. Silverwood* (*ubi supra*), he should give no costs of the appeal.

Solicitors—Mr. A. Gillespie, for plaintiff; Messrs. J. G. Hepburn & Son, for defendant.

JESSEL, M.R. }
1874. } *In re GOODWIN'S TRUSTS.*
Jan. 31.

Will—*Illegitimate Children*—*Child born after the Date of the Will.*

A gift by will by a testator or testatrix to his or her illegitimate children by a particular person is good as well as to a child born after as before the date of the will, if the child obtains the reputation of being such a child before the death of the testator or testatrix.

In December, 1849, Richard Perkins went through the ceremony of marriage with Mary Goodwin, his deceased wife's sister.

On the 15th of July, 1850, Mary Goodwin made her will, by which she bequeathed her residuary personal estate upon trust for Richard Perkins during his life, and after his decease upon trust to pay and divide the trust premises unto and equally between and amongst all and every her children and child by the said Richard Perkins, share and share alike, to be vested interests in sons at twenty-one, and in daughters at that age or on marriage.

Mary Goodwin died on the 1st of May, 1860. She had issue four children, namely, Tom Goodwin Perkins, the petitioner, who was born on the 15th of June, 1850, William Harry Perkins, who was born on the 25th of March, 1860, and two other sons who died in infancy.

The testatrix survived the birth of W. H. Perkins only thirty-seven days.

Part of the testatrix's estate had been paid into Court under the Trustee Relief Act.

A petition was presented by T. G. Perkins (the son living at date of will),

praying that the fund might be paid out on the joint receipt of himself and his father.

On the part of W. H. Perkins (the child born after date of will), as evidence of his having acquired the reputation of being the child of testatrix by R. Perkins in the lifetime of the testatrix, a copy of the entry by the registrar of births was put in. The registration was effected on the 12th of April, i.e. before the death of the testatrix, and in the certificate W. H. Perkins was described as the son of Richard Perkins and Mary Perkins, late Goodwin, and it was stated that the entry was made on the information of Richard Perkins as father.

Mr. W. B. Heath, for the petitioner, said that in

2 *Jarman on Wills*, p. 228, several authorities were collected shewing that no gift could be made by deed or will to any future born illegitimate child by a particular person; that the recent case of

Occleston v. Fullalove, 42 Law J.

Rep. (N.S.) Chanc. 515; s. c. (on appeal) *post*, p. 297,

decided by the full Court of Appeal, was no doubt inconsistent with some of these authorities, but that this case was distinguishable inasmuch as the child who took in

Occleston v. Fullalove (ubi supra),

was in *ventre sa mère* at the date of the will; here W. H. Perkins was born eight years afterwards; and that the dictum of Lord Chelmsford, in the case of

Hill v. Crook, 38 Law J. Rep. (N.S.)

Chanc. 579; s. c. 40 Law J. Rep.

(N.S.) Chanc. 216; s. c. (H.L.) 42

Law J. Rep. (N.S.) Chanc. 702;

s. c. Law Rep. 6 Chanc. 311; s. c.

Law Rep. 6 H.L. 278,

was inconsistent with the decision of the Lords Justices in

Occleston v. Fullalove (ubi supra).

Mr. W. W. Karslake, Mr. Langley and Mr. W. Pearson, for respondents.

THE MASTER OF THE ROLLS.—The decision in *Occleston v. Fullalove (ubi supra)*, as he understood it, amounted to this, that a gift by will by a testator or testatrix to a class of his or her illegiti-

mate children by a particular person was good, and would extend to any child who acquired the reputation of being such a child before the death of the testator or testatrix. That, if this view of the decision was correct, W. H. Perkins was clearly entitled to share, and he must decide accordingly.

Solicitors—Messrs. Hawks, Wilmott & Stokes, for petitioner and other respondents; Mr. Mander, for respondent, John Higginson.

LOARDS JUSTICES.

1873.

Nov. 8.

} In re HEATHCOTE'S TRUSTS.

Will—Construction—Absolute Gift subject to prior Estates—Gift over on Death without Issue—Legatee surviving Period of Distribution—Indefeasible Interest.

A testator bequeathed funds to A. for life, with remainder to his two daughters in equal moieties for their respective lives, with remainder to their children, and in default of such children, with remainder to testator's two sons, with remainder in case his said sons should both die without issue to B. absolutely, and in case B. should die without issue then over. B. survived A. and all the testator's sons and daughters, who all died without issue, and finally died herself without issue:—Held, that B. took an absolute indefeasible interest in the funds, and that inasmuch as she survived the period of distribution the divesting clause never took effect.

This was an appeal from a decision of V.C. Malins. Robert Heathcote by his will, dated in 1811, declared that his trustees should stand possessed of certain trust funds upon trust for his wife for her life, with remainder as to one moiety upon trusts for his daughter Mary Ann for her life, with remainder to her children, and as to the other moiety upon trusts for his daughter Maria for her life, remainder to her children, and in case neither of his said daughters should have any such child as therein mentioned, then

in trust for testator's two sons, W. S. Heathcote and G. D. Heathcote, as tenants in common, and in case either of his said sons should die without issue then for the other of them. But in case both his said sons should die without issue "then the said trust moneys, stocks, funds and securities should be upon trust for Mary Heathcote, spinster, her executors, administrators and assigns. But in case the said Mary Heathcote should depart this life without leaving any issue of her body lawfully begotten living at the time of her decease, then the said trust moneys, stocks, funds and securities should be upon trust for such one or more of the daughters of his brothers-in-law, Philip Deare and George Russell Deare," as should be living at the time when the trusts therefore declared should determine.

The testator died in 1818, and his wife died in 1823, leaving the testator's said two sons and two daughters surviving them. The said two sons and two daughters all ultimately died without issue. The survivor of them was one of the daughters, Mrs. Angelo (formerly Mary Ann Heathcote), who died in 1866. After Mrs. Angelo's death, Mary Heathcote, then Mrs. Soutten, the wife of Benjamin Soutten, instituted a suit to establish her equity to a settlement in the trust funds, and by the decree made in that suit the income of the trust funds was ordered to be paid to her for her life for her separate use. Mary Soutten died in April, 1872, without issue, leaving one of the daughters of the testator's said brothers-in-law, a Mrs. Rainier, surviving her. Mrs. Rainier died immediately afterwards, having made a will and appointed executors. The trustees then paid the trust funds, amounting to nearly 10,000*l.* consols, into Court, under the Trustee Relief Act. Mrs. Rainier's executor presented a petition for payment out of the trust funds to them. Benjamin Soutten, who had taken out letters of administration to his late wife, also claimed the fund. V.C. Malins decided that the fund had under the trusts of the will become vested in Mrs. Rainier, and made an order for payment out thereof to her executors. From that order Benjamin Soutten now appealed.

Mr. Cotton and Mr. Hubert Lewis for the appellant.—When there was a gift to A. for life, with remainder to B. absolutely, and then a gift over in case of B.'s death without issue, the rule was that the operation of the gift over was restricted to the case of B.'s death before the period of distribution. In this case Mary Soutten became absolutely entitled in possession upon the death of the last surviving tenant for life, and the divesting clause had no operation.

The rule was well established by the authorities—

Edwards v. Edwards, 15 Beav. 357, 361, 363; s. c. 21 Law J. Rep. (N.S.) Chanc. 324;

Dean v. Handley, 2 Hem. & M. 635; *Re Hill's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 594; s. c. Law Rep. 12 Eq. 302.

They distinguished

Milner v. Milner, 33 Beav. 276.

Mr. J. Pearson and Mr. Whateley for Mrs. Rainier's executors, cited

Cooper v. Cooper, 1 Kay & J. 658.

Mr. Dauney appeared for the trustees of the will.

No reply was called for.

LORD JUSTICE JAMES said he was of opinion that the rule laid down in *Edwards v. Edwards* (*ubi supra*) as far back as the year 1852, and which had been adopted and followed in a number of other cases without any expression of dissent or doubt, must be confirmed. That rule was a very simple, intelligible and beneficial one in the administration of testators' estates. The rule was that where there was an absolute gift to vest in possession at a future time, and a gift over in case the legatee should die without issue living at his decease, that meant in case the legatee should die without issue before he was entitled to call for the actual delivery of the legacy. Death without issue meant death without issue before the period of distribution. Then the question was whether there was anything on the face of this particular will inconsistent with or repugnant to the rule which required the insertion of the words "before the period of distribution." In his Lordship's opinion, if those words were

inserted in the will the whole would be perfectly consistent, and there was nothing in those words repugnant to any other intention expressed by the testator. The only distinction in this case was that there was a gift over if the legatee should die without issue in several limitations. But there was no reason why the rule should not apply to a series of gifts as much as to one. The rule must prevail and Mrs. Soutten's representative was entitled to the fund. His Lordship said he went on this ground, that the rule applied unless there were words in the will to prevent its application, and there was nothing here to take the case out of the rule.

LORD JUSTICE MELLISH concurred.

Solicitors—Mr. W. J. Mitton, for the executors; Messrs. Birch, Ingram, Harrison & Co., for respondents; Messrs. A. F. & R. W. Tweedie, for appellant.

LORDS JUSTICES. }
1873. } *In re THE DAGENHAM*
Aug. 7. } *THAMES DOCK COMPANY.*
 } *HULSE'S CLAIM.*

Penalty—Forfeiture—Contract for Sale of Land—Proviso for Re-entry on Non-payment of Purchase Money.—Construction.

*A company, incorporated by Act of Parliament for making a dock, agreed for the purposes of their undertaking to purchase certain land for 4,000*l.*, of which 2,000*l.* was to be paid at once, the balance at a future date. The agreement contained a proviso empowering the vendors, on default in the payment of the balance or any part of it by a day named, to re-enter and re-possess the land without any obligation to repay any portion of the purchase money received:—Held, that this was a penalty from which the Court would relieve the purchasers.*

Semble, that if it was not a penalty, the agreement would be void as ultra vires of the company.

This was an appeal motion from a decision of Lord Romilly, Master of the Rolls.

The above-named company, which was incorporated by a special Act of Parliament for the purpose of constructing a dock on the Thames, in August, 1865, entered into an agreement with Sir Edward Hulse and the trustees of his marriage settlement for the purchase of certain lands for the purposes of their undertaking. The purchase money was to be 4,000*l.*, of which sum 2,000*l.* was to be paid down, and the balance on the day of completion of the purchase, which was fixed for the 1st of November, 1865. The agreement contained a proviso that if the balance of 2,000*l.* and all interest thereon should not be entirely paid off and discharged by the 7th of August, 1867 (and in this respect time should be of the essence of the contract), it should be lawful for the vendors to re-enter upon and re-possess the lands as in their former estate without any obligation on their part to repay to the company any part of the 4,000*l.* which had been previously paid or any interest thereon which should be absolutely forfeited by the vendors. The first 2,000*l.* was duly paid and the company were let into possession of the lands and commenced their works thereon. On the 6th of August, 1867, no portion of the second 2,000*l.* having then been paid, the time for payment was, by another agreement, extended to the 1st of August, 1868. By a further agreement made on the 1st of August, 1868, the time for payment was again extended to the 1st of November, 1869, and it was thereby stipulated that if the undertaking should be abandoned, or in case the 2,000*l.* with all interest from the date of the original agreement should not be entirely paid off and discharged by the 1st of November, 1869 (in all which respects time was to be of the essence of the contract), it should be lawful for the vendors notwithstanding that a conveyance of the property to the company should have been executed, and notwithstanding any intermediate negotiation or correspondence to enter into and upon, and re-possess the lands as in their former estate, and all works thereon, and to eject the company therefrom without any obligation on the part of the vendors to repay the

company the 2,000*l.* already paid or any part of the balance of the 4,000*l.* which might have been previously paid or any interest thereon which should be absolutely forfeited to the vendors; and it was declared that nothing therein contained should prejudice the rights of the vendors to take proceedings to enforce the contract, and the company thereby covenanted for the payment of the 2,000*l.* and interest.

On the 7th of August, 1869, a petition for winding up the company was presented, and on the 11th of December, 1869, a winding-up order was made. On the 25th of May, 1870, the vendors commenced an action in ejectment against the company for the recovery of the said lands. On the 20th of February, 1871, an order was made in the winding-up that the plaintiffs in the action should be at liberty to sign judgment, they undertaking not to issue execution until further order, and to abide by any order the company might make as to the property. On the 25th of February, 1871, judgment was signed in the action. Afterwards the vendors took out a summons in the winding-up, for liberty to issue execution and for the delivery up to them by the liquidator and the company of the land free from all claims of the company.

The Master of the Rolls refused the application, but offered to give to the applicants an order for sale of the land and payment of their lien out of the proceeds. This offer they refused and appealed from the order made.

Mr. Fry and *Mr. B. B. Rogers* appeared in support of the appeal.

Mr. Roxburgh and *Mr. Speed*, for the liquidator, were not called upon.

LORD JUSTICE JAMES said—In his opinion this was as clear a case of a mere penalty for the non-payment of purchase money as ever came before the Court. If the agreement were to be construed strictly according to the terms of it he very much doubted whether it would not be void as being *ultra vires*, and in contravention of the Act of Parliament which authorised the company to buy land for purposes beneficial to the public, for it would be a

great wrong both as regarded creditors and shareholders, if in case a small portion of the purchase money remained unpaid on a particular day the vendors were entitled to take back the land with all the works of the company thereon. That would be equivalent to an agreement to give up the whole undertaking. This was only a penalty from which the company were entitled to be relieved on payment of the purchase money and interest.

LORD JUSTICE MELLISH concurred.—He had always understood that the test whether or not a provision of this kind was intended to be a penalty was to see whether the forfeiture to be incurred was to be exactly the same whatever might be the extent of the injury. If that was so, then the stipulation was to be treated as in the nature of a penalty. Here the proviso was that if the 2,000*l.* and interest or any part of it (however small) remained unpaid by a certain day, the company were to forfeit the whole of the land and the purchase money already paid. That was clearly a penalty against which the Court would relieve.

Solicitors—Messrs. Lake & Co., for appellants;
Messrs. Wilkins, Blyth & Marsland, for liquidator.

JESSEL, M.R. }

1874.

Jan. 17. }

FISHER v. FISHER.

Railway Company—Purchase—Petition—Fund paid into Court—Transfer to Credit of Cause.

After a fund which represents purchase money paid by a railway company has been invested and transferred to an account not entitled in the matter of the railway company, the liability of the railway company to pay costs ceases in respect of any subsequent investment or petition for payment of the fund.

This was a suit for administration of the trusts of the will of Josiah Fisher, who died on the 8th of June, 1835.

In 1839 the London and Brighton Railway Company purchased some leaseholds, part of the testator's estate, under the compulsory powers of a special Act passed before, but containing provisions in effect similar to those in, the Lands Clauses Act. The clause relating to costs payable by the company was as follows—The London and Brighton Railway Companies Act, 1 Vict. c. cxix. s. 91—

“Provided also, and be it further enacted that where by reason of any disability or incapacity of any party entitled to any lands to be taken or used, or in respect of which any satisfaction, recompense or compensation shall be payable under the authority of this Act, the purchase money for the same or the money paid for such compensation, shall be required to be paid into the Bank of England, it shall be lawful for the said Court of Exchequer to order all the costs, charges and expenses attending the purchase, or the taking or using of such lands or which may be incurred in consequence thereof, and of the re-investment of the purchase or compensation money in other land or so much of such several costs, charges and expenses as the said Court shall deem reasonable, and likewise the costs, charges and expenses occasioned only by the passing of this Act, and not by litigation between claimants or otherwise of any proceedings had as herein authorised for the investment of such purchase or compensation money in government or real securities, and for the payment of the interest and dividends thereof, and of such government or real securities or of the money to be produced by the sale thereof out of Court, together with the necessary costs and charges of obtaining the proper order for such purposes to be paid by the said company out of the moneys to be received by virtue of this Act; and the said company shall from time to time pay such sums of money for such costs, charges and expenses as the said Court shall direct, and also that where in any other cases the purchase money for any lands to be taken or used under the authority of this Act, or any moneys payable for any satisfaction, recompense or compensation under this Act, shall, by reason of or under any

of the provisions of this Act, be paid into the Bank of England in the name and with the privity of the accountant-general of the Court of Exchequer; it shall likewise be lawful for the said Court to order the reasonable expenses of any party or parties in procuring the same to be paid out of Court, together with the necessary costs and charges of obtaining the proper orders for such purposes to be in like manner paid by the said company out of the moneys to be received by virtue of this Act, and the said company accordingly shall from time to time pay such sums of money and in such manner and for such purposes as the said Court shall direct.”

The purchase money was paid into Court to an account intituled “*ex parte* the Railway Company.”

By an order made in the matter [not in the suit] on the 7th of May, 1839, it was ordered that the sum of 63*l.* 19*s.* 2*d.*, part of the purchase money, should be invested in consols in the name of the accountant-general “in trust to an account to be intituled in the said matter, ‘Josiah Fisher’s trust account,’” and the accountant-general was to declare the trust accordingly.

In accordance with this order, the 63*l.* 19*s.* 2*d.* was duly invested in 68*l.* 4*s.* 6*d.* consols, and transferred to an account intituled “*ex parte* the Railway Company.” In 1853 two petitions were presented—one in the suit relating to the funds in the suit, and the other in the matter [*ex parte* the Railway Company] relating to the 68*l.* 4*s.* 6*d.* One order was made on both petitions, and under such order the 68*l.* 4*s.* 6*d.* consols were carried over to the credit of the suit, the account having no reference to the Railway Company. A petition was now presented for payment out of this sum and the other sum dealt with by the order of 1853.

The railway company were made respondents, and the petition prayed that the costs, so far as they related to this sum, should be paid by the company.

Mr. Morshead, for the petitioner, referred to—

Brown v. Fenwick, 35 Law J. Rep. (N.S.) Chanc. 241,

and contended that as the omission of the

title, "*ex parte* the Railway Company," in the order of 1853, was clearly an oversight, the petitioners were notwithstanding entitled to their costs.

Mr. Montague Cookson, for the respondent in the same interest.

Mr. Kekewich, for the railway company, objected to their paying the costs, and asked for their costs.

THE MASTER OF THE ROLLS said that, though he had no doubt that the title of the matter had been inadvertently omitted in 1853, he had no jurisdiction to make an order for payment of costs by the company after the money had been taken from the account "*ex parte* the Railway Company," and dismissed the petition so far as it asked for payment of the costs by the company with costs; but made an order in other respects in accordance with the prayer of the petition.

Solicitors—*Mr. R. B. Horman Fisher*, for petitioner; *Messrs. Rose, Norton & Brewer*, for the Railway Company; *Messrs. Fisher & Fisher*, for the other respondents.

BACON, V.C. } *Re* PARAGUASSU STEAM TRAM-
1874. } ROAD COMPANY (LIMITED).
Jan. 12. } FERRAO'S CASE.

Company—Calls—Payment in Cash—Fully paid-up Shares—Companies Act, 1867, s. 25.

F. was the holder of fifty 20l. shares in the above company, upon which 6l. a share had been paid, and a further call of 2l. had been made. W. (whose connection with F. did not appear) commenced an action against the company, which was stayed by an order of Court (but not till shortly after the call of 2l. had become payable), on the terms of 3,200l. being paid by the company to W. and 700l. being credited to F. to make his shares fully paid-up. Certificates of shares marked "fully paid-up" were given to F. A few months after the company was ordered to be wound up. On an application by the liquidator to have F.'s name put upon the list of contributories,—Held, that the compromise amounted to a payment in cash

within the meaning of the Companies Act, 1867, s. 25, and that F.'s liability was discharged.

In February, 1867, Captain Ferrao took fifty shares of 20l. each in the above-mentioned company. He paid in respect of deposit and calls 300l., being 6l. per share. On the 2nd of March, 1869, the company made a further call of 2l. a share, payable on the 5th of April, 1869.

In December, 1868, *Mr. Webb*, who was the engineer of the company, brought an action against the company, in which he claimed 5,000l. An arrangement was subsequently made between the company and Webb that the action should be compromised on payment of 3,900l., of which 3,200l. should be paid to Webb, and the balance, 700l., be credited by the company to Captain Ferrao (whose connection with Webb did not appear), so as to make his fifty shares fully paid up. An order was on the 15th of April, 1869, made in the Common Pleas staying the action upon these terms. Certificates of shares stamped "fully paid-up" were given to Captain Ferrao, and the shares were marked as fully paid-up in the books of the company.

The company was in July, 1869, ordered to be wound up, and the official liquidator took out this summons to obtain a declaration that as Captain Ferrao had only paid 6l. per share in cash he was liable under the 25th section of the Companies Act, 1867, to be placed on the list as a contributory in respect of the 14l. per share remaining unpaid.

No memorandum of the contract between Webb and the company had been filed with the Registrar of Joint Stock Companies.

Mr. H. M. Jackson and *Mr. Ingle Joyce*, for the official liquidator.—The Companies Act, 1867, s. 25, is retrospective, and therefore Ferrao was not entitled to make any arrangement except to pay in cash—

Cleland's Case, 41 Law J. Rep. (N.S.) Chanc. 652; s. c. Law Rep. 14 Eq. 337.

Fothergill's Case, 42 Law J. Rep. (N.S.) Chanc. 481; s. c. Law Rep. 8 Chanc. 270.

The compromise might have supported a plea of accord and satisfaction, but that is not sufficient. There must be a *bona fide* transaction which would support a plea of "payment in cash"—

Spargo's Case, 42 Law J. Rep. (N.S.) Chanc. 488; s. c. Law Rep. 8 Chanc. 407.

Mr. Kay and Mr. Cracknell, for Captain Ferrao, were not called upon.

BACON, V.C.—I do not think I ought to hesitate about this case. Whether the 25th section applies or not (although I have no doubt that it does apply), what took place seems to me to amount to payment, and payment in cash. The company by their arrangement with Webb, to whom they were indebted, compromised his action and agreed to pay him a certain sum of money. Out of that money he orders them to pay on his account the money which would be due on Ferrao's calls, and they did it. It is as plain a payment in cash as can be conceived. It is not in the slightest degree like accord and satisfaction. It is not taking less or more, or some other thing, instead of that which is claimed in an action; but it is a confession by the company (the Judge's order being obtained by consent) that they had the sum of 3,900*l.* to pay to Webb; and by Webb's order, not by any accord or satisfaction, they undertook to withhold the amount of the calls out of that sum, and to apply it in payment of Ferrao's calls. If they had been bankers, an order by Webb to pay so much money to Ferrao would be a payment in cash. Does this case in its nature in the slightest degree differ from that? The persons who have in their hands a large sum of money are directed by the owner of that money to apply part of it—no matter for what reason, gift or otherwise—in discharge of Ferrao's liability upon his calls. I think it is free from all the dangers which the 25th section was intended to provide against. The policy of the law is that when a man has undertaken to take shares, and as a consequence to pay calls upon those shares, the creditors shall not be disappointed by any collateral arrangement made between directors and the person so liable unless the contract shall

be registered in the manner prescribed. The Act of 1867 is merely a continuation of the law. It is not necessary to say that it has any retrospective operation. It takes up the law as it stood, speaks of companies and the liabilities of shareholders, and then enacts that nothing short of payment in cash shall satisfy the liability unless the contract upon which it is founded shall be registered. This case does not come within the reach of that in the slightest decree. If Webb had taken the whole sum which they were bound to pay him, and handed it to Ferrao, and he paid the calls, nobody could dispute it was a payment in cash. What was done was equivalent in every respect. The assets of the company were liable to pay the money coming to Webb. The creditors are not injured in any degree by the whole of the money being applied in payment of Webb's claim; nor can they complain that part of it was not paid into the hands of Webb, but, by Webb's order, was paid in satisfaction of Ferrao's calls. That is perfectly consistent with all the cases referred to—*Fothergill's Case* (*ubi supra*), *Spargo's Case* (*ubi supra*), and the other cases. On the ground that, in point of fact, the money, which Ferrao would have had to pay if Webb had not paid it for him, was paid to the company, I am of opinion that Ferrao's liability was discharged.

Solicitor—Messrs. Wansey & Bowen, for the official liquidator; Messrs. Whitakers & Woolbert, for Captain Ferrao.

LORDS JUSTICES.

1873.

Nov. 22.

Dec. 6.

In re EDWARDS.

In re THE LONDON, BRIGHTON AND SOUTH COAST RAILWAYS ACT.

Marriage Settlement—Covenant to settle Wife's after-acquired Property—Restriction of Covenant to Property acquired during Coverture.

A covenant in a marriage settlement to settle all property to which the wife shall become entitled after the marriage, will, in the absence of any expressions in the settlement shewing a contrary intention, be re-

2 M

NEW SERIES, 43.—CHANC.

stricted to property acquired during the coverture.

The rule laid down in Dickenson v. Dillwyn and Carter v. Carter (ubi infra) adopted in preference to that laid down in Stevens v. Vanvoorst (ubi infra).

This was a petition in lunacy for the payment out of Court of certain moneys which formed part of the estate of a deceased lunatic.

Elizabeth Braune, who died in December, 1829, by her will devised three freehold cottages at Mitcham to trustees in trust for her daughter Maria Elizabeth Edwards for life, and at her decease to be equally divided between her surviving children. The cottages were taken by the London, Brighton and South Coast Railway Company for the purposes of their railway under the provisions of the Lands Clauses Consolidation Act, and 500*l.*, the amount of the purchase-money, was paid into Court and invested in 530*l.* 10*s.* 1*d.* consols to the credit of the railway company, "the account of Maria Elizabeth Edwards and her children, devisees under the will of Elizabeth Braune deceased."

Maria Elizabeth Edwards died the 18th of November, 1872, leaving three children her surviving, viz., Charles Marshall Edwards, Elizabeth Braune Geary, the wife of John Geary, and Caroline Rowley Robinson, the widow of George Robinson. Mr. and Mrs. Robinson were married in October, 1843, and by a settlement made in contemplation of their marriage, and dated the 13th of October, 1843, the share of the said Caroline Rowley Robinson (then Edwards) under the will of Elizabeth Braune was assigned to trustees upon trust for Caroline R. Robinson for her life for her separate use, and after the death of the survivor of George Robinson and Caroline R. Robinson upon trust for their children. The settlement contained a covenant by Mr. and Mrs. Robinson in the following terms—"And it is hereby agreed and declared between and by the parties to these presents, and the said George Robinson and Caroline Rowley Edwards do for themselves respectively and their respective heirs executors and administrators covenant pro-

mise and agree with and to the said John Geary and Arthur West (the trustees of the settlement), their executors administrators and assigns, that in case after the solemnization of the said intended marriage the said Caroline Rowley Edwards and the said George Robinson, or either of them in her right, shall become entitled to any moneys or other property real or personal or both by any means whatsoever, then and in such case all such moneys or other property shall, at the costs of the said trust funds, be vested in the said John Geary and Arthur West, or the survivor of them, or other the trustees or trustee under these presents, by such acts and deeds as they or he shall think proper, and that the said trustees or trustee, their or her executors administrators and assigns, shall stand seized and possessed of the same, and of the interest or annual produce thereof, as personal estate" (all such real estate being considered as converted) "upon the same trusts with under and subject to the same powers provisoes declarations and agreements in every respect for the benefit of the said George Robinson and Caroline Rowley Edwards and their child or children as are therein expressed and contained concerning the estate and premises hereby settled."

George Robinson died in September, 1870. By an order of the Court of Chancery made the 20th of December, 1872, the 530*l.* 10*s.* 1*d.* Consols was divided into three shares and appropriated to the children of Maria Elizabeth Edwards. One of such shares was paid to the surviving trustee of Mrs. Robinson's settlement, to be held by him upon the trusts thereof, and another of such shares was carried over in lunacy to the credit of Charles Marshall Edwards, who had been found a lunatic. Charles Marshall Edwards died the 9th of June, 1873, intestate and unmarried, and this was a petition in lunacy presented by the representative of Mrs. Geary, then deceased, and by Mrs. Robinson, for the payment to them in equal moieties of the share so standing to the account of Charles Marshall Edwards. The petition was served on the surviving trustee of Mrs. Robinson's settlement.

The petition first came on to be heard on the 22nd of November, when the Lords Justices made the order prayed, subject to the consent of Mrs. Robinson's children being obtained to the payment of her share to her. It being found that this consent could not be obtained by reason of some of the children being infants, the petition was mentioned again on the 2nd of December.

Mr. Bethune Horsburgh, in support of the petition, cited—

Howell v. Howell, 4 Law J. Rep.

(N.S.) Chanc. 242;

Reid v. Kenrick, 24 Law J. Rep.

(N.S.) Chanc. 503;

Dickenson v. Dillwyn, 39 Law J. Rep.

(N.S.) Chanc. 266; s. c. Law Rep.

8 Eq. 546;

Carter v. Carter, 39 Law J. Rep.

(N.S.) Chanc. 268; s. c. Law Rep.

8 Eq. 551;

Re Clinton's Trusts, 41 Law J. Rep.

(N.S.) Chanc. 191; s. c. Law Rep.

13 Eq. 295.

Mr. Ince appeared for the trustee of the settlement and cited

Stevens v. Van Voorst, 17 Beav. 305.

Mr. Tweedy appeared for the railway company.

LORD JUSTICE JAMES said the nature and object of a covenant in a marriage settlement to settle the after-acquired property of the wife was to prevent it from falling under the sole control of the husband. Such a covenant, therefore, was *prima facie* applicable only to property which came to the wife during that marriage, and not to any property which came to her after her husband's death. His Lordship stated that he had consulted the Lord Chancellor upon this question, and the Lord Chancellor agreed with them in the opinion that in the absence of anything to shew an intention that the covenant should have a more extended operation, it was to be construed as if the words, "during the coverture," had been inserted in the settlement. In this case the words of the covenant were "if the said Caroline R. Edwards and the said George Robinson, or either of them in her right," should become entitled to any property, the same should

be settled, and the first trust was for the sole and separate use of the wife, which clearly contemplated the existence of the coverture. Their Lordships agreed with the Lord Chancellor that the rule laid down by Vice-Chancellor Malins in *Dickenson v. Dillwyn* (*ubi supra*) and *Carter v. Carter* (*ubi supra*) ought to prevail, and not that laid down in *Stevens v. Van Voorst* (*ubi supra*). The order would be for the payment of Mrs. Robinson's share to her.

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Solicitors—Mr. E. Moss, for the petitioner and trustee; Messrs. Norton, Rose & Co., for the railway company.

LORDS JUSTICES.

1873.

July 22.

SIMMONS v. PITT.

Charge on Real Estate—Bequest of Sum charged—Failure of Purpose—Void Trust for Accumulation—Heir or Next-of-Kin.

A tenant for life of real estate under a settlement, having power to charge the same with 6,000l., to be raised and paid at such time and to such purposes as he should think fit, by deed charged the estate with the above sum, payable to trustees for such purposes as he should by will appoint, and afterwards appointed the same by his will for certain purposes, which partially failed:—Held, that the part of the money undisposed of was personally, and went to the testator's next-of-kin.

This was an appeal from the Master of the Rolls.

Under a settlement made in January, 1824, Stephen Pitt was tenant for life of a moiety of certain lands, with remainder to the use of his children in strict settlement, with remainders over and with ultimate remainder, to the use of Stephen Pitt, in fee. Under the settlement Stephen Pitt was empowered to appoint a life interest in the settled estate to his wife, and to charge the estate with a sum of 6,000l., to be raised and paid at such time and to such person or persons as he should think fit. By a deed poll dated the 20th of June, 1845, Stephen Pitt, in exercise of the powers reserved to him,

appointed the said estate to his wife for life, and charged it with the sum of 6,000*l.*, to be raised and paid after the death of the survivor of himself and his wife, to Thomas Pitt and George Pitt, upon such trusts and for such purposes as he should, by his last will and testament in writing, or any codicil thereto direct, together with interest at 5*l.* per cent. from the death of such survivor, and the costs of raising the said sum.

By his will dated the 21st of June, 1845, reciting the deed poll, Stephen Pitt directed that the sum of 6,000*l.* should be retained and applied by Thomas Pitt and George Pitt upon the trusts thereafter declared concerning his residuary personal estate. And he thereby devised and bequeathed his residuary real and personal estate to Thomas Pitt and George Pitt on trust, to convert his residuary personal estate, and to hold the proceeds thereof, upon trusts, for the accumulation of the income and the investment thereof in land, which were held by the Master of the Rolls, in another suit, to be void under the Thellusson Act. Stephen Pitt died in 1848, without issue, leaving his widow surviving him. The widow subsequently died.

This suit was instituted by the testator's next-of-kin, to have the 6,000*l.* raised under the charge out of the settled estate. The only question was whether, so far as the bequest of the income of the 6,000*l.* was void, the next-of-kin or the heir-at-law were entitled thereto, or whether the charge had not, under the circumstances, ceased to be raiseable, and become sunk in the estate for the benefit of the persons entitled thereto.

The Master of the Rolls held that the whole amount was raiseable for the benefit of the testator's next-of-kin. The tenant for life of the estate appealed.

Mr. Fischer and *Mr. Sturges*, for the appellant.—So far as a power to raise money out of an estate is in part badly exercised, to that amount nothing is raiseable—

Emblyn v. Freeman, Prec. Ch. 541.

In this case the charge has been directed to be raised for certain purposes only, which were illegal, and have

failed. The position is the same as if it had never been raised—

Collins v. Wakeman, 2 Ves. jun. 683;
Tregonwell v. Sydenham, 3 Dow. 194;
Sugden's Real Property, 326, 361.

They also cited

Ackroyd v. Smithson, 1 Bro. C.C. 503.
Mr. Southgate and *Mr. G. Hastings*, for the plaintiffs, were not called upon.
Mr. Spencer Butler, for the trustees.

LORD JUSTICE JAMES said—This was one of the clearest cases that ever came before the Court, and he quite agreed with the Master of the Rolls. None of the cases cited applied. The Master of the Rolls had been reported to have said, "This was not the case of *Ackroyd v. Smithson* (*ubi supra*), nor any case resembling it. The testator had, before he made his will, a charge of 6,000*l.* upon the land, and, subject to that charge, he had a life estate. His wife had a life estate, with remainder to their children, if any; if not, the property went over, with an ultimate limitation, to Stephen Pitt, in fee. Having a charge, and nothing but a charge, upon the property, Stephen Pitt, by a deed dated twenty-one years after the settlement, appointed the sum so raiseable to such uses as he should direct by will; and by his will he gave the property as part of his residuary personal estate." The Master of the Rolls thought that the testator took the charge as personalty before he disposed of it by his will, and that it was personal estate when he disposed of it in that way. It appeared to the Lord Justice that this was expressed as clearly as possible, and that there was no ground whatever for the appeal, which must be refused, with costs.

LORD JUSTICE MELLISH concurred.

Solicitors—Messrs. White, Borret & White, for appellant; Messrs. Jones, Roberts & Hale, for respondents; Messrs. Gregory, Rowcliffes & Rawle, for the trustees.

[IN THE HOUSE OF LORDS.]

1873.

June 17, 19.

THE CITIZENS' BANK OF LOUISIANA AND OTHERS v. THE FIRST NATIONAL BANK OF NEW ORLEANS AND OTHERS.

Estoppel by Representations — Remittances to cover Bills—Equitable Assignment — Specific Appropriation.

Estoppel by representations applies only where the representation is as to a fact in existence at the time, not where it is as to something yet to come or as to a matter of future intention.

A representation or assurance given by the drawer of a bill, that the bill was drawn "specially" or "expressly" against funds already remitted by him more than sufficient to meet the bill on maturity, does not amount to a specific appropriation or equitable assignment of the funds so remitted, although it be given to one who is induced thereby to purchase the bill, unless it is also represented, or the fact is, that there was a trust already constituted, by which the payer of the bill would hold funds in trust for the payment of the particular bill, or of bills of that particular class or description.

The plaintiff purchased from the New Orleans Bank a bill drawn by them upon the Bank of Liverpool, and was told by the persons representing the New Orleans Bank at the time of the purchase, that the Liverpool Bank had, or would have, funds of the New Orleans Bank sufficient and applicable to meet the bill and appropriated for the purpose. Before the bill was presented for acceptance the New Orleans Bank stopped payment, and the Liverpool Bank declined to accept the bill on presentation, or to pay it at maturity, on the ground that although they had sufficient funds of the New Orleans Bank to meet the bill, none of such funds were specifically appropriated to the payment of it. It appeared that the course of business between the two banks was for the New Orleans Bank to remit to the Liverpool Bank bills for collection, and to draw bills against the remittances, taking care to keep them always in funds to meet the bills drawn upon them:—Held, that there was no specific appropriation of the funds of the New Orleans Bank in the hands of the Bank of Liverpool to meet the plaintiff's bill, and that the statement made to him did not

amount to an equitable assignment, and was no more than a representation of the course of dealing between the two banks.

This was an appeal from a decision of the Master of the Rolls, given by his Lordship in conformity with the decision of Lord Hatherley, L.C., and James, L.J., in *Thomson v. Simpson*, reported in 39 Law J. Rep. (N.S.) Chanc. 857, and in Law Rep. 5 Chanc. 659, and in the Court below, Law Rep. 9 Eq. 497. The facts in both cases being similar, the defendants being also the same in each case.

The facts may be briefly stated as follows—

In 1867 the appellant banking company, the Citizens' Bank of Louisiana, purchased from the defendants, the First National Bank of New Orleans, a bill for 5,000*l.*, drawn by that bank on the bank of Liverpool. Another such bill for 3,000*l.* was purchased by the appellants, the New Orleans Canal and Banking Company. The New Orleans Bank, in the course of its business, was in the practice of remitting to the Liverpool Bank bills and securities for collection in England, and of drawing bills upon the Liverpool Bank, which the latter accepted and paid at maturity. And it was part of the arrangement that the Liverpool Bank should be kept in funds by the New Orleans Bank to meet the bills drawn upon it, so that the bills drawn by the New Orleans Bank were always drawn against remittances to a larger amount, just as a customer with a balance at his bank may be said to draw a cheque against funds to a larger amount in the hands of his bankers. Before the bills drawn, as above-mentioned, could be presented to the Liverpool Bank for acceptance, the New Orleans Bank suspended payment, and the defendant, Charles Cave, was appointed receiver of the assets of the bank. This was on the 13th of May, 1867. Notice of the suspension and appointment was telegraphed to the Liverpool Bank, and when the bills were presented for acceptance, and subsequently, on their maturity, for payment, both acceptance and payment were refused by the Liverpool Bank, on the ground that though they had ample funds in their hands, the property of the New

Orleans Bank, none of these were specifically appropriated to the payment of these particular bills, and they were bound to hand over all these funds to the receiver appointed in America, for distribution by him among the general creditors of the bank, he having telegraphed to the Liverpool Bank a requisition to that effect.

The foregoing are the facts relating to the suit in which this appeal arose. In the case of *Thomson v. Simpson (ubi supra)*, the facts were similar, only there the bill had been purchased by Messrs. Thomson & Co., of New Orleans. In that case Messrs. Thomson filed their bill against Mr. Simpson, the manager of the Liverpool Bank, praying for a declaration that they were entitled to have the funds of the New Orleans Bank in the hands of the Liverpool Bank applied in payment of the bills they had purchased of the former; and for an injunction to restrain the latter bank from handing over such funds to the receiver of the New Orleans Bank.

The evidence and the statements on which the plaintiffs in each of the suits relied were very similar, and shewed that the officer of the New Orleans Bank, when the bills were so sold by him, assured the purchaser that the bills were drawn against funds of a larger amount already transmitted by his bank to the Liverpool Bank. In the present case the evidence was that the bills were drawn "specially" or "expressly" against such funds. As this evidence is fully stated and commented on in the judgment of the Lord Chancellor printed below, it is not necessary further to allude to it here. The case of *Thomson v. Simpson (ubi supra)* was heard before Stuart, V.C., who was of opinion that the New Orleans Bank was estopped by the statement of their officer, and that Messrs. Thomson were entitled to the relief prayed for. But on appeal the Lord Chancellor Hatherley, sitting with Lord Justice James, reversed that decision, and the matter was not carried further. The appellant companies not being satisfied with the last mentioned judgment, respectively filed their bills in January, 1868, against the New Orleans Bank and its receiver. The case was heard before the Master of the Rolls on the 25th of June, 1871, when his Lordship refused the plaintiffs the

relief prayed for, and made a decree dismissing their bills with costs, not only holding himself bound by the decision in *Thomson v. Simpson (ubi supra)*, but expressing himself as entirely concurring with the decree made in that case. From his Lordship's decree this appeal was now brought.

Mr. Benjamin and Mr. Cracknall, for the appellants.—It is not disputed that when the bills referred to in this case were brought to the respondent bank, the agent of the respondent bank, Mr. Alexander Harris, speaking for and with authority from Mr. Forbes, the president of that bank, told Mr. Gaines, who was the president of the appellant bank, that the bills were drawn against funds to a larger amount already remitted to the Bank of Liverpool. In the case of one of the bills, it is in evidence that the expression used was that it was drawn "expressly," in the case of the other "specially" against such funds. It is not disputed also that such funds had been remitted, or that Mr. Gaines was induced by that representation to purchase the bills. Here there was a representation made wilfully with the intention of inducing another to act upon the faith of such representation. There was a duty cast upon the person who made the representation to speak the truth, the representation made was calculated to induce a reasonable person to act upon it, and the person to whom it was made did act upon it, and was induced by it to alter his position. Therefore, we find here all the conditions laid down in

Freeman v. Cooke, 2 Exch. Rep. 654; s. c. 18 Law J. Rep. (N.S.) Ex. 114, as requisite to conclude the person who makes a representation from averring against the person acting on the representation a state of things different from that represented, and this is entirely in accordance with the language used by the Court of Queen's Bench in

Pickard v. Sears, 6 Ad. & E. 469.

The only question, therefore, is, whether the language used by Mr. Harris and by Mr. Forbes amounted to an equitable assignment, or to a specific appropriation of so much of the funds in question as would be required to meet these bills at their maturity.

The language used was technical; it influenced the mind of Mr. Gaines to act upon it, and on the principle of

Hammersley v. De Biel, 12 Cl. & F. 45, we are entitled to the assistance of a Court of Equity for the purpose of giving effect to that language. The present case is precisely similar to that of

Ex parte Imbet, 1 De Gex & J. 152; s. c. 26 Law J. Rep. (N.S.) Bankr. 65; except only that in that case a letter of appropriation was sent by the drawers of the bills to their correspondents the payers in Liverpool. But the representations made by Mr. Forbes and Mr. Harris in this case must, on the authorities above cited, have the same effect as a letter of appropriation. Again, in

Ex parte Carrick; in re Harrison, 2 De Gex & J. 208,

which was the converse of this case, the drawer of the bills had in that case also remitted funds to the payers, Harrison & Co., to cover such bills. Harrison & Co. having become bankrupt, after they had misappropriated part of such funds, the drawer was held not entitled to the funds remaining in the hands of Harrison & Co., but those funds were ordered to be applied in payment of the bills which Harrison & Co. had accepted. In that case, therefore, it was held that, under circumstances similar to those which we find in this case, there was a specific appropriation or an equitable assignment of the funds transmitted to meet the bills drawn generally against such funds. There was, therefore, a specific appropriation by the New Orleans Bank of an aliquot portion of their funds in the hands of the Liverpool Bank sufficient to meet those bills, and the representation, on the faith of which the bills were purchased, amounted to an assignment in equity of those funds for that purpose. Those representations amounted to a collateral agreement which the respondents are bound to perform although never reduced to writing. For in

Morgan v. Griffiths, 40 Law J. Rep. (N.S.) Exch. 46; s. c. Law Rep. 6 Ex. 70,

evidence of a parol agreement by a landlord to destroy rabbits, which was collateral to a written lease by the same

landlord to his tenant, was held to be admissible in an action by the tenant against the landlord for damage resulting to his crops from the neglect of the landlord to destroy the rabbits.

The case of

Jorden v. Money, 5 H.L. Cas. 185; s. c. 23 Law J. Rep. (N.S.) Chanc. 865; s. c. 2 De Gex, M. & G. 318; s. c. 13 Beav. 229; s. c. 15 *ibid.* 372; s. c. 20 Law J. Rep. (N.S.) Chanc. 174; 21 *ibid.* 531, 893,

is in our favour also, for in that case it was admitted that, if the misrepresentation had been of fact, the lady who held the defendants' bond would have been bound to make good her representation, and it was held that the representation relied on was only an expression of future intention. To the same effect was

Maunsell v. White, 4 H.L. Cas. 1,039.

In the present case there was a representation, or a promise, or a collateral agreement that the bills should be paid out of funds then existing, and the appellant bank is entitled to have that promise performed, having purchased the bills on the faith of it.

Mr. Fry and *Mr. Cozens-Hardy*, for the respondents, were not called on.

THE LORD CHANCELLOR.—This is a case in which your Lordships are asked, in substance, to review the judgment given by Lord Chancellor Hatherley and Lord Justice James in the case of *Thomson v. Simpson* (*ubi supra*), because that was a decision upon the same facts in substance, and I may also say, upon the same evidence in substance as we find in this case, and the bill in that case made the same claim in the same words as that which the appellants have made in the present case. In this case the Master of the Rolls not only held the authority of *Thomson v. Simpson* (*ubi supra*) to be in point on the present occasion, but he also gave careful consideration to the effect of the evidence of the one or two additional witnesses who have given evidence in the present case, and he expressed his own opinion to the same effect with the opinion of the Lord Chancellor Hatherley and the Lord Justice James in that case. Undoubtedly it is the appellant's right to say that there

is here no authority binding on this House. It is for you to determine whether those decisions are in accordance with a sound view of the law and the facts, or whether they are not.

The case made by the bill is put upon two grounds in the alternative. The first ground is that of equitable assignment, and the other ground, supposing there was no equitable assignment, is that of estoppel arising from a representation made by the appellants. As I understood it, the Vice-Chancellor Stuart proceeded rather upon the latter ground, of estoppel arising from representation, than upon the ground of insufficient proof of equitable assignment. Upon the point of equitable assignment, the bill undoubtedly states the case a vast deal higher than it has been attempted to be put in the evidence. The bill says the transaction is this, "that the Bank of New Orleans, desiring to obtain money in New Orleans, sent Mr. Harris, a licensed broker, as their agent, with this proposition, that if the plaintiff would give to the said National Bank current money of the United States in exchange for 5,000*l.* sterling at the rate of exchange then current in New Orleans, the said National Bank would assign to the plaintiff an equivalent sum of 5,000*l.* out of a much larger sum which the said National Bank assured the plaintiff was then in the hands of the said Bank of Liverpool belonging to the said National Bank, and which the said National Bank assured the plaintiff, as the fact was, that the said National Bank had therefore remitted for its own account, in bills of exchange and other funds, to the said Bank of Liverpool, and the said National Bank, through its said agent and broker, Alexander Harris, further proposed to the plaintiff, that if the plaintiff would give to the said National Bank current money of the United States in exchange for the said sum of 5,000*l.* sterling, at the rate of exchange then current in the city of New Orleans, the said National Bank would effect and carry out an assignment of an equivalent sum of 5,000*l.* out of the funds then belonging to the said National Bank, and lying at Liverpool in the hands of the said bank at Liverpool, by drawing a bill of exchange for the sum of 5,000*l.*

on the said Bank of Liverpool, and specifically appropriating to the payment of such bill of exchange an equal amount out of the funds aforesaid belonging to the said National Bank, and then lying in the hands of the said Bank of Liverpool." One cannot help being struck with the language of those allegations, which are a good deal more like the form of pleading at law than the statement of facts in bills of equity, which are usually according to the simple truth of the transaction. That is the first part of the case ; and of course, if proved, would be a very clear case of contract for an equitable assignment. However, doubting, I suppose, whether that would be supported by the evidence, the plaintiff's bill in a subsequent paragraph goes on to charge that, "if in fact there was no specific appropriation for the payment of the said two bills of exchange of 5,000*l.* each, as hereinbefore set forth, by reason of any default on the part of the said National Bank to make such specific appropriation, without the consent and concurrence of the said Liverpool Bank, or from any other cause whatsoever, yet the said National Bank, and the said receiver of its assets, are by reasons of the assurances and representations made to the plaintiff, when the plaintiff gave a large and valuable consideration for the said two bills of exchange, and when they were delivered to the plaintiff, as hereinbefore set forth, precluded and estopped from so alleging, and from claiming as against the plaintiff the said funds now in the hands of the said Liverpool Bank." That latter suggestion seems to have been adopted by Vice-Chancellor Stuart, and it has been much and ably insisted upon before your Lordships this morning, by Mr. Cracknall, the appellants' counsel ; and I would propose first to deal with that alternative branch of the case. Now, I apprehend that nothing can be more certain than that the doctrine of equitable estoppel by representation is a wholly different thing from contract or promise or equitable assignment, or anything of that sort. The foundation of the doctrine, which is a very important one, and certainly one not lightly to be departed from, is this ; that if a man dealing with another for value makes

statements to him as to existing facts, which being so stated would affect the contract, and without reliance on which, or without the statement of which, the party would not have entered into the contract, and which being otherwise than as they were stated, would lead to a situation after the contract different from that which would have existed if the representations had not been made, then the persons making those representations shall, so far as the power of a Court of Equity extends, be treated as if the representations were true, and shall be compelled to make them good; but there must be representations concerning existing facts. Now, my Lords, the limits of that doctrine, and the distinction between it and a contract, were carefully examined and well pointed out in the judgment given by Lord Cranworth in this House in the case of *Jorden v. Money* (*ubi supra*), where, after referring to the cases of *Pickard v. Sears* (*ubi supra*) and *Freeman v. Cooke* (*ubi supra*), which Lord Cranworth thought had stated the doctrine somewhat more accurately than it had been expressed, as far as words went, in *Pickard v. Sears* (*ubi supra*), his Lordship states this to be the general result of the rule. He says, "The rule in *Pickard v. Sears* (*ubi supra*) is, that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own position, the former is concluded from averring against the latter a different state of things as existing at the same time." And Lord Wensleydale, in the passage quoted by Lord Cranworth, went on to say, "Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears* (*ubi supra*), must be considered as established. By the term wilfully, however, in that rule we must understand (if not that the party represents that to be true which we find to be untrue), at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's

real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." Then his Lordship went on to say that there had been an erroneous application of that view in the case of *Jorden v. Money* (*ubi supra*), then before the House, to the facts of the case which were of this nature, that upon the occasion of a young gentleman's marriage, a lady to whom he owed a debt on a bond, and who was a great friend of his, said she abandoned the debt, and then after the marriage she changed her mind and sued him on the bond. It was argued that upon the doctrine of representation, she would not have been at liberty to claim to have the debt paid; and there was some difference of opinion upon grounds which need not now be regarded, and which arose out of the facts of that case; but the judgment of the House was, that she was at liberty to sue for the debt, and Lord Cranworth said this, with reference to the doctrine of representation, "I think that the doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not." Then, after referring to the particular circumstances of the case, he says, "It might be, if all statutable requisites, so far as there are statutable requisites, had been complied with, that it would have been a very good contract, whereby she might have bound herself not to enforce the payment." Then he goes on to say, "If she does not perform that promise, she is guilty of a breach of contract, in respect of which she may be sued, if it is put into a valid form, but not otherwise; so if she had said, as she did to William Money, I mean to give you everything I am worth in the world; I promise to do so; her not doing so is no fraud in the sense in which in these cases we speak of fraud; it is no misrepresentation of a fact which the party is afterwards held bound to make good as true;

it seems to me that the distinction is founded on perfectly good sense, and that in truth, in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say, 'Enter into a contract,' and then all difficulty is removed." I have been endeavouring, during the course of the argument, to ascertain if I could, for the purpose of seeing whether this doctrine of estoppel or representation has any application here, what in that view of the case is the specific representation which the respondent would be bound to make good as true. It is said that something was stated about remittances having been specifically appropriated to paying drafts to be drawn. If the meaning of what took place really was that for valuable consideration, and upon the faith of a specific appropriation of the funds, the bill of the one bank was to be bought by another bank, that, as I understand the law, would be equitable assignment, because there was a contract, one part of which was that specific funds should be held as specifically appropriated to the payment of that bill. But if it is put, not on the footing of contract, but on the footing of representation, what is the representation? It is possible, certainly, though not, I think, very probable, in mercantile dealings of this kind, that the National Bank of New Orleans might previously to the negotiation, by some of its own statements in New Orleans, have constituted a trust of funds originally belonging to them in the hands of the Bank of Liverpool, by which the Liverpool Bank was bound, as trustees, to apply these funds in payment of bills of a particular class or description. A representation which would have produced that result to which I have referred, would have been a representation that there was a trust of that description already constituted of funds, and that there were funds then in the hands, or to come into the hands by reason of something which had already taken place, of the Bank of Liverpool; but I cannot find, upon the face of any part of the evidence here, the smallest ground whatever for interpreting anything which has been said or done, as having been said or done as a represen-

tation, that a trust of that description, independently of the contract then and there made, had been constituted so as to make the Liverpool Bank at that time trustees of any fund received or about to be received by them. My conclusion, therefore, is, that this case resolves itself into a question of contract and nothing else, and that unless the equitable assignment is made out the appeal altogether fails.

Now, what is the evidence of equitable assignment? The strongest part, that which but for cross-examination, would have been the strongest part of the evidence in the present case, is identical with that used in *Thomson v. Simpson* (*ubi supra*), namely, the evidence of Mr. Forbes and Mr. Meig, the manager and agent of the bank which gave the bills. No doubt there are expressions in their evidence which at first appear to go to the length of the appellants' case, that is to say, it appears to be a statement that there had been a specific appropriation of funds in the hands of the Bank of Liverpool to answer bills, of which these were part, and that a communication was made when the appellant bank purchased the particular bills to that effect; and, if it had rested there, upon no other evidence than the original affidavits of Mr. Forbes and Mr. Meig, unexplained by the cross-examination, I am by no means sure that the appellants would not have made out their case. I may say in passing, that the language of those portions of the affidavits of Forbes and Meig, made, it must be remembered, after the bank had become insolvent, and when the question really was between two classes of creditors, is very much stronger than the language used either by Mr. Gaines or Mr. Harris, who were the parties to this particular transaction, and to one of whom the particular representations and statements were made. But when you add to that original statement of Forbes and Meig their cross-examination, the whole matter becomes as clear as daylight, and the whole result is this, that, as a matter of truth, there was no appropriation at all as between the Liverpool Bank and the New Orleans Bank, who drew the bills, of any funds or remittances except in this sense, that it being

convenient for the transaction of the New Orleans Bank, that a number of bills and other funds belonging to them should be collected in England by an English agent, and it being also convenient to them to have a credit on which they could draw at Liverpool for their own general purposes, the Liverpool Bank undertook the office of collecting the bills and other remittances, it being understood between them that they would honour the bills which might be drawn on them, but that they were, as between the two banks, to be covered by such balance from time to time in their hands; and, as a matter of fact, they were kept so covered, and at the time the transaction in question took place, they had in their hands from 45,000*l.* to 50,000*l.* of remittances belonging to the New Orleans Bank, being more than amply sufficient to meet the bills in question, or, as I collect, other bills of the same kind which had been drawn against them. Those being the arrangements between the two banks, bills of exchange payable at sixty days after sight in the ordinary form of bills of exchange, without a syllable pointing to any particular fund, are brought for sale by the one bank at New Orleans to the other bank at New Orleans, and this passes. I do not know which party asks the question or whether the information is volunteered, but in substance that passes which is stated in the affidavit of Gaines and Harris, who, making their affidavits deliberately in support of this bill, must, I think, be taken to state it as strongly as they could, having regard to the truth and to their own understanding of what passed. Now what is the statement of Mr. Gaines? He was the appellants' agent, the person who acted on the part of the appellants. He says that Harris, a bill broker employed by the National Bank of New Orleans, called on him at the offices of his own bank, the Citizens' Bank of Louisiana, and requested "me to purchase, on behalf of my said bank, a bill of exchange for 5,000*l.*, drawn by the said Bank of New Orleans on the said Bank of Liverpool. I was not desirous of purchasing the said bill and at first declined to purchase it, and Harris then stated that he was authorised by Mr.

Forbes (who, as I knew, was the President of the said First National Bank of New Orleans) to say that the said bill was drawn expressly against funds to a much larger amount already remitted to the Bank of Liverpool, and I thereupon, and on the faith of this assurance, agreed to purchase and did in fact purchase the said bill of exchange on account of the said bank." Then a second bill was brought on the 2nd of May, 1867, and he says, "Harris assured me that the last-mentioned bill of exchange was also drawn specially against funds to a larger amount already remitted to the Bank of Liverpool." On the one occasion the word "expressly" is used—"drawn expressly against funds," and on the other occasion the word "specially" is used—"drawn specially against funds." But he does not pretend in his evidence in chief to go a bit beyond that. Is that an equitable assignment? Is that an appropriation of such a kind that from the moment that transaction took place, as between the two banks, the Citizens' Bank would become purchasers, *pro tanto*, to answer these bills drawn at sixty days' sight, upon previous remittances made by the drawers to their agents at Liverpool in order to provide for that and other bills which they may draw? It seems to me that the transaction is one of the most mercantile kind, and that it is perfectly consistent with the ordinary course of dealing between the Liverpool Bank and the drawers of the bill, which, upon the whole of the correspondence and the evidence, plainly was not one of specific trust or appropriation of any particular funds. It merely amounts to this, that the person asked to take the bill wants to know distinctly whether the person who has drawn it has made a provision that it will be paid. The statement is, "We have sent forward to Liverpool funds of a much larger amount, which are intended to be used to pay off this and other bills." If that be a specific appropriation or an equitable assignment, it follows that every ordinary transaction in which any enquiry is made of the same kind is an equitable assignment. For instance, if a man draws a cheque and gives a cheque upon a bank it is a fraud in one sense, and a very intelligible sense, no doubt, if he has no

account there. If he has one, it is very likely that no question will be asked; but suppose a question is asked, and he says, "I have a sufficient balance to pay it," is that an equitable assignment of the balance? If it is not, there is no equitable assignment here. This is the view which the Court took in the case of *Thomson v. Simpson* (*ubi supra*); it is the view which the Master of the Rolls took in the present case; and in my judgment that decree is perfectly correct. I therefore advise and move that this appeal be dismissed with costs.

LORD CHELMSFORD and LORD COLONSAY concurred.

Judgment of the Court below affirmed, and appeal dismissed with costs.

Solicitors—Messrs. Clarke, Son & Rawlins, for appellants; Messrs. Sharpe, Parkers & Co., agents for Messrs. Jevons & Ryley, Liverpool, for respondents.

MALINS, V.C. }
1874. }
Jan. 26. }

NOKES v. GANDY.

County Court Appeal—Administration Suit—Action by Creditor against Executor de son tort—Injunction to stay before Decree—County Court Order XII. r. 1.

A creditor of an intestate having brought an action against the executor *de son tort*, for the recovery of his debt, an injunction staying the action was granted by the County Court Judge, acting under County Court Order XII. r. 1, upon the *ex parte* application of the plaintiff in an administration suit against the rightful administrator of the intestate and the executor *de son tort*, but before any decree had been made in the suit:—Held, on appeal, that order XII. r. 1, gave no authority to the County Court Judge to grant the injunction, and that he was wrong in granting it on an *ex parte* application.

Order of injunction accordingly discharged.

Appeal from the County Court at Chelmsford.

William Gandy died intestate on the 4th of August, 1873, being indebted to Thomas Richardson in the sum of 75*l*. After the death of the intestate, the defendant, Alfred Darby, took possession of and sold his effects.

On the 13th of October, 1873, Richardson commenced an action against Darby as executor *de son tort*, for the recovery of the debt of 75*l*. On the 18th of October letters of administration to the estate of the intestate were granted to his father, the defendant, William Gandy. On the 22nd of October the plaintiff, Albert Nokes, filed a plaint in the County Court against Gandy and Darby for the administration of the intestate's estate; and on the 23d of October the County Court Judge, on an *ex parte* application by the plaintiff, and before a decree had been made in the suit (the Court, under County Court Order I. rule 8, not having the power to make a decree before the expiration of one month from the filing of the plaint) granted an injunction restraining Richardson from proceeding with his action.

Richardson then moved to dissolve the injunction, on the ground of want of jurisdiction; but the County Court Judge held that he had jurisdiction to grant it, and further, that to prevent one creditor obtaining payment in full, or incurring costs unnecessarily at the expense of the estate and to the detriment of the general body of creditors, the injunction was, under the circumstances, necessary and proper. He accordingly refused the motion with costs.

From that decision Richardson now appealed.

Mr. Glasse (Mr. Nalder with him), for the appellant.—The decision of the County Court Judge was wrong on two grounds. First, Richardson being a creditor of the intestate, was at liberty to proceed with the action against Darby as executor *de son tort*, who could not discharge himself not having delivered the assets to the rightful executor before action brought—

Curtis v. Vernon, 3 Term Rep. 587;

Hill v. Curtis, 35 Law J. Rep. (N.S.)

Chanc. 133; s. c. Law Rep. 1 Eq. 90.

Secondly, it is the well-known rule that

a Court of Equity will not interfere to restrain a creditor from proceeding for the recovery of his debt *before* a decree for administration.

[In the course of the argument MALINS, V.C., mentioned

Cooté v. Whittington, 42 Law J. Rep. (N.S.) Chanc. 846; s. c. Law Rep. 16 Eq. 534;

remarking that he did not agree with the subsequent decision of the Master of the Rolls in

Bowtell v. Morris, 43 Law J. Rep. (N.S.) Chanc. 97; s. c. Law Rep. 17 Eq. 20.]

Mr. Cotton and Mr. Begg, in support of the order below.—The Judge had power to grant the injunction under County Court Order XII. 1 (1), and was right in doing so, in order to protect the assets, because no decree could be made before the expiration of a month from the filing of the plaint. The 12th Order vests a full discretion in the Judge, and its intention and effect is to give the County Courts a greater power as to granting injunctions than the Court of Chancery has usually exercised.

Mr. Glasse in reply.

MALINS, V.C., said, every creditor might sue an executor for a debt, and nothing could be more clear than that this Court never interfered to stay such an action until after an administration decree had been made. It was clear that if this motion had been made in this Court be-

fore decree it would have been dismissed with costs. There was no instance known in which, in such a case, an action against an executor had been stayed. Therefore, it appeared to him, that the County Court Judge had erred in granting an *ex parte* injunction, and on that ground alone he ought to have acceded to the application to discharge the order. Therefore the order must be discharged, first, on the ground that the County Court Judge had no authority to grant the injunction before decree, and that even if he had, it was not a case for exercising it; and secondly, that he had no right to grant the injunction on an *ex parte* application. Mr. Cotton had pointed out the inconvenience that a decree could not be made in the County Court within a month of filing the plaint; but it could not be said that the order was right because it sought to remedy an inconvenience. The case was not within the 12th County Court Order. If he were to sanction the practice that a creditor could be restrained by an *ex parte* injunction of the County Court from prosecuting his rights at law, when he never could be restrained in the Superior Courts, it would be altogether wrong. The order must therefore be discharged.

Solicitors—Mr. Woodard, for appellant; Messrs. Duffield & Bruty, for respondent.

(1) County Court Order XII. r. 1, is as follows —“Wherever in any suit or proceeding it shall become necessary to secure the possession of any property, or to obtain security from any person for any moneys in his possession, or to enforce the deposit or the payment into Court thereof pending litigation, or the immediate sale of any goods or chattels, and the deposit or payment into Court of the purchase money thereof, or to obtain an order in the nature of an injunction, any party may apply *ex parte* to the Judge either in or out of Court, upon affidavits setting forth the facts rendering such order immediately necessary, and upon such application the Judge may either make an order absolute in the first instance, or make an order to be absolute at any time to be ordered by him, unless cause be shewn to the contrary, or may make such other order, or give such directions in the matter as the Judge may think fit, and may order immediate execution.”

LOKDS JUSTICES. } *Ex parte* NEATH & BRECON
1874. } RAILWAY COMPANY.
Jan. 17.

Lands Clauses Act (8 Vict. c. 18), ss. 80, 85, 86—*Costs—Lien for Costs on Deposited Fund.*

A landowner has no claim against a fund deposited as security under s. 85 of the Land Clauses Consolidation Act, for his costs under the Act.

This was an appeal from an order of Vice-Chancellor Bacon, upon a petition of the Neath and Brecon Railway Company.

In the year 1865, the Neath and Brecon Railway Company being desirous of

entering before purchase upon certain lands belonging to J. L. V. Watkins, deposited in the Bank the sum of 1,544*l.* 7*s.* 4*d.* as security under s. 85 of the Lands Clauses Consolidation Act. The value of the land was afterwards duly assessed, and 1,700*l.* was awarded as its value, with 1,700*l.* for damage of severance. These sums the company paid, and a conveyance was duly executed to them on the 10th of June, 1873.

The company afterwards presented a petition under s. 87 of the Act, for the payment out of the deposited fund. The owners of the land, who were served with the petition, claimed their vendor's costs as a first charge on the fund, and the Vice-Chancellor accordingly ordered taxation and payment out of the fund of the vendor's costs, according to the Lands Clauses Act, and of the petition and payment of the residue to the petitioners.

The company appealed.

Mr. Eddis and *Mr. Gardiner*, for the appellants, relied on

Ex parte Stevens, 2 Phillips, 772; s. c. 13 Jur. 2;

Ex parte Great Northern Railway Company, 16 Sim. 169; s. c. 17 Law J. Rep. (N.S.) Chanc. 314; s. c. 12 Jur. 885; 5 Railway Cases, 269.

Mr. Kay and *Mr. Cracknall*, for the respondents.—The ground of the decision in

Ex parte Stevens (ubi supra) was that the costs were conveyancing costs, and not payable under s. 80 of the Act. The same remark applies to

Ex parte Great Northern Railway Company (ubi supra).

Here the costs are costs generally under s. 80, and it is for the petitioners to distinguish any that may not be payable if they object to the order. In

Ex parte Flower, 36 Law J. Rep. (N.S.) Chanc. 193; s. c. Law Rep. 1 Chanc. 599,

the costs were ordered to be paid out of the fund.

[The LORDS JUSTICES pointed out that the company there was solvent, and the real question was whether the costs were payable at all.]

At all events the point is mentioned in argument.

Mr. W. Whateley appeared in the same interest, but their Lordships declined to hear a third counsel.

No reply was called for.

LORD JUSTICE JAMES.—I am of opinion that the order is plainly at variance with the Act as construed by Lord Cottenham. The money is paid into Court under the 85th section for a particular purpose. When that purpose is answered, the legislature says in express words that the Court is to order it to be paid out. By the courtesy of Parliament when dealing with Courts of justice, the word "lawful" is used; but when it is said that it shall be lawful for the Court to do a certain thing, it means that it shall be done, and it is in fact unlawful to do anything else.

LORD JUSTICE MELLISH.—I am of the same opinion. By the provisions of the Act, the money is paid in for a particular purpose. The Act (s. 87) says, it shall remain as security to the parties whose land is taken for the performance of the condition of the bond. Even if it stopped there, I do not think the Court ought to apply the money for another purpose. But it goes on that upon the condition of the bond being fully performed, it shall be lawful for the Court upon the application of the promoters of the undertaking "to order the money so deposited or the funds in which the same shall have been invested, together with the accumulation thereof, to be repaid to the promoters of the undertaking." It is the ordinary form when jurisdiction is given to the Court to do a particular thing, to say that it shall be lawful for the Court to do it, and when that is said, the Court is bound to do the particular thing. I am of opinion, that even if the costs are costs under the 80th section, which is not made out, all that s. 80 says, is that in all cases of money deposited in the Bank—not, that the costs shall be paid out of the money deposited, but—that it shall be lawful for the Court to order the costs to be paid. The money is always paid in for a particular purpose, sometimes it is the purchase-money itself, and in other

cases, as here, it is security for the purchase-money. I think the meaning is that the costs are to be paid, but not out of the fund.

On the question of costs, their Lordships thought that although the general rule was to give the respondents to a petition of this nature their costs, yet as the respondents in the Court below had raised this question by affidavits involving extra costs, the fair thing would be to give no costs in the Court below.

No costs of the appeal.

Solicitors—Messrs. Dean & Taylor, for appellants;
Mr. F. C. Greenfield, for respondents.

BACON, V.C. }
1874. }
Jan. 23. }

DRIVER v. DRIVER.

Will—Construction—Gift of Residue without naming Donee—Intestacy.

D., by his will, gave all his property to his executor upon trust for the purposes of his will, and after gifts of 300l. to a daughter, and five shillings a week to his son, J. D., bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate and appoint my son, R. D.," sole executor; but the testator omitted to say to whom he bequeathed the remainder:—Held, that the testator had failed to express his intention, and that there was an intestacy as to the residuary real and personal estate.

In 1867 Jonas Driver executed his will in the terms following—

"This is the last will and testament of me, Jonas Driver, of New Road Side, Thornton, in the parish of Bradford, county of York, gentleman. In the first place, after the payment of my just debts and funeral and testamentary expenses, I give, devise and bequeath all my property of what nature or kind soever it may be, whether in possession, reversion or expectancy, unto my executor,

hereinafter appointed, upon trust for the uses, intents and purposes of this my last will, that is to say, I give and bequeath unto my daughter, Sarah, the wife of Thomas Horsfall, currier, Halifax, three hundred pounds, the same to be paid in six months after my decease. I further orther (*sic*) that a legacy of five shillings per week be paid to my son, John Driver, during the term of his natural life. I further request that my son, John Driver, shall receive not moor (*sic*) than five pounds at any time or times he shall allow the said legacy to accumulate above that sum. I give and bequeath unto my son, Robinson Driver, and my daughter, Sarah, the wife of Thomas Horsfall aforesaid, to be divided equally between them, all my interest, income and profits that may arise from all my share of lands and hereditaments, situate in Driver Square and New Halifax, Thornton, aforesaid. I further give and bequeath unto my son, Robinson Driver, and Sarah, my daughter, now the wife of Thomas Horsfall aforesaid, all my household goods and furniture, of what nature or kind soever they be, to be equally divided between them, share and share alike. I further order that after paying the before mentioned three hundred pound to my daughter, Sarah, the wife of Thomas Horsfall aforesaid, and the aforesaid legacy to my son, John Driver, I give and bequeath the remainder of my property, of what nature or kind soever it may be, whether in possession, reversion or expectancy, all interests, incomes, issues and profits, book debts, money, securities for money and other property of which I may die possessed, and I nominate and appoint my son, Robinson Driver, of Oakenshaw, farmer and publican, sole executor of this my last will and testament." The testator died in 1869 leaving three children, namely, John Driver, the eldest; Robinson Driver and Sarah Horsfall.

In 1872, a bill was filed by John Driver against his brother, Robinson Driver, to have the estate administered by the Court, and for a declaration that, subject to the payment of the testator's debts and the legacy of 300l., and making a competent provision for payment to the plaintiff of the five shillings a week, the

testator's real estate belonged to the plaintiff as heir at law, and his personal estate was divisible in equal shares amongst the three children.

Mr. Kay and Mr. Kekewich appeared for the plaintiff. They contended that as the gift to Robinson Driver as executor was expressly upon trust he could not claim beneficially.

Mr. Whitehorse, for the defendant, Robinson Driver, contended—First, That upon the true construction of the will everything was given by the first clause to the executor. Second, That it was clear upon the face of the will that the plaintiff, John Driver, was only intended to have the five shillings a week, and Third, That the Court will supply words in a will when the context shews them to be necessary—

Hope v. Potter, 3 Kay & J. 206;
Perkins v. Fladgate, 41 Law J. Rep.
 (N.S.) Chanc. 681; s. c. Law Rep.
 14 Eq. 54.

Here it is only necessary to insert the word "to" after the words "of which I may die possessed," in order to carry out the evident intention of the testator.

BACON, V.C.—I can only gather the intention of the testator from the words he has used, and here I am unable to say that the testator has mentioned any person to whom he has given the residue of his estate. It often happens that testators fail to express their intentions, and I think the testator in this case has so failed, and therefore the property is undisposed of. There must be a declaration that the testator died intestate as to his residuary real and personal estate, and the usual decree for administration must be made.

Solicitors—Mr. Philbrick, agent for Mr. Walker, Halifax, for plaintiff; Messrs. Emmett & Son, agents for Mr. Mossman, Bradford, for defendant.

JESSEL, M.R. }

1874.

Jan. 24. }

JACOBUS V. RYLAND.

Defaulting Trustee—Share in Trust Funds—Assignee—Mortgagee.

The principle which gives cestuis que trust an equity against any interest in the trust funds belonging to the trustee who has committed the breach of trust, extends to any interest taken by the trustee as next-of-kin of a deceased cestui que trust. Such equity is prior to the interest of a mortgagee of the trustee, as the trustee is considered to have paid himself before the interest accrued.

Mary Anne Elkes, wife of Edward Elkes, died in 1849, possessed of certain leaseholds and other personal estate settled to her separate use. By will dated the 30th of July, 1849, she bequeathed the leaseholds and the other personal estate to her husband upon trust for her five children, then infants, in equal shares. She appointed her husband sole executor and trustee.

Edward Elkes, in 1854, mortgaged the trust leaseholds to William Ryland, who, with constructive notice of the trust, entered as mortgagee, and received the rents and profits for many years, while all the living cestuis que trust were infants.

One of the sons died in 1856 an infant, leaving his father, Edward Elkes, his next-of-kin, who took out administration to him.

In 1858 Edward Elkes became insolvent.

In 1869 this suit was instituted by one of the daughters and her husband against the mortgagee, William Ryland, Edward Elkes and the other children. An inquiry was directed in the suit as to the amount of the estate of the testatrix. In answer to this inquiry, Edward Elkes deposed in an affidavit that, besides the leaseholds, the testatrix had left a considerable amount of personal estate, and that of this he had misapplied, in fraud of his children, about 700*l*.

No part of this sum of 700*l*. had been recouped to the trust estate.

By the decree in the suit the mort-

gagee was ordered to re-assign the leaseholds to new trustees, appointed in the place of Edward Elkes, and to repay the net rents received by him as mortgagee.

The mortgagee had paid into Court, under this decree, over 600*l*.

The share of the child who died, in the rents paid back by the mortgagee, amounted to 112*l*. 11*s*. 1*d*., and had been carried to a separate account.

Summonses were taken out by the mortgagee, William Rylance, and by Edward Elkes, claiming the share in the rents in Court, and by the surviving children, asking for a stop order to prevent the fund being paid out.

Mr. Ince, for the living children of the testatrix, contended that they were entitled to have the fund applied in recouping, *pro tanto*, the losses to the trust estate caused by the breaches of trust of Edward Elkes, which had not been recouped.

Mr. Daune, for the creditors' assignee of Edward Elkes, and Mr. C. A. Holmes, for the mortgagee, each claimed the fund, contending that, as Edward Elkes' interest arose, not under the will, but as representative of a *cestui que trust*, the equity of the other *cestuis que trust* did not attach to it.

THE MASTER OF THE ROLLS.—No doubt any creditor of the deceased son would have been entitled to the fund; but here the claim is made by persons claiming under the trustee who committed the breaches of trust. He never acquired any interest; he had paid himself before. In the view of the Court, he had been paid the amount before the interest accrued; he had, therefore, no interest. It is not a case of impounding at all. It is quite clear a defaulting trustee can never take any interest until he has made good his default. The surviving children are entitled to the fund. The summonses of Edward Elkes and the mortgagee must be dismissed, with costs.

Solicitors—Messrs. Edwards, Layton & Jaques, agents for Messrs. Chew & Sons, Manchester, for applicants; Mr. A. S. Twyford, for official assignee; Messrs. Massey, Taylor & Hales, agents for Mr. J. Howarth, Manchester, for mortgagee.

LORDS JUSTICES.

1873.

July 16, 17. }

GRAY v. LEWIS.

PARKER v. LEWIS.

Practice—Company—Directors—Breach of Trust—Right of Shareholder to sue—Indemnity against Breach of Trust—Charge of Fraud—Costs.

Where there is a corporate body capable of suing, that body only is the proper plaintiff in a suit for the recovery of property, whether from its officers or directors or from any other person, and a bill for that purpose cannot be sustained by one shareholder on behalf of himself and all others except the defendants.

The only exception to this rule is where the directors or majority of shareholders are doing something fraudulent against the minority, who are overwhelmed by them.

In order to obtain the sale of a business to a projected limited company, the L. Co., and to procure a settling day for the company on the Stock Exchange, it became necessary that 40,000 shares in the company should be subscribed for, with 5*l*. paid upon each. To effect this purpose, it was arranged between the directors of the L. Co., the I. Co.—who were promoting the L. Co.—and the N. Bank, that the N. Bank should discount promissory notes of the I. Co. to the amount of 200,000*l*.; that the I. Co. should pay the sum so received back into the N. Bank to the account of the L. Co.; that, in return for such payment, 40,000 shares in the L. Co. should be allotted to the nominees of the I. Co., and that the money so paid in should be retained by the bank, and employed in meeting the promissory notes when arrived at maturity.

This scheme was carried out. Subsequently a bill was filed by a shareholder in the L. Co., on behalf of himself and all other shareholders in the company, for a declaration that the application of these moneys to meet the debts of the I. Co. had been a breach of trust, and for the recovery of the amount from the directors of the L. Co. and the N. Bank:—Held, that such a suit came within the above-stated rule, and was not sustainable.

Held also, that the whole scheme was a sham, with regard to which no liability could arise, either at law or in equity, between the three companies who were parties to it.

The decree in the Court below found the Bank and the defendant directors of the L. Co. jointly and severally liable to make good the amount. The Bank and two of the directors appealed, but, before the appeal was heard, the Bank, to the knowledge but without the concurrence of the two directors, compromised the appeal, and afterwards filed a bill against the two directors, who were also directors of the Bank, and their own managing director (not making other directors who acted in the matter parties), to compel them to make good to the Bank the amount paid under the compromise.

Held, that, if the decree in the first suit had stood, the Bank would have been entitled to this relief, but that it was not sufficient (as in the case of a covenant for indemnity) to shew the decree in the Court below; and that decree having been reversed, the bill in the second suit must be dismissed, but without costs.

This was an appeal on behalf of Messrs. Harvey Lewis and F. B. Henshaw, two of the directors of a joint-stock company, called Charles Laffitte & Co., Limited, and defendants in the above-mentioned suit, *Gray v. Lewis*, from a decree of Malins, V.C., ordering the appellants and certain other directors of Charles Laffitte & Co., Limited, to refund a sum of 230,000*l.*, which, the plaintiff alleged, had been improperly and in breach of trust taken from the company. The case in the Court below is reported *Law Rep.* 8 Eq. 526.

The bill was filed by the plaintiff (who was the holder of 200 shares of 20*l.* each, on which 5*l.* had been paid up in Laffitte & Co.), on behalf of himself and all other shareholders in the company, except the defendants, against the directors of the company (including the appellants), the company, the official liquidator of the company, which was in course of being wound up, and the National Bank, for a declaration that the directors of Laffitte & Co. had no power to bind the shareholders to certain agreements contained in the two letters hereinafter mentioned, of the 8th of December, 1865, and the 5th of February, 1866, respectively, that the directors and the National Bank had been guilty of breaches of trust in apply-

ing the assets of the company in accordance with such agreements, and were personally liable to make good the losses incurred thereby.

The company of Charles Laffitte & Co. was formed in December, 1865, and registered as a limited company under the Companies Act, 1862, with a nominal capital of 3,000,000*l.*, divided into 150,000 shares of 20*l.* each. The objects of the company were to purchase for 150,000*l.*, and extend the banking business of Messrs. Charles Laffitte & Co., of Paris, and to carry on the business of bankers and other similar businesses. Messrs. Charles Laffitte, G. P. Kitson, Harvey Lewis, and F. B. Henshaw and others, were named in the articles of association as the first directors of the company.

The 90th clause of the articles of association provided that "The directors may invest any part of the moneys of the company in the purchase or acquisition of shares in any other company or corporation, or in the purchase or acquisition of the assets or business of any such company or corporation, or of any private person or firm, and may enter into, make and carry out on behalf of the company any deed, contract or agreement in relation thereto; but the company shall in no case purchase any of its own shares."

Messrs. Laffitte & Co., of Paris, required that, before they transferred their business to the new company, 40,000 shares in the company should have been actually subscribed for.

Previously to the incorporation of C. Laffitte & Co., Limited, negotiations had been entered into between the promoters of that company and the Ottoman Financial Association, of which Kitson, Lewis and Henshaw were directors, for the amalgamation of the company and that association upon the terms of the association taking 35,000 shares in the company, and handing over to the company all their assets in payment for such shares. The Ottoman Association not having assets sufficient to purchase the 35,000 shares in Laffitte & Co., as proposed, applied to the International Contract Company, of which Kitson was the chairman, to assist them, and, in pursuance of such application, on the 6th of

December, 1865, the International Company wrote to Messrs. Laffitte & Co., at Paris, as follows—

“We hereby guarantee the subscription of 40,000 shares to Charles Laffitte & Co., Limited, as proposed to be established in conformity with the annexed prospectus. And we further guarantee the payment of 5*l.* per share on the said 40,000 shares at the National Bank, to the credit of the proposed new company, the payments to be made in instalments of 1*l.* per share on application, and 4*l.* per share within fourteen days after the allotment.”

The International Company, in their turn, obtained an undertaking from the Ottoman Association, guaranteeing the subscription for 35,000 of these shares.

It became necessary that money should be provided to pay the subscription for the 40,000 shares thus guaranteed to be taken, not only in order to satisfy the requirements of Messrs. Laffitte, but also to enable the new company to obtain a settling-day upon the Stock Exchange, according to the rules of the Stock Exchange, and for that purpose the following arrangement was come to between the promoters of Laffitte & Co., Limited, the International Contract Company, and the National Bank, of which company, also, the defendants, Lewis and Henshaw, were directors.

It was arranged that the bank should be one of the bankers of the new company; that the bank should discount the promissory notes of the International Contract Company to the amount of 200,000*l.*, and that the money so advanced by the bank should be applied in payment for shares to be taken by the makers of the notes, or their nominees, and should remain in the bank to the credit of C. Laffitte & Co.; and that the money which, under this arrangement, would be standing to the credit of Laffitte & Co. in the bank, might be applied by the bank in payment of the promissory notes.

C. Laffitte & Co., Limited, was registered on the 8th of December, 1865, and immediately afterwards, on the same day, a meeting of the directors of the new company was held, at which Kitson,

Henshaw, Lewis and others were present. The following letter was then and there written, and addressed to the manager of the National Bank:

“Charles Laffitte & Co. hereby request that you will be good enough to discount the promissory notes of the International Contract Company to an amount of 200,000*l.* The makers thereof have undertaken, if requested by us so to do, to apply for shares in this company, Charles Laffitte & Co., Limited, and to apply the proceeds of the notes for that purpose, and on behalf of parties who will take up the said shares. And Laffitte & Co., Limited, hereby undertake that, until the amount of the said notes are replaced by you, there shall stand to the credit of Laffitte & Co., Limited, an amount equal to the sum which may remain unpaid on the said notes; and if such notes be not paid at maturity, you shall be at liberty to pay same out of the balance which shall so stand to the credit of Laffitte & Co., Limited, without any further order or authority, and to cancel the notes. Dated the 8th of December, 1865.” The following is the minute in the company's books relating to the above-mentioned arrangement and letter. “The chairman reported result of negotiations with the International Contract Co. relating to the proposed subscription for shares, and read form of letter relating to credit to be opened in favour of Charles Laffitte & Co., Limited, if necessary, with the National Bank. Resolved, that these arrangements be approved, and that the seal of the company be attached to the letter, and that a duplicate be forwarded to the International Contract Company.” The letter was accordingly signed by Kitson (chairman) and by Gauntay and Bate, two of the directors of the new company, and, in the absence of any proper seal of the company, none having been yet obtained, was sealed with Harvey Lewis's signet ring, which was adopted as the company's seal for this occasion. This letter was sent to the National Bank, and upon the guarantee contained in it, the bank discounted the promissory notes of the International Company for 200,000*l.*, and placed that amount, less the discount, to

the credit of that company. On the 9th of December the directors of C. Laffitte & Co. issued a prospectus, in which they stated that 25,000 shares in the company had been privately subscribed for. The International Company, or its nominees, then applied for 40,000 shares, as agreed, and the deposits and allotment money upon these shares were paid for out of the proceeds of the promissory notes remaining in the bank, the amount which, by means of such payments, was transferred to the credit of Laffitte & Co., being retained by the bank to meet the promissory notes as they should become due. In February, 1866, a further sum of 30,000*l.* (less discount) was transferred by the bank to the credit of Laffitte & Co., under an arrangement between Laffitte & Co., the bank, and the International Company, precisely similar to that already detailed, the letter of guarantee to the bank for this fresh advance being dated the 5th of February, 1866.

Under these circumstances an application was made by Laffitte & Co. to the committee of the Stock Exchange for a settling day. The rules of the Stock Exchange were stated in the bill to be as follows—

“The application for a special settling day for transactions in the shares of a new company must be accompanied by the following documents, viz., the prospectus, the Acts of Parliament, or articles of association, the original applications for shares, a certificate that two-thirds of the shares (exclusive of those reserved or granted in lieu of money payments to concessionaires, owners of property, or others) have been applied for, and the allotment book signed by the chairman and secretary of the company; a certificate signed in like manner, stating the number of shares applied for and allotted unconditionally, and the amount of deposits paid thereon; a certificate from the bankers of the company (accompanied by the pass book), stating the amount of the deposits received; and upon this being done, the committee will appoint a special settling day, provided that no allegation of fraud be substantiated, and that there has been no misrepresentation or suppression of material facts; that sufficient scrip or

shares are ready for delivery, and no impediment exists to the settlement account; that the company is of a *fide* character and of sufficient magnitude; that two-thirds of the shares shall be conditionally allotted; that the directors of association restrain the directors from employing the funds of the company for the purchase of its own shares; and provided that a member of the Stock Exchange is authorised by the committee to give full information as to the details of the undertaking, the application for shares, and allotments of shares, and as to any other particular that the committee may require.”

In order to comply with the rules, Laffitte & Co. obtained the requisite certificates from its three bankers, the London Joint Stock Bank, the London County Bank, and the National Bank, by letters addressed to the committee of the Stock Exchange, certified, on the 27th of January, that “an application had been made for 79,522 shares in Charles Laffitte & Co. Limited, and the deposit of 1*l.* 1*s.* 6*d.* amounting to 79,522*l.*, had been made thereon.” On the 12th of February, they certified that the balance to the credit of Charles Laffitte & Co. Limited, amounted to 237,550*l.* At the time when the last certificate was given, the bank was perfectly well, and that 230,000*l.* of the above-mentioned balance was appropriated to the purchase of promissory notes of the International Company, of which the two 10,000*l.* each, became due only after the date of the last-mentioned certificate, and the remainder would be due before the 10th of May. But the bank concealed this from the Stock Exchange committee, and the faith of these certificates was not maintained. The Stock Exchange committee granted a settling day to Charles Laffitte & Co. None of the notes of the International Company were taken up by the committee, in fact, paid as they became due out of the 230,000*l.* Charles Laffitte & Co., never acquired the 100,000*l.* of the Paris, but was to be wound up on the 3rd of February, 1866. Calls had been made

contributories to the amount of 15*l.* per share.

Both the International Contract Company and the Ottoman Company were ordered to be wound up in the year 1866.

The plaintiffs' bill, which was filed in November, 1866, prayed a declaration that the directors of Laffitte & Co. had no power to bind the shareholders of the company to the agreement contained in the two letters dated the 8th of December, 1865, and the 5th of February, 1866, that the said directors and the National Bank were guilty of breaches of trust in applying the assets of the company in accordance with that agreement, and were liable to make good the losses sustained in consequence of such breach of trust.

It appeared by the plaintiff's evidence that he was a cousin of the defendant, Sir John Gray, the proprietor of the *Freeman's Journal* newspaper, in Dublin; that he was employed as a clerk, at a salary, in the newspaper office; that he had never paid anything upon his shares in the company, and never had any sufficient means of his own to do so; that he had been informed by Sir John Gray, since the institution of this suit, that the 5*l.* per share paid up on his shares had been paid by Kitson, and he supposed that the money so paid was derived from the National Bank. The plaintiff submitted that, whilst he remained liable for calls on his shares in the company, he had a sufficient interest to entitle him to maintain this suit. The bill was originally filed against M. A. Gaucray, who was one of the first directors of C. Laffitte & Co. named in the articles of association, and took a part in the transactions complained of in this suit. But in December, 1866, before any other of the defendants had answered, the suit was abandoned against him.

Vice-Chancellor Malins, when the case came before him in 1869, decided that the National Bank, having acted upon the letters of the 8th of December, 1865, and the 5th of February, 1866, for a fraudulent and illegal purpose, must restore the 230,000*l.*, with interest, to Laffitte & Co., and that the defendants, Harvey Lewis, Henshaw, Kitson and

Bate, who had acted as the main promoters of the scheme, were liable to restore the funds to the company. See the Report, 8 Law Rep. Eq. 526.

From this decree Lewis and Henshaw and the National Bank presented separate petitions of appeal, and the appeals were set down to be heard, but before they came on, a compromise was effected between the plaintiff Gray, the bank and the liquidator of Charles Laffitte & Co., by which, in effect, the bank agreed to pay the plaintiff's costs and the debts of Charles Laffitte & Co. The defendants, Lewis and Henshaw, were not parties to this compromise, but they were well aware of it, and, in consequence, they did not further prosecute their appeal.

The bill in *Parker v. Lewis* was filed in 1870 by the bank (by their public officer) against Lewis and Henshaw, and McKenna, their managing director at the time of the transaction, to make them liable to the bank for the amount paid under the compromise.

The 13th paragraph of the bill contained a charge that each of the defendants was to receive a sum of 5,000*l.* from the International Company in consideration of their supporting the scheme as directors of the National Bank, but this charge was denied by the defendants, and was not sustained.

The Vice-Chancellor made a decree declaring the defendants liable to make good all sums properly paid by the bank under the compromise, and ordered them to pay the costs of the suit, but ordered the plaintiffs to pay the costs occasioned by paragraph 13 of the bill.

The defendants appealed; and Lewis and Henshaw also, by leave of the Court, gave notice of motion to restore their appeal, in *Gray v. Lewis*, to the paper.

PARKER v. LEWIS.

Mr. Fry, Mr. Henry James, and Mr. Davey, for the appellants Lewis and Henshaw.—The bank had power to discount the bills of the International without any security, so that, even if the guarantee of Charles Laffitte & Co. was bad, the transaction was still *intra vires*. The charge of fraud has failed, and the utmost that can be alleged against us is

indiscretion or mistake, for which, as directors, we are not liable—

Overend & Gurney Co. v. Gibb, 42 Law J. Rep. (N.S.) Chanc. 67; s. c. Law Rep. 5 E. & I. App. 480;

Turquand v. Marshall, 37 Law J. Rep. (N.S.) Chanc. 582; s. c. Law Rep. 6 Eq. 112 (on appeal); s. c. 38 Law J. Rep. (N.S.) Chanc. 639; s. c. Law Rep. 4 Chanc. 376.

But further, the only loss really sustained by the bank was under the decree in *Gray v. Lewis* (*ubi supra*), which, we contend, was wrong. The bank thought fit to compromise the suit, and on that ground we did not pursue our appeal. The *onus* lies on the present plaintiff, to shew that the liability under the compromise was properly incurred; but, if necessary, we ask now that our appeal in *Gray v. Lewis* (*ubi supra*) should be heard. The Court of Exchequer has practically refused to follow the decision in

The British and American Telegraph Company v. Albion Bank, 41 Law J. Rep. (N.S.) Exch. 67; s. c. Law Rep. 7 Exch. 119.

The company had no rightful claim against the bank. They were not misled by anything that was done, and the only persons who could have any right to complain are persons who were induced to take shares in consequence of the bank's representations.

The present suit is really founded on the charges of fraud, which have failed; otherwise the other directors, who were present when the resolution was passed, ought to be parties.

Mr. Glasse, Sir J. Karslake and Mr. Everitt, for McKenna, also contended that the transaction was *intra vires*, and further, that there was no personal charge substantiated against McKenna, and no case made against him which was not made against all the directors of the bank, who ought, also, to be parties—

Fowler v. Reynal, 2 De Gex & S. 749;

Devaynes v. Robinson, 24 Beav. 86; s. c. 27 Law J. Rep. Chanc. 157.

If the certificate was a fraud, it was only on those who took shares on the faith of it, and even regarded as a claim

by the company, the suit of *Gray v. Lewis* (*ubi supra*) was wrongly instituted—

Jones v. Garcia del Rio, 1 Tur. R. 297;

Croskey v. The Bank of Wal. Giff. 314.

The ground of fraud having failed bill cannot be sustained on any ground—

Hickson v. Lombard, Law Rep. E. & I. App. 324.

The Solicitor-General (Sir G. Je Mr. Cotton, Mr. Graham Hastings Mr. J. Armstrong, for the plaintiff.—transaction was not an ordinary bar transaction. It was a breach of trust involve the bank in such a transaction and the directors are personally liable the loss sustained—

The Imperial Mercantile Credit Association v. Coleman, 42 Law J. (N.S.) Chanc. 644; s. c. Law 6 H.L. 189;

The Joint Stock Discount Company v. Brown, Law Rep. 8 Eq. 38

The Land Credit Company of Ireland v. Lord Fermoy, Law Rep. 17; on App. Law Rep. 5 C 763;

Zulueta's Claim, 39 Law J. (N.S.) Chanc. 361; on appeal 598; s. c. Law Rep. 5 Chanc. s. c. *ibid.* 9 Eq. 270.

Then as to the argument that *Gray v. Lewis* (*ubi supra*) was wrongly decided we say that, the bank having defended in the Court below, was not bound to carry the defence any further. The present defendants, Lewis and Hen were watching the proceedings at the time of the compromise; and it was for them to suggest and support the defence, if they desired it. The result of the Court is conclusive—

Lampleigh v. Brathwait, 1 Sm (6th ed.), pp. 149, 150, and the cases there cited.

With respect to the objection parties, under the Consolidated Act, vii., r. 2, the plaintiff is not bound to before the Court all the parties liable a joint and several demand, and applies in case of a breach of trust, administration is not asked.

[JAMES, L.J.—But the Court will not act upon that when justice requires the presence of the other parties.]

We rely on

Perry v. Knott, 5 Beav. 293;

Killaway v. Johnson, 5 Beav. 319;

The Attorney-General v. The Corporation of Leicester, 7 Beav. 176;

The Attorney-General v. Pearson, 2 Coll. C.C. 581;

The Attorney-General v. Wilson, Cr. & Ph. 1; s. c. 10 Law J. Rep. (N.S.) Chanc. 53.

The bill is not solely based on fraud, and it can, therefore, be sustained, though the charges of fraud fail—

The London Chartered Bank of Australia v. Lempriere, 42 Law J. Rep. (N.S.) P.C. 49; s. c. Law Rep. 4 P.C. App. 572.

[*Mozley v. Alston*, 1 Ph. 790; s. c. 16 Law J. Rep. (N.S.) Chanc. 217.

Foss v. Harbottle, 2 Hare, 461, were also referred to as to the form of the suit of *Gray v. Lewis* (*ubi supra*).]

Mr. Fry, in reply, cited

The Charitable Corporation v. Sutton, 2 Atk. 400.

Mr. Glasse, in reply.

After the conclusion of the arguments in *Parker v. Lewis* (*ubi supra*), the appeal in *Gray v. Lewis* (*ubi supra*) was ordered to be restored to the paper.

GRAY v. LEWIS.

Mr. Fry, *Mr. Lindley* and *Mr. H. Davey*, for the appellants, argued that this suit was wrongly constituted. If a bill could be maintained at all under the circumstances it was maintainable only by the company, and an individual shareholder could not sue in his own name, as the plaintiff attempted to do in this suit—

Atwood v. Merryweather, 37 Law J. Rep. (N.S.) Chanc. 35; and in note Law Rep. 5 Eq. 464;

Foss v. Harbottle (*ubi supra*);

Mozley v. Alston (*ubi supra*).

In this case the plaintiff should have obtained leave to sue in the name of the official liquidator. There had been several cases in which such leave had been given. The objection to the form of the suit was really a substantial and not merely a tech-

nical one, for the plaintiff here was a man of no means and could not pay the costs if the appellants should be successful. Another objection to the constitution of this suit arose from the dismissal of the bill against Mons. Gautray. It was not open to a plaintiff to abandon his case against one of several persons jointly liable, and to proceed against the others of such persons. The abandonment of the plaintiff's case as against one of the defendants would be held as equivalent to an abandonment of it against all of them—

Fussell v. Elwin, 7 Ha. 29; s. c. 18 Law J. Rep. (N.S.) Chanc. 349;

The London Gas Light Company v. Spottiswoode, 14 Beav. 264;

The Attorney-General v. Dew, 3 De Gex & S. 488.

Again the plaintiff had no real or substantial interest in the suit: according to his own admission he had never paid a penny upon his shares. He was merely the nominee of some other person.

Mr. Cotton and *Mr. Graham Hastings*, for the plaintiff.—The money when paid into the National Bank was the money of "C. Lafitte & Co.," and the bank which concurred in its misappropriation with full knowledge of the circumstances was a party to and liable in respect of the breach of trust—

Wilson v. Moore, 1 Myl. & K. 127, 337;

Bryson v. The Warwick and Birmingham Canal Company, 4 De Gex, M. & G. 711; s. c. 23 Law J. Rep. (N.S.) Chanc. 133, affirming 1 Sm. & G. 447.

Mr. Fischer and *Mr. Armstrong*, for the liquidators of Lafitte & Co.—First, as to the position of the plaintiff. Had he a substantial interest in the suit? He held 200 shares on which he was liable for calls. As against creditors of the company he was the shareholder liable, therefore he had a plain interest in recovering these funds which would be applicable towards payment of the company's debts. That being so he could maintain this bill—

Forrest v. The Manchester, Sheffield and Lincolnshire Railway Company, 4 De Gex, F. & J. 126.

The fact that the company had been

ordered to be wound up did not affect the plaintiff's right to sue—

Bryson v. The Warwick and Birmingham Canal Company (ubi supra).

[LORD JUSTICE JAMES.—There being a corporate body, can an individual shareholder, either independently of or after a winding up of the company, file a bill on behalf of himself and all other shareholders to recover moneys due to the corporation?]

Mr. Fischer.—Yes. He could do so where the act complained of was a breach of trust. Any person in the position of a *cestui que trust* had a right to come to the Court and have the act rectified. After a winding up order no suit could be sustained by the company. Any suit on their behalf must then be brought by the official liquidator. But the official liquidator could not maintain a suit of this kind—

Ernest v. Weiss, 2 Dr. & S. 561; s. c. 32 Law J. Rep. (N.S.) Chanc. 113;

Clinch v. The London Financial Corporation, 37 Law J. Rep. (N.S.) Chanc. 281; 38 Law J. Rep. (N.S.) Chanc. 1; s. c. Law Rep. 4 Chanc. 117;

Hardy v. The Metropolitan Land and Finance Company, 41 Law J. Rep. (N.S.) Chanc. 257; s. c. Law Rep. 7 Chanc. 427;

The British and American Telegraph Company v. The Albion Bank (ubi supra).

Mr. Robinson appeared for Sir John Gray.

No reply was called for.

GRAY v. LEWIS.

LORD JUSTICE JAMES.—I am of opinion that the appellants, Mr. Harvey Lewis and Mr. Fraser Bradshaw Henshaw, are entitled to be relieved from the decree which has been pronounced against them in this case. They are the only persons who appear before us as appellants. The other parties against whom the decree was made have not appeared at the bar and asked (although they were entitled of course on an appeal from the whole decree to do so) to be relieved from the

decree, and they are content to remain as they are, including the National Bank, which does not appear or ask to be relieved from the decree which was made against it.

Now I am of opinion that this bill is demurrable upon almost every ground on which, according to my view, a bill is demurrable in this Court. I am of opinion that there is a wrong plaintiff, that there is a wrong forum, and that there is no cause of action by a right plaintiff in a right forum. The objection was taken that this bill should not have been filed by a plaintiff on behalf of himself and all other the shareholders, and I think it is very important indeed in order to avoid oppression, which one can see would be almost endless, in a case of this kind to adhere to the rule laid down in *Mozley v. Alston (ubi supra)* and *Foss v. Harbottle (ubi supra)*, which cases have always been considered as settling the law of this Court, that where there is a corporate body, capable itself of suing, that corporate body is the proper plaintiff and the sole plaintiff. The very object, in my view, of incorporating bodies of this kind is to render it unnecessary to have a multiplicity and endlessness of suits, which might very easily have arisen where one shareholder, on behalf of himself and a great number of other shareholders, was allowed to file a bill. Of course the difficulties in such a case as that would be very great. The defendant might have a bill filed against him by one plaintiff who might dismiss it, and, if he was a poor man, the defendant would have no remedy and would lose his costs, and then he might have another bill filed against him by somebody else, and every shareholder in the company might file a bill. Therefore there might be as many bills as there were shareholders multiplied by the number of defendants. Of course the result would be quite fearful, and indeed I think the defendant has a right to have the case made against him by the man or the real body who are entitled to complain of what he has done.

Now in this case I am of opinion that the only person—you may call it a person the body politic—the only one to complain was the incorporated company,

called Charles Laffitte & Co. In its corporate character it was liable to be sued, and was entitled to sue, and of course if the company sued in its corporate character the defendants could allege a release or a compromise by the company in its corporate character, a defence which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in *Mozley v. Alston* (*ubi supra*) and *Foss v. Harbottle* (*ubi supra*), to which as I understand the only exception is where the corporate body has got into the hands of directors and of a majority of the shareholders, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overwhelmed by them. I can easily understand the case *Atwood v. Merryweather* (*ubi supra*), in which Wood, V.C., allowed a bill under those circumstances to be filed, and even there only after there had been an attempt to obtain a proper authority from the corporate body itself in public meeting assembled.

The objection to such a bill is made very manifest by what we have in this particular case. Here Mr. George Gray files a bill on behalf of himself and all other the shareholders of the company complaining of a transaction as to which he really was by his agent a party. Now Mr. Gray never paid a farthing of money to the company; he never was in any sense of the word a shareholder of the company, except with reference to the liability he has come under since the winding up; but he was a mere name used by a person of the name of Kitson, for the purpose of carrying into effect the transaction which is complained of, and here he is asking relief on behalf of himself and the other shareholders, including all those shareholders who were then trustees and nominees of the International Company, and in respect of transactions to which the International Company was a party. Monstrous consequences might result from allowing such a suit as this, which seems to me improperly instituted.

It is not necessary to go into the other objections to the frame of the suit arising

from the dismissal of the bill against Amédée Gautray, who still remains upon the record as one of the parties liable. It is probably not necessary to consider in the first place whether this is one of those suits in which a bill can be filed against some and not others, of persons under a joint and several liability, and it is not necessary to consider how far when a man has been made a party, being out of the jurisdiction, and an appearance is entered for him, the case comes within the authority of those cases before Wigram, V.C., and the Master of the Rolls, where a defendant who was sued as one of several became bankrupt or died. The objection is in the highest degree technical, and one would rather not give an opinion on a highly technical point where the case does not require it. Therefore we will leave the objection as to Amédée Gautray undisposed of.

Now the next question is, supposing the case to be looked upon as a bill filed by the company, Charles Laffitte & Co., is it possible to sustain it? It is utterly impossible to sustain the bill, except as a bill by which the company is seeking to recover money. The case by the company against the bank is really this, and it is in my opinion a simple action at law. They say, "You, the bank, have got money in your hands, money paid into your bank to our account, and for which, therefore, you are liable to us; they are moneys had and received by you to our use, and you are our debtors to that amount; true it is you say that you have on your own books discharged yourself of 230,000*l.* of those moneys which you have so received by applying them in payment of certain bills of exchange under an authority signed by some of our directors; that authority is perfectly idle. It was entirely *ultra vires*." The bank knew it was *ultra vires*, and the directors knew it was *ultra vires*. Therefore the remedy against the bank remains exactly as if no such idle paper had been signed. The case is one for a simple action, like that which was brought in *The British and American Telegraph Company v. The Albion Bank* (*ubi supra*), which was brought for moneys actually paid in much the same way as in this case. Therefore it appears

to me that the proper action is an action at law, and there is no reason on earth why the forum should be changed.

But, beyond that, it appears to me with regard to the substance of the case, that is to say, with regard to that which is really the sole subject of this suit, namely, the transaction connected with the 230,000*l.*, there is no case as to which any liability can arise between these companies either at law or in equity. It was a transaction between the three companies, through their directors, the International, the National Bank and Charles Laffitte & Co. The National Bank, through their directors, were no more answerable than Charles Laffitte & Co. were liable, through their directors, or the International Company, through their directors. The whole thing was a trilateral contrivance between the directors of these three companies for the purpose alleged in the bill—for the purpose of making it appear that the company had moneys which it had not, for the purpose of deceiving the Stock Exchange committee by a false certificate of the state of the company. That the object from the first was illegal and *ultra vires* appears from the documents themselves. Everybody connected with the transaction must have been fully aware that no such application of the moneys could be authorised. Everybody must have been aware that the whole thing was a sham from the beginning to the end, and from a sham no action or suit arises either at law or in equity. That being so I am of opinion that the bill cannot be sustained. The appellants do not ask for costs in this case. On the ground that the plaintiff had no right to interfere, probably I should have been disposed to take a different view, but, having regard to the sham, I should not have been disposed to give anybody connected with the transaction any costs whatever.

LORD JUSTICE MELLISH.—I am of the same opinion. The only part of the case to which I wish to add a few observations relates to what may be called the merits of the case, and I wish to consider what is the true legal effect of the alleged agreement contained in the letter of the 8th of December, 1865. Now at that time Charles Laffitte & Co. had only just been registered, on that same day. They

had not started at all, and I entitle with what has been said that it quite absurd to suppose that the ordinary transaction in the way of business under their articles of association. They did not attempt to commence until months after the time this letter was written and the money entered into.

Well, what is the agreement? The agreement is that the bank shall discount of the International Contract to the amount of 200,000*l.*, that the International Company shall pay 200,000*l.* back again into the bank by the payment of 5*l.* per share on 40,000 Charles Laffitte & Co., to be the nominees of the International Company, that that sum so paid remain to the credit of Charles Laffitte & Co. nominally in the books of the bank until the promissory notes should become due, and when the promissory notes become due, then it should be the payment of the notes. That transaction, I cannot help saying appears to me, as it does to the Lord Justice, to be an entire sham. There is no pretence of dealing with these moneys for the real advance to the bank. Nobody is put in funds. The International Contract Company get no more money which they can deal with. Charles Laffitte & Co. get no money which they can deal with. The bank makes no advance to anybody except for the mere period during which it is paid taken back again. There is no real transaction at all. All that is that there is a representation that 40,000 shares have been alloted in my opinion they cannot be alloted to have been alloted at all, by the articles of association of Charles Laffitte & Co., which all these parties are aware of, they had no right to allote unless they received 1*l.* deposit on allotment, and money is borrowed to pay that the credit of Charles Laffitte & Co. and borrowed in such a way that who profess to lend it do not receive it at all, and are enabled to apply the moneys as they came back in discharge of the liability, it is quite obvious that

whatever had been advanced or paid over at all. I cannot help thinking, though the defendants say that they thought this was all right, and it was not until a late period they discovered that it was wrong that gentlemen of business and of extensive experience in joint stock companies could hardly help being aware, at least if they took the trouble to consider, what the nature of the transaction was, that it was almost impossible that such a transaction could be an honest transaction. It was a transaction on the face of it for the purpose of making it appear that 40,000 shares had been allotted and paid for, whereas in reality no shares had been allotted and paid for.

That being the nature of the transaction, what is the legal effect in point of law? I apprehend the first effect of it is that beyond all question everybody who is deceived by the transaction—everybody who is brought to subscribe for shares or to buy shares by reason of being led to believe that those 40,000 shares had been honestly subscribed for and paid for, is entitled to have a remedy both at law and in equity against those persons who have deceived him, but it must obviously be a personal remedy by each person who has been so deceived. They cannot join in a class, one suing for all the rest, because each person must enter into the circumstances of his own particular case to shew how and in what way he was deceived. That is the effect of it. But then, besides that, what effect can be given to it? Is one of the companies entitled to recover from the other company any large sum of money? It appears to me extremely difficult to see how that can be so. I entirely agree with the judgment in the case of *The British and American Telegraph Company v. The Albion Bank* (*ubi supra*) in the Court of Exchequer, and in my opinion it applies to this case. The money paid in never was in my judgment the money of Charles Laffitte & Co. It was a mere sham. They never had the control over it, they never could draw cheques upon it, and they knew they never could draw cheques upon it. The maxim I apprehend in point of law is this—"In pari delicto potior est conditio possidentis." The law will leave the parties where it finds them. I think

no action could have been brought on those notes by the bank against the International Contract Company. I think the consideration for the notes was tainted with illegality, and that the law would not have interfered with the parties at all if it had happened that the International Company had not paid back the money. I believe the law would have left it where it was, because it was so tainted with illegality that the law would not have assisted either of the parties. In my judgment the law ought to leave it there. If indeed there were any moneys of Charles Laffitte & Co. which *bona fide* shareholders paid into the bank, then, in my judgment, they would be entitled, at law at least, to recover that sum. That I apprehend is not the case before us, and I cannot help thinking the decision we are coming to meets the real justice of the case. The practical effect of the judgment of the Vice-Chancellor is that the very person, Kitson, and the allies of Kitson, who were the concoctors of these frauds, are the persons who get the benefit of the whole of this money. I cannot but think that persons in the position of the plaintiffs who have subscribed at Kitson's request, and who are mere nominees of his, must look for an indemnity from the International Contract Company, or from Kitson or from whoever employed them, but I presume in this Court they must be treated as having been parties to and having had notice of these illegal transactions. If a person allows himself to be the mere nominee of and acts for another person, he must be bound by the notice which that other person for whom he acts has of the transaction. Therefore in my opinion there is really no case made out against the defendants, Mr. Harvey Lewis and Mr. Henshaw, and the bill must be dismissed.

The order will be to discharge the decree of the Vice-Chancellor against the appellants, dismissing the bill against them without costs; return the deposit and make no other order as to costs.

PARKER v. LEWIS.

LORD JUSTICE JAMES (on Aug. 5, 1873).
—The facts of this case have been so fully stated in the case of *Gray v. Lewis* before

the Vice-Chancellor, and the case of *Gray v. Lewis* before us and the case of *Parker v. Lewis* before the Vice-Chancellor, that it is not, I think, necessary to recapitulate them.

The sort of statement was that there was a transaction between three companies, the International Contract Company, the National Bank and Charles Laffitte & Co., by which the National Bank undertook to discount bills of exchange to the extent altogether of 230,000*l.* for the International Contract Company, who undertook to apply for shares in Charles Laffitte & Co., and to pay the moneys into the National Bank, and the moneys so paid into the National Bank and any other moneys standing to their credit were to remain there as security for the 230,000*l.* bills, and were to be applied, if not sooner taken up, in cancelling the bills. The bills of exchange were nominally discounted accordingly. In the 57th paragraph of the bill the thing is summed up thus—"The several moneys so placed by the said National Bank, as aforesaid, to the credit of the said International Contract Company (Limited) were respectively drawn out and applied as follows: the International Contract Company, as aforesaid, drew out the said moneys by cheques in favour of the said George Payne Kitson or his friends with the intent that the said moneys should be paid in, and the said moneys were in fact paid in, to the said National Bank by cheques or cash purporting to be in discharge of the said 1*l.* and 4*l.* due as aforesaid in respect of shares in the said Charles Laffitte & Co. (Limited) *bona fide* applied for and allotted. But the sums so paid into the said bank, except 40,000*l.* paid in in respect of 8,000 shares in Charles Laffitte & Co. (Limited), were not paid in in respect of shares *bona fide* applied for and allotted in the said company, and the arrangements so made, as aforesaid, by the defendants amounted in fact to a loan by the said National Bank to the said Charles Laffitte & Co. (Limited) in order to enable the said company in effect, and through the intervention of the said International Company, as aforesaid, to buy its own shares which Charles Laffitte & Co. (Limited) was expressly forbidden by its

articles of association to do." The mentioned parenthetically there very clearly stated) was 40,000 irrespective of the 230,000*l.*, object of the suits of *Gray v. L. supra*) and *Parker v. Lewis*. were the moneys that were paid in in respect of the said shareholders, and the statement arrangement amounted to a loan bank to Charles Laffitte & Co. is difficult to understand. I then more accurately stated in the paragraph—"In fact the defendant colour of engaging the National an ordinary discount transaction properly and in violation of their directors of the said bank to the shareholders thereof engaged bank in the promotion of Charles & Co. (Limited), and made use of the National Bank as a means to enable said Charles Laffitte & Co. (Limited) to purchase its own shares, and to create a fictitious credit and a fictitious bank, and to enable the said company to represent that it had all up capital, when in fact it had no *bona fide* capital at all, and to enable said company to obtain a settlement when in truth the said company was entitled to that advantage, and the said company to make it appear as if M. Laffitte, as in fact the said company did make it appear to him, that the said company had obtained a *bona fide* subscription of 40,000 shares with 5*l.* per share up had been complied with whereas such was not the case."

That being the state of the transaction the suit of *Gray v. Lewis* (which was amongst other suits, was commenced) which the Vice-Chancellor arrived at the conclusion that the National Bank was in fact liable to pay to Charles Laffitte & Co. the 230,000*l.* which was the balance at the bankers, and was not fictitious capital when it had not *bona fide* capital at all. That decree was made the subject of a petition for a writ of habeas corpus hearing by all the defendants in the Court, and was then made the subject of a compromise between all the defendants between the bank and the parties interested, and connected with the

of Charles Laffitte & Co. Now if we had agreed with the judgment of the Vice-Chancellor that Charles Laffitte & Co. were entitled to withdraw those moneys from the National Bank, if we had agreed with the *ratio decidendi* of the Vice-Chancellor that in truth the moneys which went out went out as moneys of the bank and had come in as moneys of Charles Laffitte & Co. under the arrangement with them, we should have agreed with the Vice-Chancellor that the decision in *Parker v. Lewis* was a necessary corollary and consequence of the decision in *Gray v. Lewis* (*ubi supra*). But as when we heard the case of *Gray v. Lewis* (*ubi supra*) we did not concur in the view of the Vice-Chancellor in that respect, as we thought the bill in *Gray v. Lewis* (*ubi supra*) was not sustainable, that in truth there was no *res acta* at all but a mere *fabula acta* between these parties—that the whole thing was a fiction and a sham out of which no right or liability could accrue or be imposed upon any of the companies who through their directors were parties to the transaction, the ground of the decision in *Parker v. Lewis* is entirely cut away. The decision of the Vice-Chancellor in *Parker v. Lewis* necessarily, as it appears to me, followed his decision in *Gray v. Lewis* (*ubi supra*), and if our judgment in *Gray v. Lewis* (*ubi supra*) is right it appears to me also to follow that the corresponding consequence must follow, that is, that the bill in *Parker v. Lewis* must fail.

It is strongly contended before us by the counsel for the several defendants in this suit, that is to say, the defendants Lewis Henshaw and McKenna, that the bill was entirely based against these three defendants on a charge of fraud, and that the case of fraud having failed the bill ought to be dismissed upon that ground, and ought to be dismissed with costs, independently of any question upon the merits. I have read the bill very carefully, and I agree with the counsel for the defendants, that the case is substantially, essentially and exclusively based upon fraud against these parties. They were selected because they were interested in the matter themselves, as far as Lewis and Henshaw were concerned, and

for other reasons, which I will mention, with regard to McKenna. I have had some doubt as to whether the rule ought not to be applied, as to the dismissal of the bill with costs; but I think we ought to dispose of the bill not merely upon the ground that the case of fraud had been alleged and not proved, but upon the merits, making a final end, so far as we are concerned, of the litigation. Beyond all question, the transaction was one utterly indefensible on the part of the defendants. The very ground of our decision in *Gray v. Lewis* (*ubi supra*) was that it was a sham, calculated and intended to deceive somebody—the Stock Exchange, to begin with, and all the persons who might be induced by means of that to take shares in Charles Laffitte & Co. As that sham, which the directors so indefensibly made themselves parties to, has really led their own company, the National Bank, into great litigation, great expense and great loss; as there were reasons why these three defendants might reasonably have been selected as the three defendants, out of the twelve directors, who were more or less mixed up with the transaction, for the purpose of enforcing liability against them in this respect; Lewis and Henshaw being themselves directors in Laffitte & Co.; and interested in the Ottoman Company, connected with which the whole transaction was entered into; and as McKenna, though he does not appear to have been directly interested in any of those companies, was a man very much trusted indeed, in whom the greatest possible trust and confidence were reposed by the bank, and who received a very high salary from the bank, in return for which the bank had a right to expect from him the greatest possible care, prudence and caution in any matter of this kind, I think that we are not compelled to dismiss the bill with costs, as against them, and that the justice of the case is fully met by that which the Vice-Chancellor has done in this case, giving the defendants the costs of the 13th paragraph of the bill, which is the foundation of the charges of personal fraud against them.

I am of opinion, therefore, that retaining so much of the decree of the Vice-

Chancellor as gives the defendants the costs occasioned by that charge in the 13th paragraph, the charge of personal fraud against them, the rest of the bill ought to be dismissed against them, but dismissed without costs.

It was said, and very strongly contended before us, that it was not open to these parties to go into the merits of the case at all; but the defendants, the bank, having defended the suit in *Gray v. Lewis* (*ubi supra*), and having had the decree against them, that they were at liberty to compromise it on the best terms they could, and that it was not open to the defendants to shew that they could have obtained better terms. I am very much startled at that, and I think there is no foundation for it. Certainly, it would seem to be a very strong proposition to say that the bank, having had the decree against them for 230,000*l.*, in the absence of any one of the directors in that character might have compromised it for 200,000*l.*, or for any other less sum than the 230,000*l.*, or any sum they thought fit; and that every one of these twelve directors would have been personally answerable, jointly and severally, for the whole amount so decreed against them, and so compromised by them, without having an opportunity of being heard in this Court, to say that there was no foundation for the decree at all. I cannot conceive that that can be the law, and I have heard no authority adduced to satisfy me that there is any foundation for it.

MELISH, L.J.—I am of the same opinion: but I wish to add a few observations as to the last point which the Lord Justice referred to, and which is really a question, so to speak, of Common Law, as to whether the judgment of the Vice-Chancellor is conclusive. Mr. Cotton cited several cases at Common Law in support of that proposition, and the foundation of it appears to be a dictum at the end of a judgment of Mr. Justice Buller in the case of *Duffield v. Scott* (1). That was the case of an action on a bond, which bond had been given to indemnify a husband, in connection with a deed of separation, against the debts in-

curred by his wife. Then an action was brought against the husband for the debts incurred by the wife. He defended the action, and the verdict was for the plaintiff, and judgment was obtained. There was no dispute at all that the defendant was liable for the debts, but he denied his liability to the costs of the action, on the ground that notice of the action, on the ground that notice was not given to him, and that he ought to have had notice either to defend the action, or to compromise it, without defending it. Mr. Justice Buller, at the end of his judgment, with reference to that says—"The purpose of giving notice is not in order to give a person an opportunity to defend the action, but if a demand be made of the person indemnifying is bound to give notice to him and to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, the value of a judgment, and stops the party from saying that the defendant's first action was not bound to pay money." Now, the portion of the judgment which is relied upon is that Mr. Justice Buller says, "that is, to a judgment;" and that, it is said, that if there was a judgment at law that judgment would be conclusive. Now, that dictum, no doubt, is an approbation in the cases referred to. Mr. Cotton, of *Jones v. Williams* and *Smith v. Compton* (3); and cases are all cases of actions on express contracts of indemnity, that if a person has agreed to indemnify another against a particular demand, and that another has brought on that demand, he must give notice to the person who is to indemnify him to come in and defend the action; and if he does not come in and refuses to come in, he may be promised at once on the best terms, and then bring an action on the contract of indemnity. On the other hand, if he does not choose to trust the other with the defence to the action, he may, if he pleases, go in and defend it.

(2) 7 Mee. & W. 493; s. c. 10 N.S. Exch. 120.

(3) 3 B. & Ad. 407; s. c. 10 Law Exch. 120.

(1) 3 Term Rep. 374, 377.

if the verdict is obtained against him, and judgment signed upon it, I agree that at law that judgment, in the case of express contract of indemnity, is conclusive. But I apprehend it is conclusive, on account of what the law considers the true meaning of what a contract of indemnity is. It is obvious it would be very hard indeed if a person having entered into a bond, or bought land, or altered his position in any way you please, on the faith of a contract of indemnity, and then, when an action was brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view, and give an adverse verdict to the first. Therefore, by reason of that contract of indemnity it is conclusive; but, in my opinion, it is conclusive, because that is the meaning of the contract between the parties, but it unquestionably is not the general rule of law that a judgment obtained by A against B is conclusive in an action by B against C. On the contrary, the rule of law is otherwise. It is quite plain that the ordinary rule of law is that a judgment *in rem* is conclusive, but a judgment *inter partes* is only conclusive between the same persons and the persons claiming under them.

Now, in the present case, the suit is not brought on any contract of indemnity, the suit is brought for a breach of trust alleged to have been committed by the three defendants. It appears to me they must be entitled to prove—first, that they have not been guilty of any breach of trust; and, secondly, that if they have been guilty of any breach of trust no damage has accrued to the plaintiff by reason of their breach of trust. The Vice-Chancellor's judgment in this case is to be considered—and, in fact, Mr. Cotton so put it—exactly as if the bank, after the judgment of the Vice-Chancellor, had chosen to go and pay the whole 230,000*l.*, and then at once sue the defendants. Surely the defendants would say, "You are suing us for a breach of trust with reference to 230,000*l.*, but

230,000*l.* was never paid by us to the International Contract Company." Indeed, when one examines the evidence, no doubt sums went out and sums came in, but it was always so managed that there never was more than a very small sum out at one time. Therefore, there was only a breach of trust with reference to that small sum, and then, small as that sum was, it all came back again, and came back to the very persons who had paid it out, and therefore, although the paying it out might have been a breach of trust—and if the International Contract Company had not returned it, since, for the reasons I gave in my judgment in *Gray v. Lewis (ubi supra)*, the contract being not only *ultra vires* but, in my opinion, illegal, and the bank would have had no action against the International Contract Company on those notes, in my opinion the defendants would have been liable—yet I think they are entitled to shew that the whole did come back; and I cannot see that they are estopped from saying, when this money came back, according to the authority of *The British and American Telegraph Company v. The Albion Bank (ubi supra)*, that it was not the money of Charles Lafitte & Co, but was the money of the bank itself, and therefore there was no damage. Indeed, the only real doubt that I have entertained during the course of this case, after fully considering it, is whether the whole 230,000*l.*, which stood to the credit of Charles Lafitte & Co. at the time when the notes became due, and which was applied towards payment of the notes, consisted of the moneys of the International Contract Company, because, if any portion of the sum consisted of moneys which had been paid in by *bona fide* shareholders to the International Contract Company, or by any other persons who *bona fide* paid in money to the account of Charles Lafitte & Co., in my opinion, Charles Lafitte & Co. would have been entitled to recover such sums in an action at law, at any rate. Whether they would be entitled to recover them in a Court of Equity it is not necessary for me to consider, but they would have been entitled to recover such sums in an action at law against the bank, and there I think there would have been damage

arising from the breach of trust of which the defendants had been guilty. But, on going through the bill, and on examining the evidence, although, it is true, it is alleged that 40,000*l.* of the moneys paid in came from *bona fide* shareholders, yet I think the true result of the allegations in the bill and in the evidence is, that no part of the 40,000*l.* remained, so as to form part of the 230,000*l.* at the time when the notes were paid; and it is quite consistent with the whole of the bill, and the whole of the evidence, as far as I can understand it, that the whole of that 40,000*l.* had been paid out to Charles Laffitte & Co.

It was, indeed, said that some portion of the money necessarily must have consisted of other sums than the sums paid back to the International Contract Company, because of the discount. It was said that the whole 230,000*l.* was not paid out of the International Contract Company, but 230,000*l.* minus the discount, and therefore some portion, namely, to the extent of the discount, must have been other moneys. I think the answer to that really is that the bank are not entitled, as against the defendants, to claim the profit on this transaction; for, if they paid out money, and all the money they paid out came back again, I think they are not entitled, as against the defendants, to any alleged profit with reference to the discount. Besides that, the bill makes no such case at all, therefore I really differ from the Vice-Chancellor in that respect.

There are just one or two observations I wish further to make. In reading through the judgment of the Court of Exchequer in *The British and American Telegraph Company v. The Albion Bank* (*ubi supra*), there are two grounds on which the Vice-Chancellor relies, in which the Court of Exchequer distinguish the case before them from the case of *Gray v. Lewis* (*ubi supra*). It is obvious that the Court of Exchequer could only reasonably say, and would not say, that the judgment of the Vice-Chancellor was wrong, and being pressed very strongly with that judgment, as an authority in the case before them, they stated the best ground they could for distinguishing it; but,

in my opinion, those grounds which are stated as possible distinction, and I do not think the judgment of the Court of Exchequer goes beyond that, do not really make a distinction. The first ground on which they relied was the fact of the promissory notes being given, and that during the currency of the notes there may have been a real transaction; but, in my opinion, that makes no difference, because the charge which Charles Laffitte & Co. made existed during the whole time that the notes were current. If Charles Laffitte & Co. had had a power to draw on the balance during the time that the notes were running that might have made a difference, but Charles Laffitte & Co. had no power to draw on the balance during the time the notes were running. From the very moment the money came in it was pledged, and was to be held for the notes; and if they had drawn cheques against so much of it as was necessary to cover the notes there is no doubt the bank would have refused to honour them. Therefore, it appears to me, that forms no ground for saying there was any contract, on the part of the bank, to pay these moneys to Charles Laffitte & Co.; the second ground which they put, which is supposed to be an equitable ground, on which they thought the Vice-Chancellor might rely, was this—They say, that in the case before the Court of Exchequer the fraud was discovered before the Stock Exchange gave a day, and the plan was never carried out. In the case before us no doubt the Stock Exchange were deceived, and a day was given, and numerous transactions took place, possibly in consequence of it. Then they suggest that that may make a difference, and that may be a reason why, in this Court, the bank ought to be held to be bound by the representation they had made that there was this sum to the credit of Charles Laffitte & Co., and that that would make a difference between the two cases. In my opinion, although they were unquestionably bound, as between themselves and the persons to whom they made the representation, and who were deceived by it, if any such persons had made claims against them—which it does not appear was the case—I apprehend they were not bound, as between

themselves and Charles Laffitte & Co., who perfectly knew through their directors that the representation was untrue, and who not only knew it was untrue, but in reality they were directly the persons fraudulently making the representation itself, not only as much, but a great deal more than the bank were. The bank may have done enough to make itself liable, but Charles Laffitte & Co. were the principals in that false representation, and therefore, in my opinion, they could not rely on that as a ground for distinction.

Therefore, upon the whole, on the same grounds which I gave in *Gray v. Lewis* (*ubi supra*), I am of opinion that the 230,000*l.* never became the money of Charles Laffitte & Co., and therefore, that there was no breach of trust at all, except so far as any moneys were paid out to the International Contract Company. Then I think there was no damage sustained by that, because all the moneys were again returned, and became the property of the bank.

I entirely agree as to the costs.

Solicitors—Messrs. Tatham, Curling, Walls & Pym, for appellant; Messrs. Combe & Wainwright, for plaintiff and official liquidator.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} OCCLESTON v. FULLALOVE.
JAMES, L.J.	
MELLISH, L.J.	
1873.	
Dec. 4, 8.	
1874.	
Jan. 26.	

Will—Illegitimate Children—Bequest to two by Name and a Future Class—Child en Ventre at Date of Will—Reputation at Death of Testator—Public Policy.

Under a bequest to the testator's reputed children C. and E. and all other the children which he might have or be reputed to have by M. L. (his deceased wife's sister with whom he had gone through the ceremony of marriage), then born or thereafter to be born, a child en ventre sa mère at the

NEW SERIES, 43.—CHANC.

date of the will, who was born and acquired in his lifetime a name by reputation as the testator's child by M. L.:—Held (LORD SELBORNE, L.C., dissentiente) entitled to share.

By the LORDS JUSTICES every child who on the will coming into operation had acquired such a name by reputation would be entitled to share in such bequest.

By the same, a provision by will for a testator's future illegitimate children is not contra bonos mores.

The decision of WOOD, V.C., in Howarth v. Mills (Law Rep. 2 Eq. 389) disapproved of.

Decision of WICKENS, V.C., reported 42 Law J. Rep. (N.S.) Chanc. 514, reversed.

Appeal from an order made on further consideration by Wickens, V.C., reported 42 Law J. Rep. (N.S.) Chanc. 514.

On the 13th of August, 1862, James Occleston went through the ceremony of marriage with his deceased wife's sister, Margaret Lewis. By her he had at the date of his will two children, Catherine Occleston, born on the 6th of October, 1863, and Edith Occleston, born on the 28th of January, 1866, and at the date of his will also, Margaret Lewis was *enceinte* of another child by him.

By his will dated the 9th of July, 1868, James Occleston bequeathed the income of a portion of his property to trustees upon trust for his sister in law, Margaret Lewis, for her life and on her death "upon trust for my reputed children, Catherine Occleston and Edith Occleston, and all other the children which I may have or be reputed to have by the said Margaret Lewis, now born or hereafter to be born, who being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or marry, equally between them as tenants in common, and if but one such child then the whole for such one child absolutely."

The child of which Margaret Lewis was *enceinte* at the date of the will was born on the 6th of January, 1869, and was named Margaret Occleston. Margaret Lewis died on the 17th of January, 1869, and the testator on the 25th of December, 1870.

The suit was instituted by two legitimate children of James Occleston, for administration of his estate, and the question which now arose was whether Margaret Occleston, the child born after the date of the will, was presumptively entitled to share with her sisters, Catherine and Edith, under the above stated bequest.

Vice-Chancellor Wickens on the authority of

Pratt v. Mathew, 22 Beav. 328; s. c. on appeal 8 De Gex, M. & G. 522; 25 Law J. Rep. (N.S.) Chanc. 409, 606,

decided in the negative, and Margaret Occleston appealed.

Mr. Karslake and Mr. W. W. Karslake, for the appellant.

Mr. Hemming, for the two children who were born before the date of the will.

Mr. Dickinson and Mr. Dixon, for the plaintiffs.

Mr. Osborne Morgan and Mr. Macnaghten, for the trustees.

The arguments are so fully noticed in the judgments of their Lordships that it is unnecessary in this place to do more than give the following list of authorities cited—

Pratt v. Mathew (*ubi supra*);

Crook v. Hill, 38 Law J. Rep. (N.S.) Chanc. 579; reversed 40 ib. 217; Law Rep. 6 Chanc. 311; in the House of Lords *nom. Hill v. Crook*, 42 ib. 702;

Holt v. Sindrey, 38 Law J. Rep. (N.S.) Chanc. 126; s. c. Law Rep. 7 Eq. 170;

Wilkinson v. Adam, 1 Ves. & B. 422; *Trower v. Butts*, 1 Sim. & S. 181; s. c. 1 Law J. Rep. Chanc. 115;

Owen v. Bryant, 2 De Gex, M. & G. 697; s. c. 21 Law J. Rep. (N.S.) Chanc. 860;

Earle v. Wilson, 17 Ves. 528;

Gordon v. Gordon, 1 Mer. 141;

Pearce v. Carrington, 42 Law J. Rep. (N.S.) Chanc. 516, 900; s. c. Law Rep. 8 Chanc. 969;

Mortimer v. West, 3 Russ. 370; s. c. 5 Law J. Rep. Chanc. 181;

Blodwell v. Edwards, Cro. Eliz. 509; s. c. Noy. 35; 2 Rol. Abr. 43; Moo. 430;

Metham v. The Duke of Devonshire, 1 P. Wms. 529;

Cartwright v. Vawdry, 5 Ves. 530;

Arnold v. Preston, 18 Ves. 288;

Medworth v. Pope, 27 Beav. 71; s. c. 28 Law J. Rep. (N.S.) Chanc. 905.

Their Lordships differing in opinion, on January 26 delivered judgment *seriatim* as follows—

THE LORD CHANCELLOR.—In this case, in which I have the misfortune to differ from my learned brothers, I should have been glad, so far as the particular interest of the appellant is concerned, if I could have given my voice for altering the Vice-Chancellor's decree. It is certain that a gift to a child of which an unmarried woman is at the time pregnant, is not against the policy of the law; on the contrary, such a gift, by a person who acknowledges himself to be the father of that child, is as much within the moral obligation, referred to by Lord Eldon in *Gordon v. Gordon* (*ubi supra*), as if the child had been already born. Nothing was necessary for this purpose but that the testator should have sufficiently described, as the object of his bounty, the particular child of which Margaret Lewis was, at the date of his will, *enroute*. But it does not appear that he then knew (if necessary, I should myself infer from the will and the evidence that he did not know) that she was in that condition, and there is clearly no reference to that particular child in the terms of the bequest. If the appellant takes at all, it is by force of the general words, descriptive of "all other the children" (besides the two expressly named) "which he" the testator "might have, or be reputed to have, by the said Margaret Lewis, then born, or thereafter to be born;" Margaret Lewis being, and appearing on the face of the will to be, a person with whom he could not lawfully intermarry. It is clear from all the authorities, that, if the appellant takes under this description, it can only be as a "reputed" child of the testator by Margaret Lewis. That reputation cannot, in my opinion, have been acquired when this will was made; it was, however, acquired after the birth of the appellant, which took place about six months later than

the date of the will. Two questions thus arise for decision—the one, whether under a gift by will to future reputed children of the testator by a woman whom he could not marry, all children, born of that woman between the date of the will and the testator's death, who may before his death have acquired the reputation of being his children, can take? The other, whether (if this be not so) a child of the woman, who was *en ventre sa mère* at the date of the will, and who afterwards in the testator's lifetime acquired that reputation, takes? I do not think that the latter question is, in the present case, materially affected by the use of the words "now born," as well as "hereafter to be born," although the use of that form of words, by a testator who had just named his only two then existing reputed children, is remarkable. It was argued, that "now born" must, under the circumstances (or at all events may) mean now *in esse* in a sense applicable to a child *en ventre sa mère*. But in a case of illegitimacy, where the fact of paternity is incapable of being inquired into, and the fact of reputation did not then exist, I cannot adopt that argument. Of the two questions which I have stated to arise in this case, the first and more general may involve considerations of public policy of a larger kind than any which can affect the second. The rule, however, against the reception of direct evidence of paternity (which in several of the cases is described as a rule of public policy), applies equally to both; and, as it seems to me, the difficulty of identifying the persons intended to be benefited by means of a reputation of this kind, acquired after the date of the will, also affects both questions alike. Nothing is given to the appellant individually, which (so far as the construction of the will is concerned) is not equally given to any other afterborn child of Margaret Lewis, who might acquire the necessary reputation. She takes (as has already been said), if she takes at all, only as a member of the class of future reputed children. When a testator makes a gift to children already born, and reputed to be his own at the date of the will, he sets the seal of his adoption and acknowledgment upon

that existing reputation, and himself makes that extrinsic fact, known to and recognised by himself, the test of the identity of the persons intended. Whatever may be the origin or character of the reputation, the gift, in every such case, is to a particular living person, known, as possessing it, to the testator, and for that reason discoverable without difficulty by admissible extrinsic evidence. But these conditions are wanting, when the person is not in existence and when the reputation is afterwards to be acquired. What is to constitute, in that case, the necessary reputation? On whose opinion is it to depend? When must it be gained? Must it be consistent and unambiguous? Must it be continuing till the testator's death? Must it be supported by the acts or acknowledgments of the testator himself? Would his rejection or repudiation be enough to invalidate and destroy it? These and other similar questions cannot (as I conceive), be satisfactorily answered unless an answer to them can be extracted from the proper grammatical sense of the mere word "reputed," and I do not think that it can. I am disposed, therefore, to think that such a description of non-existing children, with reference to a reputation to be afterwards acquired, supplies no sufficiently certain means of identifying the objects of the gift.

With respect to the first and larger question, the present state of authority appears to me to be decidedly adverse to the appellant, although Lord Eldon, in *Wilkinson v. Adam* (*ubi supra*), declined to determine that question; and although it may be admitted that no case has yet been determined upon words exactly like these, or so expressly providing for future reputed children. In *Pratt v. Mathew* (*ubi supra*), the Master of the Rolls said: "It is quite settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute. It is not necessary to consider whether a gift to the illegitimate children of a woman is valid; that has never been determined." In *Medworth v. Pope* (*ubi supra*), however, Lord Romilly thought it necessary to decide the question which

he had so reserved in *Pratt v. Mathew* (*ubi supra*), saying: "An illegitimate child in *esse*, or *en ventre sa mère*, may, if properly described, take the benefit of a bequest; and the Court will not inquire as to his parentage or origin. But in respect of future illegitimate children, the law will not allow them to take under any description whatever." In *Barnett v. Tugwell* (1), the same Judge also said: "It is admitted that no gift in favour of after-born illegitimate children can be supported." In *Howarth v. Mills* (2), Vice-Chancellor Wood held a gift by a woman who had gone through the ceremony of marriage with her deceased sister's husband to be void as to her afterborn children; the words of the gift being "to each and every of my children, legitimate or otherwise, which shall be living at the time of my death." In *Holt v. Sindrey* (*ubi supra*), Vice-Chancellor Stuart said: "As to the rest of the children to be begotten it must fail, because every gift to an illegitimate child, the begetting of which is contemplated, is against the policy of the law." The headnote of the report of this case in the Law Reports which substitutes the words "illegitimate children unbegotten at the time of the testator's death" is erroneous. The Vice-Chancellor refers throughout his judgment, not to the time of the testator's death, but to the date of the will. In *Hill v. Crook* (*ubi supra*), Lord Chelmsford, when moving the judgment of the House of Lords, said: "No gift, however express, to unborn illegitimate children is allowed by law; nor under a gift good as to illegitimate children, as a class, will afterborn illegitimate children be permitted to take." And Lord Colonsay said: "Two things are clear, and do not depend in any degree on the intentions of the testator or the terms of his will: First, that the union of Mary Hill and John Crook, though in form a marriage, was by law not a valid marriage, and the children born of that union were not legitimate children; secondly, that the

testator could not, by any form of words, make an effectual bequest in favour of afterborn children of that union, or of a trust for the benefit of such children; and, consequently, such children can take under no will in question." Lord Cairns did not dissent from Lord Chelmsford's statement of the law. His words are: "I do not go over what has been said by the learned and learned friend now sitting in the woolsack" (Lord Chelmsford). "The impossibility of providing for illegitimate children; that is the question here." I am not aware of any case before the present any Judge ever laid down a doctrine at variance with the language of these authorities. With respect to the principle of the doctrine, I do not understand it to be disputed that the policy of the law opposes itself to everything *contra naturam*, is against prospective gifts or even by will, to illegitimate children, where any such children begotten by the deed or will comes into existence. The authorities are not expressed in such qualified terms. The opinion of the Court, without qualification, by Stuart J., that "every gift to an illegitimate child, the begetting of which is contemplated (a definition not extending, as his Lordship proceeded to observe, to a child *in ventre sa mère* at the time of the gift)," "is the policy of the law," is the same as has been some years before expressed by Lord St. Leonards in *Re Connor* (3), who regarded this as the true reason why a gift in order to provide for children of a particular class, they must first acquire the class by reputation." Lord Romilly in *Medworth v. Pope* (*ubi supra*) held that "The reason why the English law does not allow a gift to illegitimate children is, that it considers such a provision to be against the policy of the law, and the future illegitimate children *contra naturam*." And Vice-Chancellor Wood, in deciding *Howarth v. Mills* (*ubi supra*), said: "The point was mooted in *Wilkinson v. Adam* (*ubi supra*), which Lord Eldon threw out on suggestions, but said he would lay down the point where he found it, with

(1) 31 Beav. 232; s. c. 31 Law J. Rep. (N.S.) Chanc. 629.

(2) Law Rep. 2 Eq. 389.

(3) 2 J. & L. 456, 460.

determination. Since then the question has been decided by the present Master of the Rolls; the only difference being, that in that case the provision was made by the reputed father, whereas here it has been made by the mother; and if it be *contra bonos mores* in a reputed father to provide for afterborn illegitimate children, it cannot be less so in the case of a mother. I apprehend that, after the well-known case of *Pratt v. Mathew* (*ubi supra*), the policy of the law, that a man cannot make a legal bequest to the future children of his marriage with his deceased wife's sister, is firmly established." Whether, in this last passage, too much weight may not have been ascribed to the single authority of *Pratt v. Mathew* (*ubi supra*) I do not inquire. It may be admitted that, as to this point, what was said in *Pratt v. Mathew* (*ubi supra*) was not necessary for the decision; and the same is true of most of the other authorities to which I have referred. But *Howarth v. Mills* (*ubi supra*) is itself a decision not indeed of any Court of appeal, but of a most eminent Judge, expressly to the purpose; and I think it is difficult to take any other view of the earlier case of *Medworth v. Pope* (*ubi supra*) before Lord Romilly (which was cited in *Howarth v. Mills*) (*ubi supra*), in which Lord Romilly clearly construed the will as descriptive of illegitimate and not of legitimate children. In both those cases the gifts were to the illegitimate children of a woman, and therefore were free from the difficulty attaching to the proof of paternity. In *Howarth v. Mills* (*ubi supra*) the objects of the gift were the children of the testatrix herself, "legitimate or otherwise, which should be living at the time of her death." In *Medworth v. Pope* (*ubi supra*) they were the six natural children, already born, of the testator by his housekeeper, Sarah Gibson, and "such other child, if any, that might be born of his housekeeper, Sarah Gibson, in his lifetime, or in due time after his death." In both, the gifts as to the afterborn children were held void. These are decisions directly opposed, as it seems to me, to the suggested distinction between a gift by deed or will to illegitimate children who may be be-

gotten after the deed or will takes effect (which is admitted to be void, as offering an incentive to immorality), and a gift by will to such illegitimate children only as may be born, or *in esse*, at the death of the testator, which is said to offer no such incentive. In however forcible a light the difference, for this purpose, between a gift by deed and such a gift by will may be presented, I am not myself satisfied that the distinction can be practically established without a material encroachment upon the principle which is admitted to stand in the way of a prospective provision by deed for future illegitimate children. If the present testator had settled property, by deed, upon himself for life, with remainder to such of the children whom he might at the time of his death be reputed to have by Margaret Lewis, as he should by will appoint, and in default of any valid appointment to A. B., I suppose it would not be contended that the power of appointment as to the afterborn children would have been good, even though the deed might have contained a general power of revocation, and might have remained in the testator's custody, without communication to anyone, till the time of his death. So far as public policy is concerned, I do not see what material difference there is between that and the present case. A law, which does not enable a man to fortify himself, or to encourage another, in entering upon, or in continuing an immoral course of life, by anticipating and providing for its future consequences, even by a testamentary instrument, not operative (though not necessarily kept secret) till his death, may (as it appears to me) reasonably be regarded as more in the interest of public morality, than one which recognises and enforces such provisions. The language used by so many learned Judges in the cases to which I have referred, precludes the possibility of its being supposed that provision could, in their opinion, be made for future illegitimate children by so simple a process as the mere employment of a form of words descriptive of the reputation, and not the fact of paternity. If a gift may be made to future reputed children, I am unable to understand why,

on any sound principle of construction, the reputation, which is the necessary medium of proof that an illegitimate child stands in that relation to its supposed father, must be expressly referred to in a gift to afterborn, more than in one to existing children. When a gift is made to the existing "natural" or "illegitimate" children of a testator, proof of the reputation, known to and recognised by the testator, is always enough to shew who are meant; and if a gift can be effectually made to future "reputed" children, it is not easy to find a good reason why the same evidence of reputation which, on that hypothesis, would be admissible and sufficient to identify the objects of such a gift, should not be permitted to have equal effect if the gift were, in form, to the testator's future "natural" or "illegitimate" children. In law those words mean, and can only mean, reputed children.

I feel obliged, therefore, to answer in the negative the first of the two questions which I have stated as arising in this case. And if the first question is properly answered in the negative, I think it is impossible to give an affirmative answer to the second, for the reasons which were well stated by Lord Romilly in *Pratt v. Mathew* (*ubi supra*), against separating from the general class of afterborn children a child who was *en ventre sa mère* when the will was made, but to whom there is no gift otherwise than as a member of that general class. It is true, as I have already said, that there would have been no objection on the ground either of uncertainty or of public policy if the appellant had been personally designated by the will; but, unfortunately, she is not so designated. Lord Romilly's remarks (though not perhaps necessary for the decision of *Pratt v. Mathew*) (*ubi supra*) are in accordance with Lord Maclesfield's decision in *Metham v. The Duke of Devon* (*ubi supra*), in which it was determined that, under a gift by will to the natural children of a particular man by a particular woman (under which after-born children did not take) no one was entitled to participate who had not already obtained the reputation of being such a natural child, when the will was

made. The gift in that case was "to all the natural children" (of the testator's son) "by Mrs. Heneage" (a married woman). There were children at the date of the will, who had already acquired that reputation, and who took. There was another child, then *en ventre sa mère*, who, after his birth, and during the lifetime of the testator, acquired the same reputation; but this child, as well as all others who were born still later, was excluded.

Holding, as I do, that in the present case, the general class of afterborn reputed children of the testator could not have taken, and that the appellant had not, at the date of this will, acquired the necessary reputation, I am unable to concur in a reversal of the Vice-Chancellor's decision. But, as both the Lords Justices are, for the reasons which they will give, of a contrary opinion, the judgment of the Court will be in accordance with their view.

LORD JUSTICE JAMES.—If the will in this case were read and considered merely for the purpose of ascertaining the testator's intention, the language being construed, however, strictly according to the grammatical meaning of the words used by him, it seems to me beyond all doubt that the testator intended the appellant as one of the objects of his bounty. He meant the children of the particular woman to take, with this qualification, that they should be children of whom he should have acquired the reputation of being the father. If the case had been the case of a child *en ventre sa mère* at his death, there might have been a great, perhaps an insuperable, difficulty in attributing reputation of paternity in the male, while there were nothing but signs more or less visible of a possible or probable parturition expected of and by the female. But this case appears to me to be the very case contemplated and provided for by the testator so far as he could by law provide for it. Between the date of his will and the time of his death a child was, with his knowledge, born of the body of the woman while she was living with him as his wife. After the birth the cohabitation continued, and the child was in the most formal manner recognised by him by his

registering the birth as the birth of the child of himself and the woman, described by him in the register as his wife, and therefore so far as he could treating the child as legitimate. This evidence is to my mind absolutely conclusive that at the time when the will came into operation, when on his death it was opened and read, the appellant did strictly and completely fulfil the description of a "child which he was reputed to have by the said Margaret Lewis." If so, why should she not take? It is said that there is some rule of law, based upon some rule of morality or on some rule of construction, which absolutely prevents me from giving effect to what I have judicially ascertained to be beyond all question the meaning of the plain and clear words of the testator. In the case of *Crook v. Hill* (*ubi supra*), Lord Chelmsford is reported to have said: "No gift, however express, to unborn illegitimate children is allowed by law; nor under a gift good as to illegitimate children as a class, will afterborn illegitimate children be permitted to take." Lord Colonsay is reported to have said: "Two things are clear, and do not depend, in any degree, on the intentions of the testator, or the terms of his will; first, that the union of Mary Hill and John Crook, though in form a marriage, was by law not a valid marriage, and the children born of that union were not legitimate children; secondly, that the testator could not, by any form of words, make an effectual bequest in favour of afterborn children of that union; and, consequently, that no such children can take under the will in question; and Lord Cairns is reported to have said: "I do not go over what has been said by my noble and learned friend on the woolsack as to the impossibility of providing for future illegitimate children—that is out of the question here." Lord Cairns, however, in the latter sentence points out with his usual accuracy that the expressions of his noble and learned compeers were *obiter dicta*, not at all necessary to the decision of the case before them. And they are open to this further observation, which always weakens the force of any judicial *dicta*, that they were made in the way of concession to the party against whom

they were about to decide. If the expression "future children" were to be limited to what I conceive to be its more accurate meaning, children to come into existence after the will itself has really come into existence as the last will of the testator, namely, after his death, then I would at once, for reasons subsequently given, concede that there is or may be such a rule of law as that referred to. But if it be extended to apply to children coming into existence between the date of execution of the will and the death of the testator, then, in my humble judgment, the proposition is not one to be assumed, as it appears to have been in those judgments or speeches.

I will follow the example of Lord Cairns, and suppose a will to be written out at full length expressing the testator's intentions and meaning, and motives or grounds. Assume the will to be thus written: "Whereas I am living in a connection unhallowed and illicit with A. B., and there have been, and in the course of nature it is probable there may be offspring born of her body, the fruit of our intercourse, and I do not think it right that such offspring should be a burden upon the community, and I desire that, notwithstanding the misfortune of their birth, they should not be left without sufficient means for their maintenance, education and future welfare; now, therefore, I do make the following provision for all children born of her body while she is cohabiting with me." Now, what is there against morality, or religion, or public policy in such a provision? Lord Eldon, in one of the cases, *Gordon v. Gordon* (*ubi supra*), uses the following language: "If the words in this case were these—'Whereas A. is now pregnant by me,' this would imply a positive assertion of a fact, the truth of which it cannot, on grounds of public policy, be suffered to sustain by evidence. But a man may most conscientiously make use of the terms adopted by this testator to denote his belief of a fact, and his intention to proceed, not upon the fact itself, but upon such his belief of it. No doubt, where a man assigns certain positive reasons for giving a legacy, if those reasons fail, the legacy may be taken away. But here the testator has

expressed the grounds upon which he acts to be these: 'I believe that I am the father of the child with which this woman is now *enceinte*. I may be mistaken; but I had rather run the risk of providing for a child that is not my own, than of incurring the guilt of leaving a child of mine without a provision.' " I cordially concur in every word of that; and I must say that to me it seems a shocking and perverse thing to say that religion, morality or public policy compels the law to throw difficulties in the way of a man who is desirous of not committing posthumously a great crime, and who is desirous of making for his misconduct the best reparation he can both to society and to the unfortunate beings of whose existence he is the author. What would be the natural, I would almost say the legitimate, feelings of a wretched being towards that law by which, and towards that religion and morality in the name of which he finds himself deprived of the provision which his sire had carefully tried to make for him, and in consequence made, it may be, the inmate of a union workhouse, or a parish outcast infesting the public streets?

In considering this question, it is necessary to have accurately in one's mind the distinction in legal effect between motive and consideration. The law does not pretend to deal with the motive to testamentary bounty, or any other bounty. Testamentary bounty is absolute and without control as to motive. A man may leave his virtuous wife and deserving children penniless, and bestow the whole of his fortune upon the vilest companions of his profligacy, the most worthless partners of his vices, the most wicked accomplices of his crimes, and the law cannot gainsay him, even if he should openly flaunt his shocking disregard of all ties human and divine on the very face of his will. But if there be any inducement to wrong, the law can and does deal with it. If there be a covenant for a *turpis causa*; the covenant is void. If there be an illicit condition precedent or subsequent to a gift, it either voids the gift or becomes itself void. If the gift requires or implies the continuation of wrong-doing, that is in substance a con-

dition of the gift and falls within the rule as to conditions. But how can that apply to an instrument like a will, with reference to gifts taking effect at the death in favour of persons then in existence? The will takes effect because, whenever dated or executed, it is the expression of the testator's last will—of the intentions which he has at the last moment of his existence. His keeping it and leaving it unrevoked is, in point of law, and generally in fact, a continued adhesion to it. And if a man could by an attested signature, made at the moment before his death, make validly such a disposition as that now in question before us (of which there can be no doubt), how does any question of public policy intervene to affect the disposition which he has made some days or months or years beforehand, to be produced and take effect as his last intention upon, and not until, the moment of his death? His own will can be no inducement to himself to continue a life of immorality: it can be no inducement to the partner of his sin. What would be an inducement may easily be conceived. A man might make, as here, a valid will in favour of his unlawful consort and their actual offspring, and hold *in terrorem* over her his power of revocation to coerce her into a continuance of the wrong-doing. She might have courage to break off this sinful connection, and he might ostentatiously add a codicil expressly revoking the will on that ground, and the law could not, I apprehend, interfere with that revocation.

I would add, as an illustration, what appears to me a *reductio ad absurdum* of this supposed rule of public policy, this case. Take the case of a gift, to a concubine, of the man's property charged with the maintenance and education of her offspring, described as in this will; does morality require that this Court should give her the whole, leaving her, if she please, to throw the offspring on the streets? Then, is there really any established rule of construction, which makes it impossible for a man to make provision for the illegitimate offspring of an unmarried female, born between the date of his will and the day of his death? He could unquestionably, I apprehend, make pro-

vision for any other person if sufficiently described. He might leave his fortune to children in the union workhouse; he might leave it to all the persons who should be living in his house as part of his family circle at the time of his death; he might leave it to the children to whom he had stood, or should stand sponsor; and I cannot conceive it possible that there could be any enquiry as to the legitimacy or illegitimacy of those who had come into existence since the date of his will, or any enquiry as to whether his motive for such a bequest was the belief that he might have been the cause of their coming into existence.

There is, no doubt, a rule of construction that *prima facie* the term "children" means lawful children, and there is a rule of law that an illegitimate child has no father. "*Pater est quem nuptiæ demonstrant.*" And it must be admitted that the law is in some respects the same as to maternity, although there is no such maxim as its foundation, *e.g.*, there can be no heirship or succession to personal property by kinship as between such a mother and such a child. The result is that such a child in its relative sense means a legitimate child. Indeed, accurately speaking, there can be no more an illegitimate child than there can be an illegitimate legitimate, no more than there can be an oblique angled square, or an elliptical or oval circle. A man may, however, unmistakably show on the face of his will that by the description of children he means persons, or means to include persons, of illegitimate birth, as he may shew that under the term square he means or includes a rhomboid, or under the term circle he means or includes an ellipse or an oval. Another result is that when a man is speaking of illegitimate children as his, there can be no doubt as to what he means as to existing children; but there may be an insoluble question, an uncertainty not capable of being made certain, as to future children. A man makes a gift "to my future children by A. B.;" there is a condition annexed to the gift that they shall be his children, but that is a condition the existence or non-existence of which it is impossible to ascertain. His access or non-access, the

access or non-access of any other person or persons, the more or less profligacy or immorality of the female, the signs of race, or caste, or blood, might have all to be inquired into and brought into public discussion before it could be ascertained whether or not they were his children. The law forbids such inquiries, and, except in exoneration of parish rates, and except, perhaps, in the case of a doubt whether a person is the posthumous child of a deceased husband or the child of a living husband, accepts no evidence of actual paternity but the marriage union. But with regard to the female, there is no uncertainty. Whether a child is or is not born of her body is a fact perhaps of all others the most easily capable of conclusive proof, and if there be an unqualified, unconditional gift by a testator, "to the illegitimate children born and to be born of the body of A. B. before my death," there can be, at all events, no uncertainty in ascertaining at his death who are the persons answering the description. And if he superadds to that the words "of whom I shall be the reputed father," giving to those words the fair meaning, the *benigna constructio*, which all the words of an instrument ought to have, I find no element of uncertainty. It does not mean, I conceive, that of which the gossip of the neighbourhood may spread a rumour or fame, but that reputation which springs from acknowledgment, conduct and life. The burden of proof, no doubt, lies in this, as in every other case, on the person who alleges that he answers the description, but I can conceive no difficulty in producing, in a proper case, sufficient evidence of that reputation. On such an issue I apprehend the admissible evidence would be what has been the continued cohabitation and acknowledgment, or acknowledgment merely, and against which there would not, I apprehend, be admissible evidence of any gossip, true or slanderous, of the neighbourhood, that the woman had deceived and hoodwinked the man, and that the real sire was one of the house or farm servants, who was her secret paramour. Upon principle, therefore, I can see nothing which is to prevent my giving effect to the plainly-

expressed intention of the testator in favour of the appellant.

Is there, then, anything in the authorities which constrains me to disregard my own judicial conviction that the appellant is justly and lawfully entitled to share in the bounty of the man who has called himself her father, and put himself in the position of father to her. The authorities, when reduced to their real proportions, come, in my judgment, to very little that is really relevant. Such a will as the present has never been before the courts for judicial consideration, except perhaps in one case before Vice-Chancellor Wood, *Howarth v. Mills* (*ubi supra*), which is of course as much open to re-consideration here as the decision of Vice-Chancellor Wickens.

The authorities establishing any general principle applicable to the case are really only two, viz., the case of *Blodwell v. Edwards* (*ubi supra*), and the case of *Metham v. The Duke of Devonshire* (*ubi supra*). The former case was certainly, in more respects than one, a very singular case in which to raise the question, as the cohabitation was, as it turned out, a cohabitation in valid marriage, open to question, apparently, only in this way, that there had been a previous divorce *a vinculo*, and that the decree declaring such divorce might be reversed on appeal. Such appeal had by death, however, become impossible. The marriage, therefore, was indefeasible and valid, the issue were indefeasibly legitimate, and the point was never, therefore, before the Court for actual adjudication. Even so far as any resolution was come to by the Judges on the hypothetical question, there was difference of opinion between them. The reports of the case are actually contradictory as to what the resolution was, and although the internal and other evidence is very strong in favour of the accuracy of Croke's report, yet the mere fact that there are such different reports shews that the dogma had not been accepted with universal acquiescence and recognition, without which the extra-judicial resolution or talk of a majority of the Judges could hardly have the force of law. It is difficult, moreover, to conceive how any question of morality or

public policy could have legitimately entered into the consideration of that particular case. There was an union which, if the decision of a competent Court had remained unreversed, was a lawful and valid union; there was a bare possibility of reversal, and the man was desirous of protecting the issue of the union from the consequences of such a reversal. To ordinary apprehension that would seem a very provident and very moral act. The authority of that case must be really referred to the way in which the resolution of the Judges was adopted and incorporated by Lord Coke into his great exposition of the English law. Lord Coke states it thus (*Co. Litt. 3b*)—"A man makes a lease to B. for life, remainder to the eldest issue male of B., and the heirs males of his body. B. hath issue, a bastard son; he shall not take the remainder, because in law he is not his issue: for *qui ex damnato coitu nascuntur inter liberos non computantur*. And, as Littleton saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soone as he is borne. So it is if a man make a lease for life to B., the remainder to the eldest issue male of B., to be begotten of the body of Jane S., whether the same issue be legitimate or illegitimate. B. hath issue a bastard on the body of Jane S.; this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had been no other words, he could not take; and (as it hath been also said) a bastard cannot take, but after he hath gained a name by reputation, that he is the sonne of B. &c. And, therefore, he can take no remainder limited before he be born; but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder limited to him by the name of the son of his reputed father, is good; but if he cannot take the remainder by the name of issue at the time when he is borne, he shall never take it," shewing that it was in his view a mere question of construction. It will be observed, moreover, that that was the case of a deed taking effect immediately, creating an actual remainder, and the substance of which, he says, is that a person cannot

take a remainder by the name of issue, who is not issue, nor by any name or description of reputation, because he could not have such name or description at the moment of his birth; and, if he could not take at the moment of his birth, he could not take at all. How does that necessarily or at all apply to the case of a person who claims to take by a name or description actually predicable of him, not, it is true, at the time when he is born, but at the time when the gift itself first comes into existence?

And if the case be considered, not with reference to the very peculiar circumstances of *Blodwell v. Edwards* (*ubi supra*), but with reference to the abstract question of a provision by deed in favour of the future issue of an avowedly illicit intercourse, it is obnoxious to the plain rule that if the gift takes effect at all it takes effect as a gift on condition that there shall be unlawful intercourse resulting in the birth of offspring, and therefore void. So I conceive that if a testator were to provide by will for the offspring of a really future *damnatu coitus* (future with respect to the will taking effect as a will) it would be void as a gift by reason of the illegal condition precedent, as being a direct inducement to the man and woman to continue in a life of lawless immorality. But that, as I have said, cannot be predicated of an instrument revocable and secret until the moment of the testator's death, and a gift thereby made absolutely, and without any condition, in favour of a person then in existence, however that existence had been caused.

Then there is the case of *Metham v. The Duke of Devonshire* (*ubi supra*). That, again, is in some respects a singular case, and very briefly reported. A will directed a certain sum to be raised, and to be paid to such persons as the testator should by deed appoint. The testator by deed appointed the sum to "all the natural children of his son by Mrs. H." The decision was that all the children took who were born at the date of the deed, but not such children as he afterwards had by her. The report has the following as to the question of a child *en ventre sa mère*—"Also it being a question

whether a natural child *en ventre sa mère*, of the Duke of Devonshire by Mrs. Heneage, should take? Lord Parker inclined that such child could not take for the reason above mentioned, viz., for that a bastard could not take, until he had got a reputation of being such a one's child, and that reputation could not be gained before the child was born." That appears to me to have been dealt with as, and to have been a plain case of construction of the words used. A gift to the children of A. by B., when applied to illegitimate children, could only, at all events *prima facie*, mean persons then reputed as children, persons of whom the Court could predicate that the donor meant them by that description, and there was nothing in the will to shew any intention to include any others. But suppose the will had contained the words, "including the child of which she is now *enceinte*," there could be no doubt that child would have taken, however strong might be the evidence that the child was not really procreated by the paramour. And suppose the will had been "for all the children born of the body of Mrs. H. during my life, and while she is living with my son," we have, I think, no clue to what would have been the decision of Lord Macclesfield. He puts the case entirely on intention. He says—"The Earl of Devonshire could never intend that his son should go on in this course; that would be to encourage it; whereas it was enough to pardon what was passed." He further says, it is true, "bastards cannot take until they have gained a name by reputation." That really means that bastards cannot take by the name of children or issue until they have gained the reputation of being children or issue. If it means more, it is directly overruled by the decision of Lord Eldon, with the concurrence of Sir William Grant, that a gift to a bastard child *en ventre sa mère* is clearly good. I would add that that decision of Lord Eldon's seems to me to go a great way towards deciding the present question. He says, in effect, if you eliminate the question of actual paternity, which is incapable of proof, there is no reason why such a person should not take, if sufficiently designated. If there

is no legal uncertainty as to the fact that a particular person was a person *en ventre sa mère* at a particular date, there can be no legal uncertainty as to whether such person or any other person was actually born of the body of a particular woman. Nor can there, as it appears to me, be any more uncertainty in ascertaining the reputation of paternity as to children born between the date of the will and the death, than there is in ascertaining the reputation of paternity as to children born before the will. In each case it would have to be ascertained alike by the same evidence and the same means as, in Scotland, and almost every European country but England, the putative paternity is ascertained for the purposes of legitimation by subsequent marriage. Take the case of an unquestionable gift by a man "to my natural children by A. B." Evidence would be admissible to exclude children of A. B. born during a previous concubinage, and to ascertain which children really had obtained by reputation the character of being his; and I can see no difficulty in admitting and obtaining similar evidence as to children born between the will and the death. The rule of law has, as it appears to me, been stated by Sir E. Vaughan Williams, with his usual strict accuracy in his work on Executors (6th edit. p. 1,026, part 3, book 3, c. 2, s. 2), where he says: "A natural child cannot take as the issue of a particular father, until it has acquired the reputation of being the child of that person, which cannot be before its birth. Hence natural children unborn at the date of the will, and described as the children of the testator, or of another man, to be born of a particular woman, cannot take under that description. And a prospective gift to future illegitimate children of a woman is wholly void, as *contra bonos mores*. So a legacy to a natural child *en ventre sa mère*, under the description of the child of the testator, or of another man, cannot be supported; because, since the identity of the father cannot be proved by reputation, it can only be ascertained by evidence such as, being contrary to the public decency, the law will not admit. But if the bequest be to a natural child, of which a

particular woman is *enceinte*, without reference to any person as the father, this difficulty does not exist, and the legacy will be supported. So where the testator expresses his belief that a natural child *en ventre sa mère* is his, and, proceeding on such belief, provides for it, the bequest will be sustained; for in such case, as the testator chooses to assume the fact, and to act upon the foundation of his belief, there is no uncertainty in the object; since, whether it was or was not the child of the testator, he meant to provide for it, as the child of the mother described."

I am of opinion, on the whole case, that the testator's intention is clear, that there is no principle of public policy to prevent that intention being effected, and that there is no authority to prevent my giving a decision in accordance with what I feel to be the truth, the honesty, the morality, the justice of the case, in favour of the appellant's right to share with her sisters in the bequest in question contained in the testator's will.

LORD JUSTICE MELLISH.—By his will in this case, dated the 9th July, 1868, the testator left one-half of his real and personal estate to trustees, on trust for his sister-in-law, Margaret Lewis, for life, and, after her death, upon trust for his reputed children, Catherine Occleston and Edith Occleston, and all other the children which he might have, or be reputed to have, by the said Margaret Lewis, then born, or thereafter to be born, in the manner mentioned in his will. Margaret Lewis was the sister of the testator's deceased wife. The appellant Margaret Occleston was a child of Margaret Lewis. She was born on the 6th of January, 1869, nearly six months after the date of the will, and was from the time of her birth the reputed child of the testator. Margaret Lewis died on the 17th of January, 1869, and the testator on the 15th of December, 1870. The question to be determined is whether Margaret Occleston is entitled to take with Catherine Occleston and Edith Occleston the one-half of the residue of the testator's real and personal estate. I think it is clear that she cannot take as an actual child of the testator by Mar-

garet Lewis, because although there is evidence from which any jury would find, if the question could be left to them, that the appellant was a child of the testator by Margaret Lewis, yet it seems clear on the authorities that the law does not allow such evidence to be given, and this was not seriously disputed. I also think that she cannot take as a child of Margaret Lewis, who was reputed to be a child of the testator at the date of making the will. Assuming that an illegitimate child can acquire the reputation of being the child of a particular man whilst *en ventre sa mère*, I think there is not sufficient evidence that the appellant had at that time acquired the reputation of being the child of the testator. There is no evidence that the testator or anyone else knew at that time that Margaret Lewis was with child, and it seems to me impossible to infer that a child, whose existence was unknown, was the reputed child of anybody. If, therefore, the appellant takes at all, she must take as a child, which the testator was, subsequent to the making of his will, reputed to have by Margaret Lewis.

Now two objections are in substance taken to the right of the appellant so to take. First, that there is not, and indeed could not be, a sufficient legal description to enable a class of subsequent born illegitimate children to take; and, secondly, that it is contrary to the policy of the law to allow such a class to take, even if they could be sufficiently described. Now, with reference to the first question, it appears to me that every child of Margaret Lewis who was born during the testator's lifetime, and who at the time of his death was his reputed child, must be included in the class. Whether, if there had been a child *en ventre sa mère* at the time of the testator's death, who afterwards was born, and acquired the reputation of being the testator's child, such a child would have been included, may be doubtful; but, giving the narrowest construction to the words of the will, every child born in the testator's lifetime, and who was his reputed child at the time of his death, must, I think, be included. Then is such a bequest void upon the ground of the insufficient de-

scription of the persons who are to take? I am of opinion that it is not. It is clear that a bastard may take as the reputed son of a particular person after he has acquired such reputation. Now, none can take under a will until the testator is dead, and if at that time a child has acquired the reputation of being a child of the testator, why may he not take under the description of a reputed child of the testator? As a general rule it is obviously wholly immaterial that a person, who is to take a bequest under a will, cannot be ascertained at the time the will is made, if he is so described that he can be ascertained after the death of the testator. It makes no difference whether a testator making his will on his deathbed gives a legacy of 20*l.* to every servant who is then in his service, or whether, making his will years before, he gives a legacy of 20*l.* to every servant who shall be in his service at the time of his death. Neither can I see how a bequest to the illegitimate children of a particular woman who shall be the reputed children of the testator at the time of his death is more uncertain than a bequest to the illegitimate children of a particular woman who are the reputed children of the testator at the time he makes his will. In the one case there must be an inquiry whether the children were the reputed children of the testator at the time of his death; and, in the other, whether the children were the reputed children of the testator at the time he made his will.

Then, with respect to the authorities, I cannot find that there is any direct authority on the subject. The cases appear to establish that a bequest to the future illegitimate children of a man is void for uncertainty, because the law will not allow evidence to be given that they are the actual children of the man. On the other hand, it seems clear that a bequest to the future illegitimate children of a woman is not void for uncertainty whether it be or be not void for encouraging immorality, and as being contrary to the policy of the law; and in my opinion, a bequest to the illegitimate children of a particular woman, who shall be the reputed children of the testator,

is not more uncertain than a bequest to the future illegitimate children of a woman simply.

It occurred to me during the argument that there might be some difficulty in determining at what time it was necessary that a child who was to take should have acquired the reputation of being a child of the testator, but on consideration I am satisfied that the material time is the death of the testator. If at that time a child of Margaret Lewis had acquired the reputation of being a child of the testator, such child seems to me clearly within the description of the persons who are to take.

I have next to consider whether a bequest to the future illegitimate children of a woman who shall be the reputed children of the testator is void on the ground of public policy. I agree that the earlier authorities, and in particular *Blodwell v. Edwards* (*ubi supra*), as reported in *Croke*, do go a long way to establish that a settlement of property by deed on future reputed children or bastards is void as being contrary to public policy. Fenner, J., is there reported to have said that they had conferred with divers of the justices in Serjeants' Inn, and that the greater opinion of them was that a remainder to the first reputed son or bastard is not good because the law doth not favour such a generation, nor expect that such should be, nor will suffer such a limitation for the inconvenience which might arise therefrom. I am not disposed to throw any doubt on the correctness of this opinion. If a man at the commencement of an illicit intercourse with a particular woman could make a valid settlement on his expected illegitimate children, this would, I think, manifestly encourage the immoral connection, and discourage marriage, which the law favours. The present case, however, is the case of a will, and it is necessary to consider how far the same doctrine applies to wills. Now, if a will was so worded as to give a bequest to illegitimate children to be begotten after the death of the testator, I think it would be subject to the same objection as a settlement by deed; and it may be observed that both in *Metham v. The Duke of Devonshire* (*ubi*

supra), and in *Hill v. Crook* (*ubi supra*), the will was the will of a third person, and not of either the father or the mother of the children; and if in those cases the word children had been held to include future illegitimate children, it would have included children begotten after the death of the testator, when the will had come into operation. In the present case, the will being the will of the putative father himself, it is impossible that it can encourage an immoral intercourse after his death. If the bequest is to be held to be contrary to public policy, it must be because it tended to promote an immoral intercourse in his lifetime. There was no evidence that Margaret Lewis knew that the will was made, and if she did know it, she must also have known that it could be revoked at any moment. Then can it be said that the testator himself would be encouraged in immorality by having the power to make a will in favour of his future reputed children? I cannot see that he would, or at any rate I think that this is too uncertain to be made a ground of decision. I am of opinion that a will no more comes into operation for the purpose of promoting immorality, or for effecting something contrary to public policy during a testator's lifetime, than it does for any other purpose.

Then, with regard to the authorities, I do not think they prevent our upholding this will. In *Wilkinson v. Adam* (*ubi supra*), Lord Eldon says, p. 468—“Whether the cases cited from Lord Coke, which are all cases of deeds, have necessarily established that no future illegitimate child can take under any description in a will, whether that is to be taken as the law, it is not necessary to decide in this case.” Lord Eldon seems, therefore, to have thought that there might be a distinction between deeds and wills, and we are now to consider what the distinction between deeds and wills is, and in my opinion the essential distinction between a deed and a will for this purpose is that a deed operates from its execution, and a will from the death of the testator. I do not think it necessary to go through the other cases. They were, with one exception, either cases in

which it was held that future illegitimate children were not included in the will at all, or cases in which the will was so worded as to make it necessary to prove that the children were begotten by a particular man. The case which I think an exception is *Howarth v. Mills* (*ubi supra*). In that case there was a bequest by a woman, who was legally unmarried, to all her children, legitimate or otherwise, and it was held by Wood, V.C., that after-born illegitimate children could not take. As the children to take were the illegitimate children of a woman there was no uncertainty in the bequest, and the children must also be necessarily born in her lifetime. The judgment of the Vice-Chancellor is in these terms—"I cannot doubt that there was an intention on the part of the testatrix to provide for these unfortunate children, and for their sakes I regret that it cannot be carried into effect. The point was mooted in the case of *Wilkinson v. Adam* (*ubi supra*), in which Lord Eldon threw out some suggestions, but said he would leave the point where he found it, without any determination. Since then the question has been decided by the present Master of the Rolls, the only difference being that in that case the provision was made by the reputed father, whereas here it has been made by the mother; and if it be *contra bonos mores* in a reputed father to provide for after-born illegitimate children, it cannot be less so in the case of a mother. I apprehend that, after the well-known case of *Pratt v. Matthew* (*ubi supra*), the policy of the law, that a man cannot make a legal bequest to the future children of his marriage with his deceased wife's sister, is clearly established." The judgment was, therefore, based entirely on *Pratt v. Matthew* (*ubi supra*). Now in *Pratt v. Matthew* (*ubi supra*) a testator left property "for my wife for life," meaning his sister-in-law, and after her death, "for all and every my children hereafter to be born;" and it was held by the Master of the Rolls that after-born illegitimate children could not take. This judgment appears to me to be based on two grounds; first, that a gift to future illegitimate children of a man is an insufficient description of the persons who

are to take; and, secondly, that children in that will ought to be construed to mean legitimate children, and the case seems not to have proceeded at all upon the ground that a gift to the future illegitimate children of the testator is immoral, and contrary to public policy. Under these circumstances I cannot think that *Howarth v. Mills* (*ubi supra*) is a binding decision upon us, or that the different dicta on the subject save us from the duty of deciding the case now before us on what we may consider a correct principle. The present will is, in my opinion, so worded, that future illegitimate children are undoubtedly included in it, and are sufficiently described without making it necessary to prove that they were begotten by any particular man; and as the only children who can take are children who must have been born, or, at any rate, begotten, during the lifetime of the testator, I am of opinion that it does not infringe against any rule of public policy. I am of opinion, therefore, that the appellant is entitled to succeed.

Solicitors—Mr. J. Warburton, agent for Messrs. Jellicorse & Bates, Manchester, for the appellant and respondents; Messrs. Chester, Urquhart & Co., agents for Mr. Foyster, Manchester, for the trustees.

JESSEL, M.R. }
1874.
Jan. 21, 24. }

LAND v. LAND.

Administration of Estate—Intestate—Infants—Jurisdiction to authorise carrying on Business.

In a suit instituted for the administration of the estate of an intestate trader by beneficiaries, where there are infants interested, the Court has no jurisdiction to authorise the administrator to carry on the trade of the intestate.

A house decorator had died intestate, leaving four infant children, and a widow, stepmother to the children. The widow took out letters of administration. The suit had been instituted by two of the infant children; by the widow as next

friend, against the eldest son as heir, and the youngest as customary heir, for administration of the intestate's real and personal estate. It was brought on as a short cause. In the proposed minutes was an enquiry whether it would be for the benefit of all parties that the intestate's business should be carried on.

Jan. 21.—*Mr. Villiers*, for the plaintiff.
Mr. W. C. Renshaw, for the defendant.

THE MASTER OF THE ROLLS said he did not think that he had jurisdiction to authorise an administratrix to carry on the trade, but that the case might stand over for counsel to look for precedents.

Jan. 24.—*Mr. Villiers* cited

Tinkler v. Hindmarsh, 2 Beav. 348, and said there were precedents in Seton where executors had been authorised to carry on a business.

THE MASTER OF THE ROLLS said that *Tinkler v. Hindmarsh* (*ubi supra*) was a creditor's suit, and the creditors could do what they liked with the property; that the powers of executors depended on the will by which they were appointed, and cases with regard to them did not apply to an intestacy, and that he could not make such an order in this suit, where there were infants interested.

The administratrix had better sell the business as soon as she could.

Solicitor—*Mr. Terry*.

LOKDS JUSTICES. }

1873.

June 22.

BELANEY v. FREENCH.

Solicitor's Lien—Right to retain Documents—Suit—Discharge of Solicitor.

A solicitor, who has been employed in a suit for the administration of an estate, and is discharged during the course of the suit, cannot, on the ground of lien, retain documents belonging to the estate, so as to embarrass the proceedings in the suit.

This was a suit for the administration of the estate of R. Thompson. Messrs.

Hines & Sons were employed as solicitors in the suit by the plaintiffs, who were trustees of the testator's will, and by some of the defendants interested in the estate. They were subsequently, during the progress of the suit, discharged from acting as the solicitors of the above-mentioned parties. The said solicitors, at the time of their discharge, had in their possession certain plans which were required for the management of the estate, and they claimed a lien on these documents for their costs of suit, and for moneys advanced for the purposes of the testator's estate; they also claimed to be entitled to an express charge thereon created in their favour by the trustees of the testator's will. On a motion by the defendants, Lord and Lady French, that the plans should be delivered up by Messrs. Hines & Co. to the receiver appointed in the suit, Vice-Chancellor Bacon made the order asked for, without prejudice to the solicitors' lien. The solicitors appealed from this order.

Mr. Eddis and *Mr. Ince*, in support of the appeal, insisted that the solicitors were entitled to retain the plans by virtue of their lien, and of the special charge.

Mr. Hemming appeared for the respondents.

LORD JUSTICE JAMES said that a solicitor could not embarrass a suit by keeping papers belonging to an estate which was being administered by the Court, and could not be allowed to enforce payment by those means. There was no sufficient evidence of any express charge having been created, and the appeal must be dismissed, with costs.

Solicitors—*Mr. Philipe*, agent for Messrs. Hines & Sons, Sunderland, for appellants; Messrs. Hensman & Nicholson, for respondents.

JESSEL, M.R. }
1873. } LAUTOUR v. THE ATTORNEY-
March 19. } GENERAL.

Practice—Dying Witness—Replication—Consolidated Order XIX., rule 12—Affidavit filed before Issue joined—Special Leave—Taking off File.

A plaintiff filed an affidavit made by a dying witness, and offered an opportunity for cross-examination, and afterwards filed replication and, having omitted to give notice of reading the affidavit within the prescribed time, took out a summons for leave to read the affidavit, which summons was adjourned to the hearing of the cause. The plaintiff printed the affidavit, with the others proposed to be read at the hearing, and thereupon the defendant moved to take it off the file and expunge it from the printed affidavits:—Held, that this motion was irregular.

This was a suit originally instituted by a General Lautoir against the Crown, and revived after his death by his executrix. On the 26th of December, 1865, the original plaintiff, being in immediate expectation of death, made an affidavit respecting various matters at issue in the suit, and on the 28th the affidavit was filed, and his solicitor wrote to the defendant's solicitor as follows—

“The extremely precarious state of General Lautoir's health made it imperative on me to procure his deposition in support of such of the statements in the bill, and to meet such of the statements in the answer of the Attorney-General as he could speak to. I therefore have this day filed an affidavit made by him, a copy of which I herewith furnish to you; and if you shall consider a cross-examination to be necessary, I shall be happy to co-operate with you in procuring the attendance of one of the examiners at the General's residence at Bromley, or in procuring the appointment of a special examiner for that purpose, or if you like, will consent to any cross-examination you may desire by any London commissioner for taking affidavits without an order. The physicians now attending the General inform me that he cannot last more than a week or ten

days. He is past eighty, and very much wasted.”

In answer to this, the defendant's solicitors wrote, on the 1st of January, 1866—

“In reply to your letter of the 28th ult., we beg to enquire whether the plaintiff's affidavit to which you refer has been filed under any special order, and how and when such order (if any) was obtained. Considering the state of the proceedings this affidavit does not appear to be regularly on the file for any purpose whatever. We may add, from what is stated as to the plaintiff's health, the offer of him for cross-examination seems entirely illusory.”

And the plaintiff's solicitor replied the same day, saying—

“In answer to your letter of this date, written in reply to mine of the 28th ult., I beg to say that the affidavit of General Lautoir has not been filed under any special order; but as it is proposed, should the General's health or life fail, to give notice of using it at the hearing under the 12th rule of the 19th General Order, I have been advised that it was proper to give you an opportunity of cross-examining him while he continues capable of giving evidence, which he is at present.”

General Lautoir died on the 11th of January, 1866. The suit was afterwards revived and issue joined, and on the 27th of November, 1872, the plaintiff took out a summons asking that the affidavit of General Lautoir might be received and used as evidence at the hearing, although notice of such intention was unintentionally omitted to be given to the defendants within one month after issue was joined, pursuant to rule 12 of the 19th of the Consolidated Orders.

The defendant opposed this summons, and it was adjourned into Court to come on with the hearing of the cause; and the plaintiff had General Lautoir's affidavit printed amongst the other affidavits proposed to be used at the hearing.

The defendant now moved that General Lautoir's affidavit might be taken off the file and expunged from the printed copy of affidavits filed on behalf of the plaintiff.

The Solicitor-General (Sir R. Baggallay) and *Mr. Hemming*, for the defendant, submitted that the affidavit was irregularly filed, and was an evasion of the rules as to examining a witness *de bene esse*.

Mr. Woodroffe (Mr. Bedford Pim with him), for the plaintiff, said that this motion was, in effect, an appeal from the order already made, directing the summons for leave to read the affidavit to come on at the hearing. A plaintiff could file an affidavit before filing replication, because he might bring the suit on on motion for decree, and if, after filing an affidavit, he filed replication, there was nothing irregular in proceeding in the manner which had been adopted in this case, and which was, indeed, directed by rule 12 of Consolidated Order XIX. The plaintiff was then justified in printing the affidavit for the convenience of the Court and counsel; its appearance amongst the printed affidavits would not prejudice the defendants when the summons came on at the hearing.

Order XIX., rule 12, is in the following words—

"No affidavit or deposition filed or made before issue joined in any cause shall, without special leave of the Court, be received at the hearing thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court, notice in writing shall have been given by the party intending to use the same, to the opposite party, of his intention in that behalf."

Sir R. Baggallay, in reply, cited

Ogles v. Morris, 36 Law J. Rep. (N.S.)

Chanc. 833; s. c. Law Rep. 2

Chanc. 701.

THE MASTER OF THE ROLLS.—I do not think I am at liberty to introduce any new practice. There is no rule that no affidavit is to be sworn on a plaintiff's behalf till he is ready to give notice of motion for a decree, or has joined issue. On the contrary, on motion for decree the affidavits must be filed before the notice is given. Therefore, in all cases where a plaintiff thinks he may require to bring the suit on in that way he must

file his affidavits first. Then suppose that, having filed his affidavits, he changes his mind, and lets the cause come on on replication. Then the orders say he shall not use the affidavits already filed unless he gives a certain notice to the other side. That shews that this case was contemplated by the orders. Therefore it appears to me that the affidavit was quite regularly filed. I have also taken the opportunity of asking the registrar if he knows of such a motion as this, or any reason why such an affidavit should be taken off the file, and I find he does not know of either. Of course it is quite a different question whether the affidavit is to be received at the hearing, and I cannot dispose of that now. Therefore, I refuse the motion.

Solicitors—Messrs. Raven & Bradley, for the applicant; Messrs. Kimber & Lee, for the plaintiff.

HALL, V.C. }
1874.
Jan. 16. }

TAYLOR v. TAYLOR.

Devise of Real and Personal Estates—Rents and Proceeds—Annuities—Charge—Corpus or Income—Powers of Distress and Entry, to recover Annuities as if they had been secured by a Lease for Years—Arrears.

J. T. died in 1839, having by his will devised and bequeathed the residus of his real and personal estates to trustees for eleven years from his death, upon trust out of the rents and proceeds to pay (in the events which had happened) certain annuities, one of which was an annuity of 500l. to the two petitioners for their lives, and the life of the survivor of them. The residus of the rents and proceeds was, during the eleven years, to be accumulated for the benefit of the person who at the end of that time should be entitled to the residuary personally. At the end of the eleven years the real estate was to go, "subject to, and charged with, the payment of the annuities, and with power of distress and entry for the recovery of the same, as if they had been secured by

a lease for years," to the testator's nephew, J. T., for life, with remainder to his first and other sons in tail, with remainders over. Part of the testator's real estates had been sold, and were now represented by a fund in Court of 13,738l. 14s. 5d. Consols. The petitioner's annuities had been paid in full till 1858; but there was now a sum of 1,367l. 6s. 5d., for arrears owing to the annuitants:—

Held, first, that the mode in which the payment of the annuities was secured did not necessarily make them a charge on the corpus of the estate; second, that the arrears of the annuities were payable out of the income, and not the corpus of the estate; third, that they were not necessarily payable out of the income of any particular year; and, fourth, that the remedy against the income for arrears continued beyond the lives of the annuitants.

Petition.—Further hearing by order.

This was a petition presented by Elizabeth Henrietta Wainhouse and Caroline Wainhouse, annuitants, under the will of Joseph Taylor, who died on the 8th of April, 1839.

The petition stated that the testator, by his will, dated the 10th of October, 1837, devised and bequeathed the residue of his real and personal estates to trustees, for the term of eleven years from the day of his decease, upon trust, to pay out of the rents, interest, dividends and proceeds to arise therefrom, the sum of 500l. per annum to his wife Sarah (who died on the 30th of April, 1848), for her life, if she should so long continue his widow:—And upon further trust, to pay thereout the sum of 75l. per annum unto and equally among his three nieces, the daughters of his late brother William, namely, the plaintiff, Ann Parkyn, Mary Taylor (who died on the 26th of September, 1848), and Elizabeth Taylor (who died on the 5th of January, 1871), to be paid to their separate use, for their respective natural lives, and to the survivors and survivor of them, in manner therein mentioned: And upon the further trust, to pay thereout the sum of 500l. per annum to Edward Wainhouse, for his life, if he should so long continue solvent, in manner there-

in mentioned; but if the said Edward Wainhouse should become bankrupt, or execute an assignment of his estate for the benefit of his creditors, or take the benefit of the Act for the relief of insolvent debtors, or become insolvent in the ordinary mercantile acceptation of that term, the testator directed that then, and from thenceforth, the annuity of 500l. should go to and be paid (instead of to Edward Wainhouse and his assigns) unto and equally among Dorothy Ann Wainhouse (since deceased) and the petitioners, Elizabeth Henrietta Wainhouse and Caroline Wainhouse (the sisters of Edward Wainhouse), for their separate use, for and during their respective natural lives; such annuity of 500l. to continue and be paid to the survivors and survivor of them. The testator also directed that the residue of the rents, interests, dividends and proceeds should, during the term of eleven years, be accumulated, in manner therein mentioned, for the benefit of the person who should become entitled to the residue of his personal estate on the expiration of the term of eleven years:—And from and after the determination of the term, the testator devised all his real estate at Hunslet, Potter Newton, or elsewhere (subject, nevertheless, to and charged with the payment of the annuity of 500l.), to his wife, for the residue of her life or widowhood; the annuity of 75l. to his said nieces, for the residue of their respective lives, or life of the survivors or survivor of them; and the annuity of 500l. to Edward Wainhouse, or his said sisters, as the case might be, according to the trusts thereinbefore declared concerning the same, for the residue of his life, or the residue of his said sisters' respective lives, and the lives or life of the survivors or survivor of them; "with powers of distress and entry for the recovery of the said several annuities as if the same had been respectively secured by a lease for years to his trustees, to the use of his great nephew, the plaintiff, Joseph Taylor, for his life;" with remainder to the use of the trustees, to preserve contingent remainders; with remainder to the use of the testator's great nephew's first and other sons, successively, according to seniority in tail male, with divers remainders over.

Dorothy A. Wainhouse died in 1844, intestate, and the petitioner, Elizabeth Henrietta Wainhouse, was her legal personal representative.

The testator's widow died in 1848.

A suit having (in 1843) been instituted to administer the testator's estate, an order was (on the 25th of July, 1849) made in it, whereby it was declared that Edward Wainhouse having become insolvent, in the ordinary mercantile acceptance of the term, his sisters, Dorothy Ann Wainhouse and the petitioners, were entitled to the annuity of 500*l.*; and that no interest was payable on the arrears of it.

The petitioners received their annuities in full down to 1858, up to which time the other annuities bequeathed by the will were also duly paid. From that time, however, to the present, all the annuities had fallen into arrear; in consequence, as was alleged by the tenant for life in possession of the estates settled by the will, of the insufficiency of the annual income of the estates to pay the annuities in full.

Certain accounts and enquiries with respect to the arrears, and the property subject to them, had been taken and made. It thence appeared, that the amount of the arrears due to the petitioners in respect of their annuities was, in 1873, a sum of 1,367*l.* 6*s.* 5*d.* :—That Elizabeth Taylor had died on the 5th of January, 1871, having by her will appointed Joseph Stenson her executor, who duly proved the will; and that at her death there was a balance of the arrears of the 75*l.* annuity due to her, amounting to 59*l.* 5*s.* 5*d.* :—That Ann Parkyn had died on the 3rd of June, 1872, having by her will appointed William Finch her executor, who duly proved the will; and that at her death there was a balance of the arrears of the 75*l.* annuity due to her, amounting to 108*l.* 12*s.*

It further appeared that part of the testator's property, at present subject to the annuities, consisted of a freehold estate at Gledhow, in the parish of Leeds; being a mansion house and land, let to a yearly tenant at a rent of 230*l.* per annum; and further, that under the provisions of the Taylor's Estate Act, 1866, and of the 19th & 20th Vict. c. 120, "The Leases

and Sales of Settled Estates Act," the Hunslet property had been sold; and that there were also now in Court, to the credit of the cause of *Taylor v. Taylor*, "the account of the proceeds of the sale of the Hunslet property, together with the accumulations of interest thereon," a sum of 13,738*l.* 14*s.* 5*d.* Bank Three per Cent. Annuities.

The petitioners were advised that the arrears and continuing payments of all the annuities were a charge upon the *corpus* and capital of the settled estates; or, at any rate, that they constituted a continuing charge upon the rents, profits and annual income thereof; that such arrears ought to be raised and paid accordingly; and that due provision should be made for the full payment of the annuities.

The present plaintiff in the suit, who was the tenant for life in possession of the settled estates, had, in conjunction with his eldest son, duly barred the entail in the real estate, subject to the annuities; and had acquired the absolute power to dispose of it, subject to such charge.

The petition then prayed (*inter alia*) for an order that the arrears of the annuities might be raised, and paid out of the *corpus* and capital of the property charged therewith; that provision might be made for keeping down the continuing annuities out of the rents, profits and income; or, if they proved insufficient, out of the *corpus* and capital of the property charged therewith, and that provision might be made for the costs of the petition.

Mr. Bristowe and *Mr. Wright*, for the petitioners, supported the prayer of the petition, and referred to—

Cupit v. Jackson, M'Cle. 485; s. c. 13 Price 721;

Booth v. Coulton, 39 Law J. Rep. (N.S.) Chanc. 622; s. c. Law Rep. 5 Chanc. 684;

Birch v. Sherratt, 36 Law J. Rep. (N.S.) Chanc. 925; s. c. Law Rep. 2 Chanc. 644;

Foster v. Smith, 1 Ph. 629; s. c. 15 Law J. Rep. (N.S.) Chanc. 183;

Williams on Executors, vol. ii. p. 1261.

Mr. Lindley and *Mr. W. Barber*, for the parties now entitled to the property subject to the annuities, contended—first, that they were not charged on the *corpus*

of the property; second, that if they were a charge on the rents and proceeds of it, they were not a continuing charge on them; and, third, that if they were so, they were not charged on the income beyond the lives of the annuitants.

They cited—

Hindle v. Taylor, 20 Beav. 109; s. c. 25 Law J. Rep. (N.S.) Chanc. 78;

Baker v. Baker, 7 De Gex, M. & G. 681; s. c. 20 Beav. 548; s. c. 27

Law J. Rep. (N.S.) Chanc. 417;

s. c. 6 H.L. Cas. 616; s. c. 25 Law

J. Rep. (N.S.) Chanc. 76;

Addcott v. Addcott, 29 Beav. 460;

and insisted, finally, that the annuities, being payable only out of the annual rents and profits, if they proved deficient, the annuities must abate accordingly. The testator had not expressly used the word "annual;" but the whole scheme of his will—the giving of the powers of distress and entry, but not of sale, and the direction to accumulate the surplus rents and profits, supported the respondents' view.

Mr. Bristowe replied.

HALL, V.C.—The question on this petition is entirely one of the construction of the will of Joseph Taylor. By that he gave his residuary real estate, and all the residue of his ready money, money arising from securities, together with the securities upon which the same may be invested, household furniture, goods, chattels, and personal estate, and also the legal estate and interest of and in all lands, tenements and hereditaments, to him conveyed in mortgage by any person or persons whomsoever, to Edward Wainhouse, William Vincent, and Griffith Wright, their heirs, executors, administrators and assigns, for the term of eleven years from the day of his decease, upon the trusts thereafter expressed (that was to say)—First, he provided for his wife having certain furniture for her life, which was to fall at her death into his general estate; and then he proceeded—"And upon trust, to convert all the wines which shall be in my dwelling-house at the time of my decease, and such part of the residue of my personal estate so bequeathed to them as aforesaid (except my books and paintings) as shall not be in specie at the time of my

decease, and not invested in securities at interest, into money;" and then upon trust, "to invest it in the way specified;" and then upon further trust, "to pay out of the rents, interest, dividends and proceeds to arise from the said real and personal estates, the sum of 500*l.* per annum to my wife for her life, if she shall so long continue my widow." Then he specified the time at which the payments were to be made. "And upon further trust, to pay thereout the sum of 75*l.* per annum unto and equally among my three nieces," describing them, "for their respective natural lives, such annuity of 75*l.* to continue and be paid to the survivors and survivor of them, by two equal half-yearly payments." Then he stated the mode in which they were to be paid; and continued, upon further trust, to pay the annuity of 500*l.* to his widow; and then he directed the mode of payment of that annuity. Then that annuity was, in certain events, to go over to other persons during their lives, and then he said—"I will and direct that the residue of the said rents, interest, dividends and proceeds shall, during the said term of eleven years, be invested in real securities at interest, and be allowed to accumulate for the benefit of the person who shall become entitled to the residue of my personal estate on the expiration of the said term of eleven years; and I hereby empower my said trustees to let or lease the said real estate devised to them, as they may think proper, during the said term of eleven years, so that they obtain the best rent that can be had for the same; and to apply such part of the said rents, interest, dividends and proceeds, as may be necessary in keeping the said real estate in repair, and in insuring the same from fire; and I hereby direct that, in the converting my personal estate into money, pursuant to the trusts hereinbefore contained, my trustees shall have full discretion as to the time and mode of such conversion, and also to keep any part of such personal estate which cannot be advantageously disposed of (instead of selling the same) for the person entitled thereto, under the bequest hereinafter mentioned." Then he proceeded—"and from and after the determination of the

said term of eleven years."—I stop there. That first portion of the will is a disposition, having reference only to a period of eleven years after the testator's decease. It provided for the payment of certain annuities out of the interest, dividends and proceeds. Those provisions for the payment of these annuities are unquestionably only provisions for payment out of income during the period of eleven years; and it is impossible to contend, or argue, that the annuities during the eleven years are a charge upon *corpus* at all. The argument might, perhaps, have been considered to go to the full extent of saying that they are only to be paid out of income during the period of eleven years; and I take it to be probable that that may be so, so far as regards the eleven years. It does not establish that which, perhaps, might be contended for, viz., that you are to pay the annuities out of the income in the particular year, inasmuch as there might be arrears at the end of eleven years, for the raising of which, apparently, there is no provision made at all. The testator seems to have contemplated the probability that during the eleven years the annuities would be paid. However, what I have said shews clearly that there is not, at all events upon that portion of the will, anything which charges the *corpus* of the estate with the payment of them. Then having provided for the payment during the eleven years, we come to a new set of provisions—"and from and after the determination of the said term of eleven years I devise all my said real estate"—describing it—"subject, nevertheless, to and charged with the payment of the said annuity of 500*l.* unto my said wife, for the residue of her life or widowhood; the said annuity of 75*l.* unto my said nieces, daughters of my late brother William, for the residue of their respective lives." They were to take in certain events. Then there was a power of distress and entry, for the recovery of the said several annuities, "as if the same had been respectively secured by a lease for years" unto the trustees, "to the use of my great-nephew for life; and then over, in strict settlement."

Now, the question is whether, under

that second disposition, the annuity question are to be raised out of the *corpus* that is, by sale or mortgage of the *corpus* of the estate? It is contended that should be. If the case were free authority what is the simple case, as regards this disposition? It is a ordinary case of a testator devising an estate in strict settlement to a person for life, with remainder over to other persons in the ordinary way, and saying that several persons so taking for life, are to take the annuities out of the income of the *corpus*, subject to the payment of the annual sums; and the persons who are entitled to those annual sums are to have a power of distress and entry for the very of those annuities, as if the same had been respectively secured by a lease for years. There is nothing in that case all to say that the annuities in question are to be charged upon the *corpus* further than this, that the persons who are to take successively, are to take the annuities out of the income of the *corpus* that is to say, they are to take it out of the income of the *corpus* with the payment of the annuities. They must pay them out of what they shall successively have to pay them out of; the tenant for life will pay them out of the income which he gets, and the remainder-man will pay them out of the income which he gets. There is nothing in that case to charge the *corpus* at all. Any charge upon the *corpus*, or for taking it out of the *corpus*, would lead to very considerable confusion, probably, if in any given case there was not enough to pay the annuities. If you are to take it out of the *corpus* in that particular year how are you to adjust it again between the tenant for life and the remainder-man? There is no provision made for that in any way whatever. It seems to me that in all cases of strict settlement, such as the ordinary case of a marriage settlement, when you give a jointure—although you do say that to that, in practice, a term of years is raising it—the gift of the jointure necessitates the adjustment of it between the different persons paying it. Although you do that, the ordinary way is to give the jointure with a power of distress and entry. You give that jointure to be paid out of the income of the *corpus*.

The *onus* of proof lies on those who say it is to be otherwise paid; and that the annuitant is to have something beyond that in the form of specific remedy. Therefore, in treating this case independently of authority, I should say that that is the meaning of this testator, and that it is to be paid out of income. But I do not find anything whatever to countenance the argument that you are only to take it out of the income of a particular year, or that you are to confine the payments to the income during the whole life of the annuitants. The annuitant is entitled to the annuity. The annuitant has power of distress and entry for obtaining payment of that; and whenever it is necessary to assert her right, she must exercise her power of distress and entry in reference to what is actually owing to her at the time when she comes to make the claim. Therefore I say, independently of authority, that that must be the meaning of it, and I hold that that is the meaning; because there is no authority whatever, as I consider, which at all warrants any view that will limit it to the particular income during the year.

That being, so far, against the petitioners as regards the charge upon the *corpus*, and for the petitioners as regards the charge upon the income, independently of authority, is there any authority which entitles the petitioners to charge the *corpus*? None has been referred to, except, so far as I recollect, the case of *Cupit v. Jackson* (*ubi supra*), in which the Lord Chief Baron seems to have considered that (in that particular case) an annuitant was entitled to have a sum raised out of the *corpus*. It is to be observed, in *Cupit v. Jackson* (*ubi supra*), it was perfectly immaterial, as it appears ordinarily to be in these cases, whether it is a charge out of *corpus*, or taken out of the rents as they accrue, from time to time; that is, with reference to the interest of other parties; because, in *Cupit v. Jackson* (*ubi supra*), apparently the question was simply one of jurisdiction, whether it was a case for a bill, or a case for remedy at law? That was the argument in that particular case. The property there was subject to the payment of a particular annuity, which was retained by the settlor

as absolute property, and therefore it was quite unimportant as between other parties. But I do find the question was considered in the case of *Graves v. Hicks* (1). In that case, the testator devised lands, subject to an annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail; with remainder, subject to another annuity to his wife, to his grandson, and the grandson's first and other sons, in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and thereupon the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband; and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were not duly attested. He then made a fourth, which was duly attested, revoking several of the dispositions, thus: "Dispositions heretofore made by me in my said will and codicils, of all my freehold, copyhold and personal estate, of every kind." Then there were limitations in tail. There were other questions in *Graves v. Hicks* (*ubi supra*), but with them we have nothing now to do. Suffice it to say, that in that case, subject to the annuity, the property was given to his son for life, with remainder over to the son's first and other sons in tail. The other questions having been disposed of, and an order having been made in the case on the 9th of December, 1833, which declared "that the testator's residuary real estates were charged with the following annuities, or yearly rent-charges, in favour of Mrs. Hicks: namely, one of 300*l.*, and another of 100*l.*, under the will; one of 100*l.*, under the first codicil, and another of the same amount under the fourth codicil; and with an annuity, or yearly rent-charge of 100*l.*, in favour of Mr. Hearle," it was further declared, "that the annuity, or yearly rent-charge of 300*l.*, was a primary charge to the several other annuities, or yearly rent-charges, given by the will and codicils; and that those other annuities, or yearly

(1) 11 Sim. 536; s. c. 10 Law J. Rep. (n.s.) Chanc. 185.

rent-charges, were charged on the said estates, without any priority between them." So that there was an actual order made in the cause that those were charges upon the estate, which so far was favourable to the annuitant. The testator's general personal estate proved insufficient for the payment of his debts; and the rents of the residuary real estates, after paying an annuity and the interest of a sum in gross, which the testator had charged on the estates in his lifetime, were also inadequate to pay the annuities, declared to be charged on the estates by the will and codicils. Those annuities became greatly in arrear, and in 1838 the arrears due to Mrs. Hicks amounted to 3,479*l.*, and had since increased. It was contended, on behalf of Mrs. Hicks and Mrs. Hearle, that by the will and codicils the annuities were charged upon the *corpus* of the residuary estates; and that, consequently, the arrears ought to be paid out of a sum of money which had been produced by the sale of timber on the estates; and that if that should not be sufficient, out of money to be raised by sale or mortgage of the estates. The case was argued, and the Vice-Chancellor says—"The case of *Cupit v. Jackson* (*ubi supra*) has no relation whatever to the present case." Then he states the case of *Cupit v. Jackson* (*ubi supra*), and having stated the facts of that case, he says—"She filed the bill against John Jackson," that is the plaintiff in *Cupit v. Jackson* (*ubi supra*), "who at that time was seised in fee of the estate, subject to the arrears of the annuity." Then he says—"The whole amount of those arrears was then finally determined, and in that case, there being but one demand which, at all events, must in some manner or other have been raisable out of the estate, the Lord Chief Baron thought that, in that case, the whole amount of the arrears having been ascertained, and the estate charged with the annuity being in the hands of the defendant, who was seised in fee simple of it, it was right that the amount of those arrears should be raised by the sale or mortgage of the estate. Consequently, as it appears to me, it has no relation whatever to the present case; because, in the present case, the estate, out of which it is

proposed that the arrears of the annuity shall be raised, happens to be still subject to settlement, as to part, on Mrs. Hicks for life, and subject thereto, on Mrs. Hearle for life, with remainder to John Hicks for life," and so forth; and then he says—"The annuitant being alive, and some arrears having become due, the amount of which arrears, I admit, is now ascertained, it is proposed that this Court shall order that amount to be raised, by sale or mortgage, out of the settled estates. However, no case has been produced as an authority for such a proceeding; and my opinion is that, unless the Court finds it necessary to make a decree for the sale of the estate for some other purpose, there is no ground whatever for making a direction that the amount of those arrears (which, it is true, are now ascertained, but which will be liable, very probably, in the course of a succession of years to fluctuate) shall be raised in the manner proposed; for I do not understand that it is necessary now to give any direction for the sale or mortgage of the real estate for any other purpose. My opinion therefore is, that all that can be done at present is, to let the matter go on; and if the future rents increase the arrears will be diminished, and, for aught I know, may be ultimately paid. I feel great reluctance to do that which is novel, and which is not supported by any principle that I have heard adduced, or by any case that has been cited." I think that is applicable to the present case, and that it is not inapplicable by reason of the fact that there is a fund existing which represents part of the *corpus* of the estate. I take it that it rests upon a principle which is applicable to the present case.

As regards what I have said about the right to have the arrears paid without reference to the duration of the lives of the annuitants, that is, that they may be paid out of future rents and profits, I conceive that the particular remedy that is given here (which it is to be observed is not as it was in some of the cases that have been referred to—not a power to enter and distrain) is a power of distress and entry for the recovery of the annuities, "as if the same had been respectively secured by a lease for years." Now,

the effect of that I conceive is this: that you have two powers—you have a power of distress, as distinguished from a power of entry; and, having a power of entry, to recover the annuity you enter. The effect in law is, that you become possessed of a chattel interest, and that chattel interest is an interest which endures until all the arrears are paid. That is the nature of the remedy which is given here, and which tends strongly to confirm, in my mind, the view that the parties are entitled to be paid their full arrears, without reference to whether they can be paid or not during the lives of the annuitants. Therefore, upon the whole, I hold that to be the correct view.

Then, as regards the order to be made upon the present occasion, the petitioners are entitled to be paid the arrears out of income, so far as there is income, that is, the amount that has been specified; the petitioners will be entitled to be paid out of future income, so far as it is not required for the payment of the annuities in each year becoming due, until the whole is liquidated.

As regards the costs of the petition, I think the petitioners have contended for that to which they are not entitled. I can only deal with this property now as a specifically devised estate. I cannot deal with the costs otherwise than upon that footing. It seems to me that as the petitioners have in part failed, and in part succeeded, they must take their costs out of the particular fund to which they are entitled, that is, so much of it as is actually income. The other parties to the petition must bear their own costs. I cannot give them their costs out of that fund.

The following were the minutes of the order made on the petition—

HALL, V.C., January 16th, 1874.—The Court being of opinion that the annuities are not charged on the *corpus*, but are payable, with all arrears, out of the income accruing and to accrue from the *corpus* of the property, tax the petitioners' costs, and pay them out of so much of the fund in Court as consists of income; pay the rest of such income to the annuitants, in proportion to the amounts found due

NEW SERIES, 43.—CHANC.

to them respectively; pay the future income arising from the capital to the annuitants until their annuities and all the arrears are paid; and, subject thereto, to the person entitled to the real estate: tax the costs of the respondents (the Taylors), as between solicitor and client, to be a charge on the *corpus*; but no order for their present payment. Liberty to apply.

Solicitors—Messrs. Bothamleys & Freeman, for petitioners; Messrs. Lambert, Burgin & Petch, agents for Mr. H. Snowdon, of Leeds, for respondents.

HALL, V.C. { THE ATTORNEY-GENERAL AND
1874. { THE COMMISSIONERS FOR THE
Jan. 26. { REDUCTION OF THE NATIONAL
DEBT v. RAY.

Contract—Annuity—Purchase—Misrepresentation—Rescission—Jurisdiction—
10 Geo. 4. c. 24.

Unintentional misrepresentation was made to the Commissioners for the Reduction of the National Debt of the age of T. O., on whose life they granted an annuity:—Held, after the death of T. O., that the contract, though completely carried out, should be rescinded; and though the statute under which it was granted provided other remedies for misrepresentation and mistake.

This was an information and bill against the Secretary of the Atlas Assurance Company for a declaration that two contracts for the purchase of two annuities of 100*l.* 1*s.* 6*d.* and 100*l.* 2*s.* respectively, on the life of Thomas Chalk, of Kingston, Surrey, granted by the Commissioners for the Reduction of the National Debt to the trustees of the Assurance Company were void, and that they might be cancelled.

In December, 1843, the Assurance Company, through their actuary, applied to the Commissioners for the purchase, in the names of the trustees of the company, of an annuity on the life of Thomas Chalk.

A declaration was signed by the actuary, and delivered to the Commission-

ers, which stated that the trustees were desirous to pay a sum of money down for the purchase of a life annuity of 100*l.* 1*s.* 6*d.*, and they formally nominated "Thomas Chalk, of Kingston, Surrey, gentleman, now at the age of sixty-four years, to be the person on the continuance of whose life the said annuity is to depend, and whose age is certified and verified by the declaration now produced."

A statutory declaration was made and delivered to the Commissioners, in which it was solemnly and sincerely declared by one of the trustees of the office that Chalk was of the age mentioned; was born at Barking, Essex, and that the names of his parents were William and Elizabeth Chalk.

No parochial register of the birth or baptism of Chalk was produced, but it was stated that his parents were members of the Society of Friends; and there was annexed to the statutory declaration a certified extract from a London register of births of the Society of Friends, then deposited at the General Register Office, Rolls Buildings, which the deponent said he believed to be true, and which stated the birth of Thomas Chalk in 1779, at Barking. This information was provided for the Atlas Company by the secretary of another society, on whom the Atlas Society considered themselves justified in relying.

On the 30th of December, 1843, the Commissioners, relying on the representations made, granted the annuity applied for; and in March, 1844, relying on the same representations, they granted for the sum paid to them another annuity on the same life. The annuities were paid down to the 5th of January, 1869. Thomas Chalk died on the 2nd of February, 1869, and according to the register produced, would then be eighty-eight years old. The company did not make any claim for any further payment, as they might have done, after the death of Chalk; nor did they follow the usual course of giving notice of the death. The Commissioners discovered the death, and that the entry in the register at Kingston was that Chalk was at the time of death eighty-two years of age; that he was born at

Brighton in 1786, and that his parents were Thomas and Sarah Chalk, whereas the certificate had given William and Elizabeth as the parents' names.

The explanation in reference to the errors not being satisfactory, the Commissioners instituted these proceedings for the purpose above mentioned, and for an account, alleging that they were entitled to be paid a further sum of 3,425*l.* 5*s.*

The Act appointing the Commission, 10 Geo. 4. c. 24, by section 40 imposed a heavy penalty and forfeiture on a false certificate of age; by section 45 gave the Commissioners jurisdiction to rectify contracts in case of accidental errors; and by section 51 limited actions and suits in respect of all matters under the Act to three months.

Mr. Henning, for the informant and plaintiffs, relied on

Rawlins v. Wickham, 1 Giff. 355; s. c. 3 De Gex & J. 304; s. c. 28 Law J. Rep. (N.S.) Chanc. 188.

Mr. Southgate, *Mr. Dickinson*, and *Mr. Kekewich*, for *Mr. Ray*, the secretary, on behalf of the Atlas Company, relied on the absence of intentional fraud, and contended that there had been a mutual mistake, as in

The New Brunswick and Canada Railway and Land Company v. Conybeare, 9 H. L. Cas. 711; s. c. 31 Law J. Rep. (N.S.) Chanc. 297;

and the contract having been fully performed, there was nothing now to set aside. They referred to ss. 40, 45 and 51 of the Act, imposing a penalty for a false certificate, and contended that the Act took away the jurisdiction of the Court to give a civil remedy.

HALL, V.C. (after stating the facts), said the first question to be determined was, whether the Commissioners were entitled to avoid the contract *ab initio*, on the ground of misrepresentation, and to be put into the same position as if the contract had not been entered into at all. It was said that there was no intentional misrepresentation made by the Atlas Company, and that they took steps to ascertain the truth of the statements which they made to the Commissioners.

But though he did not impute any moral fraud, there was a distinct misrepresentation for which they must be held responsible to the persons to whom they made it. He referred to the judgment of Lord Cairns in *The Reese River Mining Company v. Smith* (1), as an authority that such misrepresentation, though it might not be moral, was legal fraud.

That being so, he could not doubt that, according to the general principles of the Court, a party having been induced to enter into a contract by a statement of that which was untrue, had a right to say, "I will have that contract rescinded and treated as nothing." The observations made in *Rawlins v. Wickham* (*ubi supra*) were quite an authority for that, and though that was a case of actual fraud, as regards one of the partners, it was not so as regards the other.

Then as to the observations in *The New Brunswick and Canada Railway Company v. Conybeare* (*ubi supra*), those observations must be read with reference to the facts in the particular case. In that case the circumstances were very peculiar, and if the passage read from the judgment of Lord Westbury, in which he says, "the case so alleged must be shewn, according to the language of Lord Eldon, to amount to that which a Court of Equity holds to be fraud," were read in connection with the view taken by Lord Cairns in the case of *The Reese River Company* (*ubi supra*), the present case would come within what in the view of Lord Eldon would be considered actual fraud, fraud being always understood, not in any offensive sense, but what the Court treats and considers as fraud. Therefore the case of the informant and plaintiff was made out, and he did not feel any difficulty at all about its being a contract which had come to an end. It was sufficient to say, with regard to that, that the Commissioners came as soon as the mistake was discovered, and they had a right to say, "we are entitled to be put back into the position we should have occupied but for the contract."

As regarded the contention upon the clauses of the Act of Parliament, that the

(1) 39 Law J. Rep. (N.S.) Chanc. 849; s. c. Law Rep. 4 E. & I. App. 64.

remedy was gone, in not making the claim within the three months, these clauses, he thought, had nothing to do with it. They were clauses protective of the officers and persons who were discharging the duties created and conferred by the Act, and not in any way affecting the construction of contracts entered into; and even if they did apply to ordinary contracts, this case, being for the purpose of civil remedy, one really amounting to fraud in equity, that would exclude the operation of the section altogether.

Then it only remained to consider, what relief was to be given. If these moneys had not been taken out of the public funds, for the purpose of payment of the annuities, they would have been applied, under the provisions of the Act for the Reduction of the National Debt, and would have produced $3\frac{1}{4}$ per cent. compound interest, and which they would be entitled to; and, on the other hand, they offered to pay the same exactly for all they have received, and that seemed a very equitable view of the case.

Therefore the informant and plaintiffs were entitled to the relief that they asked, and to the costs of the suit.

Solicitors—Messrs. Raven & Bradley, for plaintiffs; Messrs. Dawes & Sons, for the Atlas Company.

LORDS JUSTICES. }
1874.
Feb. 23. } M'CLEAN v. KENNARD.

Partnership — Death of Partner — Uncompleted Contract — Rights of Representatives of Deceased Partner — Agreement between Surviving Partners and Executors and Trustees of Deceased Partner.

The executors of a deceased partner are, as a general rule, entitled to have the subsisting contracts of the partnership carried out to completion, in order to ascertain their testator's share of the profits resulting therefrom, his estate being liable also to contribute rateably to the resulting loss, if any.

Five persons as partners entered into a contract for the construction of some public

works. Before the contract was completed one of the partners died. By his will he appointed two executors and three trustees, and authorised his trustees to carry on any business in which any part of his trust property should for the time being be invested. Before the will was proved an agreement was drawn up, expressed to be made between the surviving partners, and the executors and trustees of the testator, the names of the executors and trustees being left in blank. The agreement provided (inter alia) that the contract should be carried out on joint account of the co-contractors, who were to contribute in equal shares to the expenses, and that the executors and trustees of the testator should be sleeping partners, the acting partners being the four survivors. The agreement was executed by the four survivors. The next day the executors named in the will proved it. One of the three trustees disclaimed the trusts. The agreement was afterwards executed by the executors and acting trustees. *BACON, V.C.*, decided that the intention was that all the persons named as executors and trustees in the will should execute the agreement, and that consequently it was under the circumstances not binding on the surviving partners. He held also that the testator's estate was entitled to receive his share of the value of the contract to be ascertained at the time of his death.

On appeal.—Held, that the object of the agreement was merely to bind the testator's estate, and that it was sufficient that it was executed by the executors and acting trustees.

Held, also, that the testator's estate was entitled to his share of the profits of the contract as ascertained on its completion, the estate being also liable to contribute in the same proportion to the losses.

This was an appeal from a decision of *Bacon, V.C.*

In the month of August, 1869, Messrs. R. W. Kennard, G. Elliot, J. R. M'Clean, James Abernethy, and W. B. Greenfield, jointly entered into a contract with Nubar Pasha, on behalf of the Khedive of Egypt, for the construction of some extensive works in the port of Alexandria. No formal articles of partnership were executed by the co-con-

tractors, but it was agreed that the profits should be shared and the losses borne by them equally. It was estimated that five years at least would be required for the completion of the works, and the outlay would amount to 2,000,000 R. W. Kennard died on the 11th of January, 1870. He had, on the 30th of December, 1867, executed a will, by which he appointed his wife and his sons R. W. Kennard and E. Kennard, executors and trustees thereof. He also appointed the same two sons trustees of the trust, and he authorised his trustees to carry on and manage, or to join in carrying on or managing, any trade or business in which any part of his trust property should for the time being be invested. By a codicil dated the 20th of March, 1869, the testator appointed his son J. P. Kennard, a trustee of the trust jointly with his two sons. By a deed, dated the 20th of March, 1869, the testator contracted with J. P. Kennard, H. H. Kennard, and H. J. Kennard, that he would forthwith settle and assign to his real and personal estate unto the use of J. P. Kennard, H. H. Kennard, and H. J. Kennard, their executors, administrators and assigns, respectively, upon trust to permit the settlor to receive the income of the estate respectively for his life, and after his death upon such and the like trusts as were declared by the will and the deed. After the testator's death negotiations took place between his sons and the surviving co-contractors, with a view to settling the rights of the parties in relation to the contract with the Khedive, and ultimately a memorandum of agreement was drawn up, of which the material portions were as follows:

"Memorandum of agreement, made the 20th of May, 1870, between the undersigned W. B. Greenfield, G. Elliot, J. R. M'Clean, James Abernethy, and

R. W. Kennard, executors and trustees of the late R. W. Kennard, deceased. Whereas the parties hereto are jointly interested as co-contractors in a contract entered into with His Highness the Khedive of Egypt, for the execution of certain works in the harbour at Alexandria, and it has been agreed between them as fol-

1. "The contract to be carried out on joint account of the co-contractors, and in the best interests of all concerned in the contract. All the co-contractors will contribute in equal shares towards the expenses of carrying it out.

2. "The executors and trustees of the will of the late R. W. Kennard to be sleeping partners, the acting partners being Messrs. M'Cleane, Elliot, Greenfield, and Abernethy, who are to give all necessary personal superintendence in carrying out the contract.

3. "The business of the partnership to be conducted under the name of Greenfield & Co.

13. "In the event of the death of any of the acting partners before the completion of the contract, the personal representatives of such deceased partner to be sleeping partners in the same manner as Mr. R. W. Kennard's executors and trustees, the active management of the affairs of the co-partnership remaining with the surviving acting partners.

15. "The agreement is to be binding, as between themselves, upon the parties whose signatures are hereto annexed, as from the date hereof, and upon the executors and trustees of Mr. R. W. Kennard, as soon as they have signed the same."

On the 20th of May, 1870, Messrs. Greenfield, Elliot, M'Cleane & Abernethy signed this agreement. At this time R. W. Kennard's will had not been proved. On the 21st of May, 1870, the two sons, H. J. Kennard and E. Kennard, alone proved the will. The testator's wife had died very shortly after him. On the 8th of June, 1870, J. P. Kennard disclaimed the trusts of the will, and on the same day he retired from the trusts of the voluntary settlement, and E. Kennard was appointed a trustee thereof in his place. On the 4th of July, 1870, H. J. Kennard and E. Kennard signed the agreement of the 20th of May, 1870. J. P. Kennard never signed it, and he refused to do so.

Abernethy afterwards assigned all his interest in the joint undertaking to M'Cleane, Elliot & Greenfield.

The bill in this suit was filed in December, 1870, by M'Cleane and Elliot against

H. J. Kennard, E. Kennard and Greenfield, and by it the plaintiffs alleged that they signed the agreement of May, 1870, only in the full assurance and belief that it would be signed by J. P. Kennard as well as by H. J. Kennard and E. Kennard, and the plaintiffs insisted that under these circumstances the agreement was not binding as between them and Greenfield, and the defendants H. J. Kennard and E. Kennard.

The bill prayed that the agreement of the 20th of May might be declared not binding as between the plaintiffs and Greenfield, and the defendants H. J. Kennard and E. Kennard, and that it might be delivered up to be cancelled, and that the rights of the plaintiffs and the defendant Greenfield on the one side, and of the defendants H. J. Kennard and E. Kennard, as executors of R. W. Kennard or otherwise, with respect to the contract with the Khedive, might be declared and determined by the Court, and that if any partnership existed between the plaintiffs and Greenfield and the testator, or between them and the defendants H. J. and E. Kennard, it might be wound up, or dissolved and wound up, under the direction of the Court.

At the hearing of the cause, there being a conflict of evidence as to the intentions of the parties to the agreement, Vice-Chancellor Bacon was of opinion that, upon its legal construction as it stood, it was meant to be executed by all the persons named as executors and trustees; and he declared that it was not binding as between the plaintiffs and Greenfield on the one part, and the defendants H. J. Kennard and E. Kennard on the other part, and ordered an account to be taken of the partnership dealings and transactions between the plaintiffs and Abernethy and Greenfield and R. W. Kennard, up to the time of his death, in respect of the contract with the Khedive, and an inquiry to be made what was the value of the interest of R. W. Kennard at the time of his death in the contract, to which value alone he held that the testator's estate was entitled.

From this decree the defendants H. J. Kennard and E. Kennard appealed.

Mr. Kay and *Mr. Cracknell*, for the

appellants, argued that, independently of the agreement, the testator's estate was entitled to the share of the profits resulting from the contract, and this could only be ascertained upon its completion. His estate was bound by the contract, and would have to make good his proportion of the loss, if any loss resulted. As to the agreement, the only object of it was to bind the testator's estate. When it was executed by the surviving partners it was uncertain who would be the representatives of the testator's estate. When that fact was ascertained, it was enough that those persons who did represent the estate should sign the agreement.

Mr. Lindley and Mr. Montague Cookson, for the plaintiffs.—On the death of Mr. Kennard the remedy of the Egyptian Government with respect to the contract was against the survivors only. The contract was joint, not joint and several. In such a case the remedy is joint in equity, as well as at law, when there is no existing liability in the shape of a debt—

Sumner v. Powell, 2 Mer. 30; s. c. on appeal, Turn. & R. 423.

The death of Kennard dissolved the partnership, and the right of his executors was to have his interest sold, if it was saleable, in order to wind up the partnership—

Ambler v. Bolton, 41 Law J. Rep. (N.S.) Chanc. 783; s. c. Law Rep. 14 Eq. 427.

With regard to the agreement, the Vice-Chancellor's view is the true one.

Mr. Creed, for Greenfield.
No reply was heard.

LORD JUSTICE JAMES said, I am unable to concur in the judgment or in the decree of the Vice-Chancellor.

It appears to me, first of all, that at the death of the testator he was a co-contractor, and that his estate then became in equity, whatever it might be at law, a co-contractor in the business, and the result is (unless there are some circumstances to induce a Court of Equity on some peculiar equitable ground to interfere with the ordinary consequences of such a contract) that the executors of the deceased, or to speak more accurately, his estate in the hands of the executors, be-

came entitled to share in the profits of the contract, if there were any profits, and became liable to share the losses arising out of the contract, if there were losses, and that the executors are entitled to have that ascertained in the only mode in which it can be ascertained, that is to say, by having the contract completed, and to see at the end of the contract what is the result, either as to profit or loss. I really cannot distinguish this case, either in principle or in its circumstances, from the case, which has been more than once suggested by the Lord Justice, of four persons engaged in a contract for the purchase of a cargo of cotton, or a cargo of sugar, or of any other commodity of that kind, which had not been wholly delivered at the time of the death of one of them. That being so, and if that had been the declaration made, and which I think is what ought to be substituted for the declaration actually made by the Vice-Chancellor, possibly it may not be very material to determine the other point as to the agreement. But still I think it right to do so, because I think that the agreement results for the benefit of the plaintiffs, and it may be right that we should determine how it stands. Now when we come to look at the agreement and to see how it stands, and when we come to read it and to know the circumstances under which it was made, I cannot really bring myself to entertain a doubt that it was an agreement between the then surviving co-contractors and the persons (whoever they were) who represented the co-contractor who was dead. It is beyond all question that at the date of the agreement the will was not proved, and it is beyond all question that it was not even ascertained what trustees had accepted or would accept, what executors had proved or would prove, or would survive to prove. Then that being the state of things at the time, the agreement is made, a well-known solicitor, and one at the head of his profession, had to prepare the agreement between the parties, and to carry into effect the previous letters in which the same idea is expressed, and he draws up an agreement beginning with the

usual statement of the date and the parties. Then there is this recital—"Whereas the parties hereto are jointly interested as co-contractors in a contract entered into with his Highness the Khedive of Egypt for the execution of certain works in the harbour at Alexandria, and it has been agreed between them as follows." Who are the parties of whom alone it could be averred that they were co-contractors or jointly interested? Why, the representatives of the deceased testator. Not any person named as trustee or executor in the will would have anything to do with it, because, for example, a trustee who did not accept the trust, or who disclaimed, never could have been meant to be described as a person jointly interested with the co-contractors. Then the contract is to be carried out on the joint account of the co-contractors, and in the best interests of all concerned in the contract. All the co-contractors are to contribute in equal shares towards the expenses of carrying it out. That is to say, the contract is to be carried out on the joint account of the surviving co-contractors, and of the estate of the deceased co-contractor, in the best interests of all concerned in the contract. The individual persons named as executors and named as trustees would have no interest whatever in the contract, and would have no reason whatever to say anything to it. Then who are the persons who are to contribute? Why, the co-contractors are to contribute in equal shares. It does not mean that the seven persons are to contribute in equal shares, the four and the three, it means that the four and the estate of the deceased are to contribute in equal shares, that estate being one of the co-contractors. Then it goes on to explain that, for the convenience of the others, the executors and trustees of the will are only to be sleeping partners, that is to say, the estate is to be a sleeping partner, and that no one of them is to have a right to go and actively intervene in the execution of the works; but they are to be simply in the position of having an interest in the profits, or a liability to bear in respect of losses.

Then again we come to the provision

as to the death of another of the original co-contractors, which is also binding, as it appears to me, and must, I presume, be admitted to be binding, even if the plaintiffs were right in their contention as against the defendants. "In the event of the death of any of the acting partners before the completion of the contract, the personal representatives of such deceased partner to be sleeping partners in the same manner as Mr. Robert William Kennard's executors and trustees, the active management of the affairs of the co-partnership remaining with the surviving acting partners." Then if the personal representatives of the deceased partners were to be sleeping partners in the same manner as the representatives of Robert William Kennard were to be under that clause, can there be any doubt that the persons, who in this case would not be partners selected by reason of their fitness or personal responsibility, but would be there simply in the character of personal representatives, are there in the same character as in the other case? That is what the agreement itself shews. Then it says that "the agreement is to be binding as between themselves upon the parties whose signatures are hereto annexed as from the date hereof." They were all ascertained, and they were all ready to sign. That was and is binding as between all those parties. Then it is to be binding "upon the executors and trustees of Robert William Kennard as soon as they have signed the same." That is to say, it is to be binding on the legal personal representatives as soon as and when the persons being the legal personal representatives have signed the document and as soon as it was completed, and then it seems to me that everything is done which is required to be done as appears on the face of the instrument itself, and having regard to the surrounding circumstances. That is to say, it is to be binding on the persons who at the time of the signature would be the executors and trustees of Robert William Kennard, and who in that character would be co-contractors, who would be jointly interested in the execution of the works. I am of opinion that if it was signed by the two trustees and executors,

it was signed by the persons who were intended to sign it, and that thereupon it became binding on all the other partners. I must say I think that a great deal of time has been occupied in pressing on us matter which, in my opinion, is utterly inadmissible as evidence. What the intentions of the plaintiffs were, what they thought or believed, or what the conversation was, seems to me to be utterly inadmissible when once we have got a written contract, and have got the facts which were existing at the time that written document was entered into, and it would be utterly unsafe in the dealings of mankind—no one would be safe—if a man could get rid of a document which he has signed by saying that he had received some information (for that really is what the plaintiffs' case comes to) that somebody or other would be bound by it, and that that in his mind was the great inducement for him to enter into the agreement. The whole of that to my mind is legally inadmissible as evidence, and, even if it were admissible, it seems to me to have not the slightest weight whatever. I am of opinion, therefore, that the decree of the Vice-Chancellor ought to be reversed, and that there must be a declaration that the agreement is valid and binding on the plaintiffs, that the estate of Robert William Kennard is entitled to share in the profits and benefits, and is also liable for the losses, arising from the contract.

LORD JUSTICE MELLISH said, I am of the same opinion. The testator, Robert Wm. Kennard, and four other persons signed a contract with the government of Egypt to execute some works in the harbour at Alexandria. Some slight proceeding had taken place towards carrying out the contract, and in that state of things R. W. Kennard died. Now the first question is, what was the effect of that? I am of opinion that, though it is quite true that at law the right to bring an action on the contract and the liability to be sued on the contract was in the survivors, yet it is quite clear that even at law, and much more in equity, the benefit of the contract and the liability under it, as between the executors of the deceased partner and the surviving partners, con-

tinued, notwithstanding the death of R. W. Kennard. Mr. Justice Williams at p. 843 of his book on Executors (seventh edition), says, "The general rule is that the interest which a testator had in a *chose in action* jointly with another shall not pass to his executor; yet *per legem mercatoriam*, as formerly mentioned, an exception was established in favour of merchants, which has been extended to all traders and persons engaged in joint undertakings in the nature of trade. But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable on recovery to account to the executor or administrator for the share of the deceased." Now those, in my opinion, are the respective rights of the executors of R. W. Kennard and his surviving partners, and there can, I apprehend, be no doubt at all, that if no bill had been filed in equity, nor any agreement entered into between his executors and trustees and the surviving partners, but the matter had gone on, and the contract had been completed, his executors could have filed a bill in this Court to have an account of the profits earned in the transaction, and to have them paid over to them. I have not heard any sufficient authority cited to convince me that a Court of equity would interfere with the carrying out of a contract of this description, and oblige the executors to accept a valuation, instead of taking the profit which may arise from carrying out the contract. The only case cited in favour of that proposition was *Ambler v. Bolton* (*ubi supra*), before Lord Romilly. But, in my opinion, that case is no authority for the proposition. There was a sort of running contract with the Postmaster-General for carrying the mails, which was liable to be terminated at a particular time, or which might last for a further time if both parties were willing; and it is obvious that in that sort of case there is a continuing contract where the consideration can be measured, and you can say what the profits for a particular time would be. In that sort of contract, then, the question was whether

the survivor of two partners who had become interested in the contract was entitled to determine it, and he said that he was at liberty to go on with it or to determine it as he liked. It might be in a case of that kind that the most convenient way of judging of the rights of the deceased partner was to make a valuation of what in fact was his share of the goodwill of the contract. But where the contract is one for performing one specific work, I cannot see how it can be ascertained what the profits will be except by letting the contract be carried out, and then finding out what the profits actually are.

That being so, the second question comes, what is really the effect of the agreement which the parties entered into after the death of R. W. Kennard? I agree with what the Vice-Chancellor said, that the parties differed in their evidence as to what they intended. But the Court cannot look at all at what they said they intended. The question really is, what is the legal effect of the agreement they have entered into? The Vice-Chancellor thought that, according to the legal effect of this contract, it professed to be a contract by all the executors and all the trustees of R. W. Kennard, and that because one who had been named a trustee in his will and in the deed had not signed, therefore the contract had not been signed by all the parties who were intended to sign it. But, in my opinion, that is not the true construction of this contract. First, let us look at the circumstances at the time when the contract was entered into. R. W. Kennard had left two executors, but neither of them had proved; he had left three trustees, but they had not acted. I think it must be taken that the parties did know that there was a doubt as to who the persons would be who would ultimately become his executors and trustees. In that state of things they entered into this agreement, leaving a blank for the names of the executors and trustees, but describing the persons, whoever they might turn out to be, as "executors and trustees of the will of the late R. W. Kennard." Then it begins by reciting "Whereas the parties hereto are jointly interested as co-contractors" in the

contract made with the Government of Egypt. It is quite obvious that the persons who were really interested, as far as R. W. Kennard was concerned, were his executors and trustees, whoever they might be, and that if a person, though appointed executor, renounced probate, that person would have no interest at all. Then it goes on to say, that the contract is to be carried on on the joint account, and it says that the executors and trustees of the late R. W. Kennard are to be sleeping partners. I agree that that goes strongly to shew that the object was simply to bind the executors and trustees, whoever they might be, so as to have the estate bound. The thirteenth clause seems to me also very material. [His Lordship read it.] Surely that shews on the face of the agreement itself in what position the parties really intended the executors and trustees to stand. No doubt, in point of law, by signing this agreement, they may have made themselves personally responsible. But it is plain to my mind that the object of the parties was to get the estate bound, and provided that R. W. Kennard's estate was bound, the object was satisfied; because they say that, if any one of the parties dies, his executors are to become sleeping partners, they not having the least knowledge who these executors might be, but, whoever they were, the estate was to be bound. They say they are to be bound in the same way as the executors and trustees of R. W. Kennard, and therefore it is plain to my mind that all they were looking to was that the estate of R. W. Kennard should be bound. Then there is this clause, which is also material. [His Lordship read the fifteenth clause.] It is plain that they intended first of all to be bound, *inter se*, whether the executors and trustees signed or not, but it is plain that they knew that some little time would elapse before the executors and trustees would sign. They could not sign immediately. What was the reason of that? If the parties who were intended to be bound were those who were named in the will as executors and trustees, there was no reason why they should not sign at once. Why not write down their names, and let them sign at once? It is plain the

reason was that the parties knew that it was uncertain who would ultimately turn out to be the executors and trustees; therefore time was to be given in order that this might be ascertained, and then the persons so ascertained were to sign. In my opinion that is the true construction of the agreement, and we must collect what was the intention of the parties from what they have said in the agreement itself. In my opinion, we ought not to attend—even if it were admissible—to the evidence of Mr. Elliot and the others, who say, notwithstanding that any representation was made to them by the Kennards, or by anyone else, by which they were deceived; but who simply say that they put a particular construction on the agreement. It is impossible that a party can get rid of an agreement which he has signed, by saying he thought it meant something different from what it does mean. I therefore entirely agree that the bill should be dismissed with costs.

The Court being of opinion that the agreement is binding on all the parties who signed it, dismiss the bill with costs.

Solicitors—Messrs. Bircham, Dalrymple & Co., for plaintiffs; Messrs. Collette & Collette, for Greenfield; Mr. F. C. Greenfield, for appellants.

LORDS JUSTICES. }
 1874. } MENIER v. HOOPER'S TELE-
 Feb. 23, 24. } GRAPH WORKS (LIMITED).

Company—Rights of Minority of Shareholders—Suit by Shareholder—Parties—Demurrer.

Though a shareholder in a company is entitled to vote with an exclusive view to his own interest, yet where the majority of shareholders deal with the assets of the company for their own benefit, to the exclusion of the minority, the Court will, at the instance of the minority, restrain such dealing, and compel the majority to account in respect of such dealings.

A telegraph company instituted a suit against one of their directors, asserting a claim to a concession which he had obtained

for his own benefit. Afterwards, by the influence of one shareholder, who held a majority of the shares in the company, the suit was compromised and a release of the claim was executed. It was also resolved to wind up the company voluntarily, and a liquidator was appointed. A bill was filed by one of the minority of shareholders (on behalf of himself and the rest of the minority) against the company, the liquidator, and the holder of the majority of the shares, alleging that the motive for entering into the compromise was the obtaining by that shareholder of a secret benefit to himself, and praying that he might be ordered to account for that which he had so received.

On demurrer,—Held (affirming a decision of BACON, V.C.), that the suit was sustainable, and that the bill was properly filed in the name of a shareholder.

This was an appeal by the defendants from an order of Vice-Chancellor Bacon, overruling their demurrers to the bill in this suit.

The bill was filed by E. J. Menier, on behalf of himself and all other the shareholders of the European and South American Telegraph Company (Limited), except such of them as were defendants, against Hooper's Telegraph Works (Limited); Wm. Hooper, their managing director; the European Company (which was in voluntary liquidation); and H. W. Crace, their liquidator. The total number of shares issued in the European Company was 5,325; of these the plaintiff held 2,000; Hooper's Company held 3,000; and thirteen other persons held twenty-five shares each. The company was incorporated in December, 1871, its object being to establish, and maintain and work a submarine telegraph cable to Brazil, and for this purpose to make use of certain concessions granted by the Government of Brazil and other Governments to a M. Balestrini, and which the company were to purchase. Hooper's Company were to construct the cable. One of the directors of the European Company was the Baron de Mauà. The case made by the bill was this, that in consequence of some difficulties which arose with regard to Balestrini's concessions, the Baron de Mauà advised his

co-directors to abandon them, and to apply for a new concession in the name of the company, and stated that he had sufficient influence to obtain it. He was requested accordingly to obtain a new concession from the Brazilian Government. He then determined to keep the benefit of any concession he might obtain to himself, and he resigned his office of director of the European Company. He obtained a concession in his own name. In consequence of this, the European Company in November, 1872, filed a bill against the Baron de Mauà, praying to have it declared that he was a trustee of the concession for the company. It was afterwards discovered that he alleged that he had transferred the concession to a company called the Telegraph Construction and Maintenance Company, and that company were thereupon made defendants to the suit, and the amended bill prayed also that the transfer might be declared inoperative as against the plaintiffs, and that the defendants might be restrained from dealing with the concessions without the consent of the European Company. In December, 1872, an injunction was moved for, but it was refused by Vice-Chancellor Malins, on the ground of the balance of convenience and inconvenience. It was at first determined by the directors of the European Company to appeal against this decision, and Hooper's Company were desirous that an appeal should be prosecuted. Shortly afterwards Hooper's Company changed their minds, and wished that the suit against the Baron de Mauà should be abandoned. Both Hooper's Company and Menier were consulted by the directors of the European Company as to what should be done. Ultimately at a meeting of the board of directors of the European Company, on the 21st of January, 1873, the following resolution was passed—"That it is the opinion of this meeting, that on Hooper's Company undertaking to pay all the professional and other expenses incurred in forming and carrying on this company, as well as the costs, charges and expenses of the suit in Chancery against the Baron de Mauà, not exceeding in the whole 8,000*l.*, it would be expedient that the appeal against

Vice-Chancellor Malins' decision should not be proceeded with, and that the Chancery suit should be abandoned and the company wound up, provided M. Menier's consent can be obtained to this step." Menier was informed by the company's solicitor of this resolution, and he through his solicitor informed the company's solicitor that it was his wish to go on with the Chancery proceedings. On the 28th of January, 1873, the following resolution was passed at a board meeting of the European Company—"That M. Menier not having replied to the communication, informing him of the proposal on behalf of Hooper's Company, referred to in the resolution of the 21st of January last, notice be immediately given to M. Menier that, if the terms contained in such resolution are not accepted by him on or before the 31st inst. by twelve o'clock, it was further resolved to take the necessary steps to call a meeting of the shareholders to wind up the company voluntarily and to appoint a liquidator." On the 31st of January, another meeting of the board of directors of the European Company was held, at which it was resolved—"That, as M. Menier had not consented to the proposition made on behalf of Hooper's Company, an extraordinary meeting of the shareholders of this company be called for the 12th of February, to consider the expediency of winding up the company voluntarily and appointing a liquidator for that purpose." At another meeting of the board of directors of the European Company, held on the 4th of February, 1873, the following resolution was passed—"The majority of the shareholders having expressed a wish that the proposed appeal against Vice-Chancellor Malins' decision should not be proceeded with, resolved, that in the opinion of this board it is desirable that no further proceedings be taken in this suit against the Baron de Mauà and the Construction Company." On the 12th of February, 1873, an extraordinary general meeting of the shareholders of the European Company was held, and it was then resolved that the company be wound up voluntarily, and Mr. H. W. Crace, the secretary of Hooper's Company, was appointed liquidator. These

resolutions were confirmed at a subsequent meeting held on the 5th of March, 1873. The plaintiff, as soon as he heard of these proceedings, protested against them. An indenture between the European Company, the Baron de Mauá and the Construction Company, was afterwards executed, by which, in consideration of the Baron and the Construction Company having respectively consented to the bill in Chancery being dismissed as against them without costs, the European Company released the Baron and the Construction Company from all claim in respect of the concession granted by the Brazilian Government to the Baron. This deed was executed by Crace as liquidator in the name of the European Company. The bill alleged that Hooper's Company were induced to assent to the abandonment of the Chancery suit and the winding up of the European Company in consideration of their obtaining an amended contract from a company called the Great Western Telegraph Company, with whom they had previously entered into a contract for the laying of a cable, by which amended contract Hooper's Company obtained a large increase of the consideration which the Great Western Company had by their original contract agreed to pay them. The bill alleged that this amended contract would not have been entered into, unless Hooper's Company had by their influence in the European Company obtained the abandonment and compromise of the suit against the Baron de Mauá, and the release of the claim of the European Company to the concession granted to him by the Brazilian Government. The bill also alleged that as part of the same scheme, the Great Western Telegraph Company afterwards resolved to wind up voluntarily and to transfer their business and property to another company, called the Western and Brazilian Telegraph Company, which company had entered into a working agreement with a company, called the Brazilian Submarine Telegraph Company, whose cable was to be constructed and laid by the Construction Company. By the release of the claim of the European Company, the Brazilian Submarine Company obtained a clear title to the concession granted by

the Brazilian Government to Baron de Mauá, he being one of the directors of that company. Under these circumstances the bill alleged that Hooper's Company were trustees for the plaintiff, and the shareholders in the European Company, or for that company, of all benefits which Hooper's Company had derived or should derive in respect of the matters before mentioned. And the bill prayed a declaration to that effect; an enquiry as to the securities, benefits or profits received or derived by Hooper's Company, and that the same, or the value thereof, might be transferred to Crace as liquidator of the European Company, for the purpose of distribution amongst all the shareholders of the European Company, and for an injunction to restrain Hooper's Company from parting with what they had so received.

Hooper's Company and the European Company demurred to the bill for want of equity. The Vice-Chancellor overruled the demurrers, and the defendants appealed.

Mr. Fry and Mr. Millar, for Hooper's Company.—First. There is no equity to sustain this suit. A shareholder may vote as he pleases; he stands in no fiduciary relation to the company or to the other shareholders.

[LORD JUSTICE MELLISH.—The case is in substance that you have sold an asset of the European Company.]

The suit was not an asset of the Company.

[LORD JUSTICE JAMES.—It was instituted to realise an asset of the company. Suppose the majority of the shareholders had voted all the assets of the company to themselves? Perhaps the Court cannot look into every motive which influences a shareholder in giving his vote. But suppose the majority had said, we will give up the other suit if the defendant will pay us a sum of money.]

Then, Secondly. If there is any equity, it is in the European Company, and the suit ought to have been in their name. The suit seeks to get in what is alleged to be an asset of the company. That is the duty of the liquidator. If he will not do his duty, the Court can remove him—

Foss v. Harbottle, 2 Hare 461;

East Pant Du, &c., Company v. Merryweather, 2 Hem. & M. 254;

Atwool v. Merryweather, 37 Law J. Rep. (N.S.) Chanc. 35; s. c. Law Rep. 5 Eq. 464 n.;

In re The Imperial Bank of China, 35 Law J. Rep. (N.S.) Chanc. 445; s. c. Law Rep. 1 Chanc. 339;

Gray v. Lewis, ante, p. 281; s. c. Law Rep. 8 Chanc. 1035.

Mr. Fooks and *Mr. Davey*, for the European Company and their liquidator.

Mr. Kay, *Mr. H. M. Jackson* and *Mr. Everitt*, for the plaintiff, were not called upon.

LORD JUSTICE JAMES said, I am of opinion that the order of the Vice-Chancellor is quite right. The case made by the bill is very shortly this—The defendants, Hooper's Company, who have a majority of shares in this company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. Hooper's Company have obtained certain advantages for dealing with something which was the property of the whole company. The real case therefore is, that the minority of the shareholders say, in effect and substance, "The majority have divided an asset of the company more or less between themselves, to the exclusion of the minority." I think it would be a shocking thing to say that that could be done; for if so, the majority might divide among themselves the whole assets of the company, and pass a resolution saying that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case is made out as alleged by the bill, I say that the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of those benefits ascertained for them in the best way the Court can do it, and given to them.

It is said that this is not the right form of suit, because, according to the principles laid down in *Foss v. Harbottle* (*ubi*

supra), and very strongly insisted upon in my judgment in *Gray v. Lewis* (*ubi supra*), the Court ought to be very slow indeed in allowing a shareholder to file a bill where the Company is *prima facie* the proper person to file it. In this particular case it seems to me that there is precisely the exception referred to by Vice-Chancellor Wood in *Atwool v. Merryweather* (*ubi supra*), a case in which the minority were the plaintiffs and the majority were the defendants the wrong doers who were alleged to have put the minority's property into their pockets. The present appears to me to be a case in which it is right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders who are not defendants. Therefore the demurrers ought to be overruled.

LORD JUSTICE MELLISH said, I am entirely of the same opinion. Although the bill is very long, yet when once it is understood what the real substance of it is, I do not think there is much difficulty. It so happens that Hooper's Company are the majority in this company, and there was a suit instituted by the company which might or might not turn out advantageous to them. The present plaintiff says, and the litigation in substance is on this, that Hooper's Company, being the majority of the company, have procured the former suit to be settled upon terms favourable to themselves, they getting a consideration for settling it in the shape of a profitable bargain for the laying of a cable. I am of opinion that, although it may be quite true the shareholders of a company may vote as they please, and for the purpose of their own interests, yet they cannot sell the assets of the company and keep the consideration to themselves. They must allow the minority to have their share of any consideration which may come to them. I also entirely agree that under the circumstances the suit is properly brought by a shareholder on behalf of himself and all the other shareholders who are not defendants.

Solicitors—*Mr. J. Harwood*, for plaintiff; *Messrs. Wilson, Bristows & Carpmaal*, for Hooper's Company and the European Company.

BACON, V.C. }
 1874. }
 Feb. 11. } ROBINS v. ROSE.

Will—Construction—Forfeiture—General Words—Bankruptcy.

The meaning of the word "bankruptcy" was held to be cut down by the particular intention of a testator.

A testator gave the income of property to one of his trustees for life, or till bankruptcy, or till he should do or suffer anything to deprive himself of the enjoyment of the income. He was adjudicated bankrupt, the bankruptcy was annulled, and ultimately his property revested in himself. The trustees managed the property so that there was no income payable to him in the meantime. —Held, that he had not forfeited his life interest.

The will of Charles Robins, late of Bristol, after certain specific bequests, was as follows—

"All my remaining real and personal estate, subject to the specific bequests heretofore contained, I give, devise and bequeath unto the said Sarah Ann Rose and Charles Edward Robins, their heirs, executors, administrators and assigns, upon trust to sell my real estate, and such part of my personal estate as shall consist of leasehold lands or tenements, either together or in parcels, and either by public auction or private contract, with full powers to insert any special or other stipulations, as to title, evidence of title, or otherwise, in any contract or conditions of sale, as they may think proper, and to call in and convert into money the remainder of my personal estate. And I declare that the said trustees or trustee shall, out of the moneys to arise from such sale, calling in and conversion of my said residuary real and personal estate, out of the money of which I shall be possessed at my death, pay my just funeral and testamentary expenses, and the expenses incident to the execution of the preceding trust, and shall invest the residue of the said moneys respectively in the Parliamentary stocks or funds of Great Britain, or at interest upon Government or real securities in England, Wales, or Ireland, or in the purchase of freehold or long leasehold

lands, houses, or ground rents, issuing out of and secured upon such lands or houses, and shall at the discretion of the said trustees or trustee vary the investments from time to time for any other investments of the same or a like nature. I give to my trustees discretionary authority to postpone for such period as to them shall seem expedient the sale of all or any part of my residuary real estate, and the getting in of such parts of my residuary personal estate as shall consist of stocks, funds, shares or securities of any description whatsoever, and also to let from year to year, or for any term not exceeding seven years in possession at the best rent, and to manage at their discretion the unsold real estate, but I declare that from the time of my decease the unsold real estate and outstanding personal estate shall be subject to the trusts hereinafter declared concerning the said net moneys, and the rents, interest and yearly produce thereof, and shall be deemed annual income for the purposes of such trusts, and such real estate shall be transmissible as personal estate." The trustees were then directed to pay Sarah Ann Rose an annuity of 250*l.* during widowhood, and an annuity of 31*l.* 4*s.*, free of legacy duty, to Eli Robins. The will proceeded in these terms—"and, subject to the trusts aforesaid, I give all the remainder of my said real and personal estate, and the stocks, funds and securities wherein the same may be invested, unto the said Sarah Ann Rose and Charles Edward Robins, their heirs, executors, administrators and assigns, upon trust for the said Charles Edward Robins for and during the term of his natural life, or until he shall become bankrupt or insolvent, or shall do or suffer any deed, matter or thing, which but for this provision would deprive him of the personal enjoyment of the said moneys or annual income thereof," and from and after his decease or the happening of any or either of the events hereinbefore mentioned, the property was given over for the benefit of the children of Charles Edward Robins.

The testator died in June, 1870. On the 8th of July, 1871, Charles Edward Robins was adjudicated bankrupt in the Bristol County Court. He came to an

arrangement with his creditors, and the bankruptcy was annulled by an order dated the 26th of January, 1872. By this order his property was vested in Sarah Ann Rose. On the 31st of January, 1873, an order was made in bankruptcy, in the same County Court, altering the order of the 26th of January, 1872, by the rescission of so much of the order as vested the property of the bankrupt in Sarah Ann Rose, and his property was revested in himself.

One of the objects of this suit, which was brought by the infant children of Charles Edward Robins, was to determine whether by his bankruptcy Charles Edward Robins had forfeited his interest in the property. The personal estate of the testator was not sufficient to pay his debts, the trustees postponed the sale of his real estate, they kept down the annuity of Eli Robins out of the rents, and applied the balance partly in payment of debts, and the rest towards the annuity of Sarah Ann Rose, but all the debts were not satisfied, and the whole of this annuity had not been paid, so that there was nothing actually receivable by Charles Edward Robins till after his property had been revested in him. Up to the time of his bankruptcy Charles Edward Robins had the active management of the testator's estate, subsequently to that time it was managed entirely by Sarah Ann Rose.

Mr. Eddis and Mr. Hemming contended that as through his own act the bankrupt had postponed the payment which was due to him from the testator's estate, and as in fact if the estate had been properly managed there would have been property coming to him during his bankruptcy, the case did not therefore come within the principle of

White v. Chitty, 35 Law J. Rep. (N.S.)
Chanc. 343; s. c. Law Rep. 1 Eq.
372;

Lloyd v. Lloyd, Law Rep. 2 Eq. 722;
Trappes v. Meredith, 39 Law J. Rep.
(N.S.) Chanc. 366; s. c. Law Rep.
9 Eq. 229;

but was governed by

Smallcombe v. Olivier, 13 Mee. & W.
67; s. c. 13 Law J. Rep. (N.S.)
Exch. 305;

and a forfeiture had taken place.

Mr Kay and Mr Ince, contra, said the

trustees had acted *bona fide* and within their powers in postponing any sale, and there was actually nothing due to the bankrupt till his property was revested in him; the prevailing intention of the testator was to prevent alienation, and no alienation having taken place there was no forfeiture.

Mr Eddis replied.

BACON, V.C. — Upon the question whether there has been a forfeiture, the testator's intention alone is to be regarded, and though in the clause providing there should be a forfeiture in certain events we find the event of bankruptcy mixed up with others, the clear intention of the provision was that, if anything should happen to deprive Charles Edward Robins of the personal enjoyment of what was given to him, then it should go over. Now what has he done which has deprived him of any personal enjoyment? It is clear upon the facts that, up to the time of his bankruptcy, having received 600*l.* or thereabouts of rents which he, with the consent of his co-trustee, was at liberty to dispose of in any way he thought fit, he did dispose of them in the payment of the testator's debts. Where is the crime of that? He was master of that fund, put it in whatever way you will. He spent only his own money. He had a right to do that, as his personal enjoyment was not interfered with in any way. Upon his bankruptcy his co-trustee becomes the only acting and receiving person, and she receives 300*l.* and odd, and she applies it as she thinks fit. She had a right to postpone payment of her annuity. She does receive and apply, in respect of the payment of the debts, that 300*l.* and odd, all but 50*l.* What wrong was there in that? Who has a right to complain of that? She has preserved, it may be, the estate for the plaintiffs in this suit. At all events she has kept the estate intact. The testator has given his trustees and executors a most absolute discretion to postpone or not the sale which became necessary for the general purposes of his will, including the payment of his debts. Then, within twelve months, or a little more than twelve months of the testator's death, the

defendant, Robins, becomes bankrupt; nothing seems to have been done upon his bankruptcy, but a meeting of the creditors was shortly afterwards held, and then an agreement was made, by which Mrs. Rose, having undertaken to pay 20*s.* in the pound upon the debts upon the terms of having the estate vested in her; that arrangement was carried into effect in the month of January, 1872. The reason for that was, perhaps, that there should be some security for the payment of the 20*s.* in the pound. For whatever reason it may be that order is made vesting in Mrs. Rose the property, but in January following that order is wholly rescinded. It is to be taken, therefore, as if no such order had been made. The person in whose favour it was made, whether she acquired that as trustee for any other purpose, or whatever it was for, whether for his benefit or for hers, I have no means of ascertaining; but it is clear that neither that order nor anything else under the bankruptcy did interrupt that personal enjoyment, which it was the testator's object should be possessed by Robins, and while he retained it that there should be no gift over. In my opinion, consistently with every one of the cases which have been referred to, there has not happened in this case any forfeiture of Robins' life interest; there has been no interruption of his enjoyment, and whatever effect may be given to the annulment of the bankruptcy he remains under the order of bankruptcy at this moment as much entitled to the life interest as he was on the day that the testator died.

The account which is referred to for the purpose of shewing that there has been an improper application of the income of this property—the account shews directly contrary. The account shews that there was nothing ever received by Mrs. Rose, even under that vesting order, as belonging to the bankrupt, and nothing of which he was entitled to claim the personal enjoyment before his bankruptcy. I must assume that with her consent the whole of the income would be applied in the first place to discharging the incumbrances upon the estate for the preservation and pro-

tection of the estate rightly for anything that appears; and after his bankruptcy, notwithstanding the order vesting in her his property, she continues to deal with the income in the same way as he and she had dealt with it before—to pay the debts as far as it was convenient or right to do, and get for her annuity only that 55*l.* In my opinion the case is different from any case where there has been held to have been a forfeiture, that there has been no forfeiture within the terms of this will, and no sums payable to the bankrupt, the executor being entitled to receive the money as much as he was, and receiving it for the purposes of the estate, and applying it, in my opinion, in a manner of which there is no reason to complain. The plaintiffs are entitled to an account. The account may be taken if the account as it stands is a true account or the only account. The account will not be very beneficial, but the claim to have the bankrupt's life interest forfeited for the benefit of his children must, in my opinion, wholly fail.

Solicitors—Messrs. T. White & Sons, agents for Mr. H. Brittan, Bristol, for plaintiffs; Messrs. Doyle & Edwards, agents for Mr. Bartrum, Bath, for defendants.

MALINS, V.C. }

1874.

Jan. 31. }

HARBROOK v. COMBES.

Jurisdiction—Infant's Copyhold—Power to raise Fine by Mortgage of Copyhold.

The Court has no jurisdiction to direct a fine in respect of copyholds to which an infant has become entitled as customary heir of an intestate to be raised by a mortgage of the copyholds.

This was a suit for the protection and management of an infant's real estate, partly freehold and partly copyhold, of the manor of Dorking, to which he became entitled as heir at law and customary heir of his deceased uncle, who had died intestate, and seized of the copyholds, for an estate of inheritance according to the custom of the manor.

The infant at the time of the institution of the suit was seventeen years of age, and had not been admitted to the copyholds. Upon admission, a fine of about 100*l.* would become payable, which was a sum considerable in amount relatively to the income of the infant, and it having been considered advisable under these circumstances to raise the amount of the fine out of corpus, so as not to absorb the income by accumulating it for the purpose, a declaration was inserted in the proposed minutes of the decree, that the fine ought to be raised by mortgage of the copyhold property.

The cause was heard as a short cause on the 17th of January, 1874, and a decree was made in accordance with the proposed minutes, but before it was passed and entered, a question was raised by the Registrar as to the jurisdiction of the Court to make the decree in the proposed form, and it was accordingly now mentioned to the Court.

Mr. C. A. Holmes, for the plaintiff, submitted that it was not within the jurisdiction of the Court of Chancery to direct a sale or mortgage of an infant's real estate, merely on the ground that it would be beneficial to the infant. The only cases in which the Court has ordered a sale or mortgage, have been where there was some person who had a right to call upon the Court to sell or mortgage the estate for the satisfaction of a claim or debt. But a fine upon the admittance of a tenant is not a charge on the lands—

Scriven on Copyholds, 5th ed. p. 240, citing

Hutcham v. Finch, 1 Roll. abr. 374. Chancerie (P);

and

1 *Watk. on Cop.* 321.

In this case the only persons that could possibly have any claim or debt entitling them to call on the Court for a sale or mortgage to satisfy the fine when it became due on the infant's admission, were the Lord of the Manor and the guardian; but neither of them could do so. The lord had but two remedies for the recovery of the fine, namely either to enter (after the usual proclamations) and seize "quousque," until he should have received the amount of the fine, or to pro-

NEW SERIES, 43.—CHANC.

ceed under the powers given him by the Act for consolidating and amending the law relating to property belonging to infants, and other persons under disability—

11 Geo. 4. and 1 Will. 4. cap. 65. ss. 5 and 6.

He had his general and statutory remedy, and no other, to recover the amount. Again the guardian's position was defined strictly by the same statute (section 8), and he also could only, if he paid the fine to the lord, satisfy himself the amount out of the rents, and could not call on the Court to direct a sale or mortgage.

Mr. Brooksbank, for the defendant.

MALINS, V.C., said that he was disposed to think that the Court had no jurisdiction to direct the fine to be raised by mortgage of the infant's copyhold, as originally proposed by the minutes, and the declaration and direction to that effect must in consequence be omitted from the order, and a reference to chambers directed to consider how the fine ought under the circumstances to be raised. Probably the best course would be for the lord, by amicable arrangement, to enter and pay himself out of the rents and profits. Some one representing him could, if necessary, appear before his Honour in Chambers when the application was made.

Solicitors—*Mr. G. R. Burn*, for plaintiff; *Mr. Adam Burn*, for defendant.

LOARDS JUSTICES. }

1873.

Nov. 22.

SAYERS v. CORRIE.

CORRIE v. SAYERS.

Practice—Concurrent Suits—Same Subject Matter—Transfer—Costs.

After a suit had been instituted by trustees for executing the trusts of a settlement, two of the cestuis que trust, who were defendants to the suit, filed their bill in another branch of the Court for a declaration that the settlement was void, or for its rectification, and so far as necessary for the execution of the trusts thereof:—Held,

2 X

that there was such common ground between the two suits as to bring them within the rule requiring a second bill relating to the same subject matter as an existing suit to be instituted in that branch of the Court to which the first suit is attached, and that the second suit must be transferred accordingly, and the plaintiffs in that suit must pay the costs of the application for such transfer.

This was a motion on behalf of the plaintiffs in the first above-mentioned suit of *Sayers v. Corrie*, which was attached to the Court of Vice-Chancellor Malins, to have the second above-mentioned suit of *Corrie v. Sayers*, in which the bill had been marked for the Rolls Court, transferred to the Court of Vice-Chancellor Malins.

The bill in the first-mentioned suit was filed on the 25th of July, 1873, by the trustees of two indentures of settlement, made in August, 1868, upon the marriage of Mr. and Mrs. Corrie. It prayed for the execution of the trusts of the said indentures of settlement, the discharge of the plaintiffs from being trustees, and the appointment of new trustees thereof. Mr. and Mrs. Corrie and their two children were the defendants to this suit. The bill in the second mentioned suit was filed on the 30th of August, 1873, by Mr. and Mrs. Corrie against the trustees and the two children praying for a rectification of the said two indentures of settlement, the removal of the said trustees, and the appointment of new trustees, and the execution "if, and so far as necessary," of the trusts of the same indentures.

Mr. W. D. Rawlins, in support of the motion, cited

Orrell v. Busch, Law Rep. 5 Chanc. 467;

Lucas v. Siggers, 41 Law J. Rep. (N.S.) Chanc. 364; s. c. Law Rep. 7 Chanc. 517.

Mr. W. W. Karslake, for the plaintiffs in the second suit, resisted the application. He argued that the general rule which was established in order to prevent the snatching of decrees, did not apply in this case. The second suit which sought rectification of the deeds of settle-

ment must be decided before a decree could be made in the first suit. In the present state of business in the Courts it would be disposed of much sooner in the Rolls Court than in the Vice-Chancellor's Court.

JAMES, L.J., was of opinion that the two suits were sufficiently connected to bring the case within the general rule. They might be taken as practically parts of the same suit. Both of them sought the removal of the trustees and the execution of the trusts of the deeds, whether rectified or unrectified, so there was common ground between them. The second suit ought, therefore, to have been instituted in the same branch of the Court as the first, and the plaintiffs in it must pay the costs of the application for the transfer. Their Lordships could not pay any regard to the argument as to the state of business in the Courts below.

MELLISH, L.J., concurred.

Solicitors—Messrs. Clarke, Son & Rawlins, for plaintiff; Mr. H. H. Hallett, for defendant.

BACON, V.C. }
1874. } COLQUHOUN v. COURTENAY.
Jan. 15. }

Company—Mortgagee of Shares—Transfer into name of Servant—Trustee.

Shares in a company were, to escape liability, transferred by the direction of a mortgagee into the name of the mortgagee's servant. The servant afterwards claimed the shares, and contended that as the transaction was fraudulent as against the company, the Court would not assist the mortgagee by declaring that she was a trustee of the shares for him:—Held, That the mortgagee, not being under any liability to the company, or to the creditors of the company, had a right to direct this transfer to be made, and was entitled to a declaration that the servant held the shares in trust for him.

The bill in this suit was filed to obtain a declaration that the defendant, Emma

Courtenay, was a trustee of three hundred and twenty shares in the Mercantile and Exchange Bank for the plaintiff, Sir Patrick Colquhoun.

The Mercantile and Exchange Bank was a company registered under the Companies Act, 1862. In 1865 Sir Patrick Colquhoun directed 320 shares in this bank, on which 12*l.* 10*s.* per share had been paid, to be transferred into the name of Emma Courtenay, but retained the share certificates in his own possession. It appeared that the bill had been amended to shew that these shares belonged to Sir P. Colquhoun's brother, Mr. Edward Pye Colquhoun, and that the certificates had been handed to the former to secure a sum of money which he had advanced, but the amendments being irregular in point of time, had been struck out. Previously to the transfer to Emma Courtenay, the shares had stood in the name of Tinkler, a dependant of the Colquhoun family, but a call, amounting to 500*l.*, having been made, and paid by Sir P. Colquhoun, the latter directed the shares to be transferred to the defendant.

On the 25th of March, 1867, Emma Courtenay executed a transfer of the shares to the plaintiff, Joseph Raison, who was a clerk to Sir P. Colquhoun. This transfer was not, however, sent in for registration till after the company went into liquidation, and consequently Emma Courtenay's name remained on the register.

On the 25th of February, 1869, the company commenced winding up and liquidators were appointed. Before the winding up, the company had returned to the shareholders 4*l.* 10*s.* per share in four instalments, some of which were paid by cheques, and others by promissory notes; these cheques and notes were received by Emma Courtenay, who always endorsed and handed them to Sir P. Colquhoun, and he paid them into his bankers.

During the winding up a further amount became payable to the owner of the shares. This amount was claimed by Emma Courtenay, and the liquidators said that they must pay the amount to her unless restrained by legal proceedings. Accordingly, on the 12th of March, 1870,

this bill was filed, praying that Emma Courtenay might be declared a trustee of these shares for Sir P. Colquhoun, and that the company might be restrained from paying any sums in respect of the shares to her. The liquidators paid the amount, 160*l.*, into Court.

A great deal of evidence was adduced by Emma Courtenay to shew that the shares were given to her out and out by Sir P. Colquhoun, in consideration of past cohabitation, and that she had executed the transfer to Raison without knowing what it was, and at the request of Sir P. Colquhoun, at a time when she had perfect confidence in him. This evidence was wholly contradicted by Sir P. Colquhoun, who alleged that the defendant, Emma Courtenay, had been in his service for many years as his cook and in no other capacity, and that the shares had been placed in her name merely to avoid liability in event of calls being made by the company.

Mr. E. P. Colquhoun was not a party to the suit, but appeared on the hearing, and stated he had no interest in the shares.

Mr. Kay and *Mr. Horace Davey*, for the plaintiffs, contended that the execution of the transfer to Raison was conclusive evidence that Mrs. Courtenay was only a trustee.

Mr. E. K. Karslake and *Mr. Willis*, for Mrs. Courtenay.—The plaintiff held this "pocket transfer" with the intention of claiming the shares as his if they turned out valuable, but with the intention of declaring they belonged to Mrs. Courtenay, if any calls were made. This is clearly fraudulent, and the Court will not assist any one coming forward and claiming by virtue of his own fraud—

Doe v. Roberts, 2 B. & Ald. 367;

Brackenbury v. Brackenbury, 2 J. & W. 391.

The cases shew that transfers to clerks and servants are invalid—

Buckley on Joint Stock Companies, p. 16.

Mr. E. P. Colquhoun, who apparently still has some interest in the shares, ought to have been a party.

Mr. Bardswell, for the liquidators.

Mr. Kay, in reply.—Sir P. Colquhoun,

being only a mortgagee, is entitled to place these shares in the name of a trustee to avoid liability. In doing so, he is only acting as a mortgagee does when he takes an under lease.

Parol evidence is sufficient to shew there is a trust, and that in the case of either owner or mortgagee—

Childers v. Childers, 1 De Gex & J.

482; s. c. 3 Kay & J. 310; s. c. 26

Law J. Rep. (N.S.) Chanc. 743;

Davies v. Otty, 35 Beav. 208;

Symes v. Hughes, 39 Law J. Rep.

(N.S.) Chanc. 304; s. c. Law Rep.

9 Eq. 475.

Even if the intention was fraudulent, it has never taken effect, and, therefore, a person who is *particeps criminis* cannot take any benefit—

Platamone v. Staple, G. Cooper 250.

If the defendant claimed under the maxim, "*in pari delicto melior est conditio possidentis*," it was her duty to say so in the pleadings, which she has not done—

Haigh v. Kaye, 41 Law J. Rep.

(N.S.) Chanc. 567; s. c. Law Rep.

7 Chanc. 469, 473.

Mr. E. K. Karlake, in reply on the cases cited.

BACON, V.C., said he should decline to enter into the evidence as to the alleged connection between the plaintiff and the defendant, because it had no material bearing on the case. He considered, however, that the facts of the case as admitted on both sides, and especially the fact that the defendant had handed to the plaintiff the moneys and circulars she had received, as the registered shareholder on the books of the company, sufficiently proved that the shares had not been given out and out to the defendant, but that she was a trustee for the plaintiff. The question was whether the law prevented this Court from recognising any such transaction, because it was fraudulent on the part of the plaintiff seeking relief. But that principle, which was one of unquestionable authority, had no application to this case, because the plaintiff was never at any time under any liability to the company or to the creditors of the company. He had lent money to his brother, who was

the owner of these shares, and he had the whole beneficial interest in the shares in consequence of that transaction, and for his security it was right that the shares should be held by a trustee. He did that which was perfectly justifiable in his position, he found some other person who would take the character of trustee and hold these shares for his security. The plaintiff was interested in these shares to an extent which enabled and authorised him to require a transfer of the shares from Tinkler, who formerly held them, and who was alarmed at the liability to pay the 500l. which the plaintiff had paid for him, and the plaintiff, having directed a transfer of these shares to the defendant, he had a right to a declaration that the defendant held them as trustee for him. Mr. E. P. Colquhoun's not having been a party to the suit, was rectified by his appearing on the hearing and relinquishing all right to the shares. The liquidator's costs were ordered to be paid out of the fund in Court, but no other order as to costs was made.

Solicitors—Messrs. Willoughby & Cox, for the plaintiff; Messrs. Treherne & Wolferstan, agents for Mr. Gibson, of Margate, for the defendant; Messrs. Chester, Urquhart & Co., agents for Messrs. Haigh & Co., Liverpool, for the official liquidator.

JESSEL, M.R. } *Re THE BURNHAM NATIONAL SCHOOLS.*
1873.
Dec. 6.

Charity Commissioners—Jurisdiction—Contentious Cases—Charitable Trusts Act, 1853, s. 5—Appointment of Trustees who act contrary to Intention of Founders—Interference of Court of Chancery.

The Charity Commissioners have jurisdiction to appoint new trustees in contentious cases.

The dictum of LORD ROMILLY in Hackney Charities, Re Nicholls (34 Law J. Rep. (N.S.) Chanc. 169), that s. 5 of the Charitable Trusts Act of 1860 excludes their jurisdiction in contentious cases disapproved of.

Where the Charity Commissioners have jurisdiction the Court of Chancery will only interfere in a case of great miscarriage.

Under 6 & 7 Will. 4. c. 70, two joint

rectors of a parish were *ex officio* trustees of a Church school, and through their disagreement a vacant mastership was not filled up, and the school was consequently closed for more than two years. The Charity Commissioners appointed three additional trustees (all members of the Church of England), who immediately after their appointment, with the concurrence of one of the old trustees, transferred the school to the School Board. The Court refused to interfere with the appointment of the additional trustees.

Semble.—It is very doubtful whether the Charity Commissioners could have removed the *ex officio* trustees.

If either of the new trustees had not been a member of the Church of England the appointment would have been improper.

In August, 1836, under the powers of 6 & 7 Will. 4. c. 70. s. 3, part of the glebe of Burnham Ulph (which parish had two rectors) was, with the concurrence of the bishop, conveyed to the use of the joint rectors of the parish as a site for a school for "the education of poor children in the principles of the Christian religion according to the doctrine and discipline of the Church of England," to be managed by the rectors and their successors, and to be united to the National Society for Promoting the Education of the Poor in the principles of the Established Church, and to be conducted in conformity with the principles of that institution.

On the 27th of February, 1851, a further piece of the glebe was conveyed by the then joint rectors, of whom the petitioner, the Rev. W. Bates, was one, to similar uses; a large subscription was got up by the petitioner, to which he contributed largely, and new schools and school-houses were erected. The conveyance was made under the powers conferred by the 6 & 7 Will. 4. c. 70. s. 3, and 3 & 4 Vict. c. 38. ss. 6, 7, 8.

In 1854 the Rev. G. Hayter was appointed one of the rectors, and as such became joint trustee with Dr. Bates.

In 1854 the active duties of management of the schools were given to Mr. Hayter by his co-trustee, and the schools were managed by Mr. Hayter from 1856 to 1870.

After the passing of the Education Act of 1870, a dispute arose between the trustees, Mr. Hayter desiring and Dr. Bates refusing to have the regulations contained in the 7th section of that Act permanently introduced into the regulations of the school, in order to obtain an annual Parliamentary grant.

In August, 1871, the boys' schoolmaster left. Mr. Hayter wished to appoint a certificated schoolmaster. Dr. Bates would not consent to this, and consequently from that date until 1873 the school was closed for want of a master.

In November, 1871, a School Board was formed for the parish.

In July, 1872, an application was made by Mr. Hayter and several landowners of the parish to the Charity Commissioners, praying them to appoint three additional trustees of the schools.

Dr. Bates opposed the application.

On the 1st of April, 1873, the Commissioners made an order appointing Mr. Blyth, who was chairman of the School Board, Mr. Mitchell, and Mr. Overman, to be additional trustees, in conjunction with Dr. Bates and Mr. Hayter. All the three additional trustees were members of the Church of England. Dr. Bates had himself named Mr. Mitchell as a proper trustee.

On the 12th of April, 1873, the trustees, Dr. Bates alone opposing, passed a resolution for the transfer of the schools to the School Board.

In July, 1873, Dr. Bates presented this petition to the Master of the Rolls, praying that the order of the Charity Commissioners for the appointment of new trustees might be discharged, varied or remitted to the Board for re-consideration, with such declaration in relation thereto as to the Court might seem meet.

Mr. Hayter put in an affidavit stating that he had been most anxious to preserve the Church character of the school, and that he did not doubt he would have been able to have done so if Dr. Bates had consented to the conscience clause of the Act of 1870 being introduced into the regulations of the school. Mr. Blyth put in an affidavit stating that he was a member of the Church of England, and would have preferred the school re-

maining a Church of England school; and also stating his belief that in consequence of Dr. Bates's refusal to introduce the new regulation it was impossible to raise sufficient funds by voluntary subscription to carry on the school.

Mr. Mitchell and Mr. Overman deposed to a similar effect.

Sir R. Baggallay and *Mr. E. C. Batten*, for the petitioner. — First, we contend that as this was a contentious case, the jurisdiction of the Commissioners was altogether excluded by the 5th section of the Act of 1860, 23 & 24 Vict. c. 136. Lord Romilly, in the case of

The Hackney Charities, Re Nicholls,
4 De Gex, J. & S. 588; s. c. 34

Law J. Rep. (N.S.) Chanc. 169, distinctly held that this was the effect of the section, and though his decision was reversed on other grounds by the Lords Justices on appeal, they did not disapprove of his view of the 5th section.

Secondly. Whatever may be the effect of the 5th section, the Charity Commissioners had no jurisdiction to appoint additional trustees in this case; (a) because the Charitable Trusts Acts give them no such power; (b) because under the Act 6 and 7 Will. 4. c. 70. s. 3, and 4 and 5 Vict. c. 38. ss. 6, 7 and 10, the joint rectors of the parish for the time being are made the statutory trustees. They are corporations sole and have a perpetual existence. There is therefore no necessity and no power to appoint new trustees.

Thirdly. If any order could have been made, this order was necessarily wrong, because the effect was to convert a Church of England School into an undenominational school, and therefore contrary to the express trusts of the original founder, and the Court in all cases observes as far as possible the intention of the original founder, see

The Attorney-General v. Caius College,
2 Keen 150; s. c. 6 Law J. Rep.
(N.S.) Chanc. 282.

Fourthly. The appointment of Mr. Blyth at least was improper inasmuch as he was chairman of the School Board, and necessarily pledged to transfer the schools to the School Board.

Mr. Hemming, for the Attorney-General, was not called on.

THE MASTER OF THE ROLLS.—I will not trouble you, Mr. Hemming, in this case.

This is an appeal from an order of the Charity Commissioners, and as stated, and I may say correctly stated, by Sir Richard Baggallay, it raises some questions of public interest and other questions which I may say appear to be of private interest to two clergymen who appear to have quarrelled, and to whom perhaps a portion of one of Virgil's lines may be very fairly applied when he referred perhaps to persons in another position as regards the extent of animosity which might exist amongst celestials or celestial minds.

As regards the public questions I have no doubt whatever, and had I entertained the slightest, I should certainly have heard Mr. Hemming and taken time to consider. The public questions are three. It was said first, that this order which is an order to appoint additional trustees of a charity ought not to have been made, because this was a contentious case, and that the Charity Commissioners have no jurisdiction to decide contentious cases. That was founded on the 5th section of the Charitable Trusts Act, 1860, and I must say that when it was first mentioned to me, not being familiar with the authority to which Sir Richard Baggallay referred me, I did not think the point fairly arguable. I must, however, have been entirely mistaken, because I find that a dictum of my predecessor, Lord Romilly, is to be found in the books, which certainly is to the contrary effect.

Now the 5th section is to this purport—“The said board shall not exercise the jurisdiction hereby vested in them in any case which by reason of its contentious character or of any special questions of law or of fact which it may involve or for other reasons they may consider more fit to be adjudicated on by any of the judicial Courts.” The meaning of that section I should have thought to be plain and obvious. It is that the Charity Commissioners should not be compelled to take upon themselves the exercise of the jurisdiction conferred by this Act in any case in which they considered that it could be so much better dealt with by a judicial Court, that it would be improper for them

to exercise that jurisdiction. I should have thought the terms were perfectly clear and plain. It was not that they might decline the jurisdiction altogether, it was not any case in which they might consider they ought not to exercise it that would have enabled them to repudiate the jurisdiction—but it was that they might decline to exercise it in any one of the cases named, or for other reasons, meaning for special reasons of the same kind, or of a similar kind. But if the Charity Commissioners considered they ought to exercise jurisdiction, this section, it appears to me, did not interfere with it at all.

I am bound to say that the argument must be treated as a serious one, because I find that in the case of the Hackney Charities, Lord Romilly appears to have taken a different view from mine. I may mention that that decision itself is no authority, because it was reversed on appeal, and still less, therefore, can an *obiter dictum* of the Judge who decided that case be binding upon me; but it does certainly appear to me that the view taken by his Lordship was that the Charity Commissioners had no jurisdiction in contentious cases. It is not necessary to read the passages which have been already read by Sir Richard Bagge, but I take that to be the fair description of the views entertained by his Lordship. However, not considering myself bound by that dictum, feeling myself free to give my own opinion as to the construction of the section, I am compelled to say it appears to me so plain and so clear that, notwithstanding that dictum, I do not feel it necessary to call upon counsel to argue on the other side.

The second objection of a public character was this, that there was no jurisdiction in the Charity Commissioners to appoint additional trustees. There again I cannot accede to the argument. It appears to me clear that there was. The question depends on two sections of the first Act, the Act of 1853 (and for this purpose they are the same), sections 28 and 32. The one section applies where the charity has an income below a certain pecuniary amount (that was varied, and therefore it is no use saying what the amount was), and the other where it

exceeds that amount. The 28th section, so far as is material, is in these terms—“Where the appointment or removal of any trustee or any other relief, order or direction relating to any charity,” and so forth, “shall be considered desirable, then the Court of Chancery may” in substance do it in chambers instead of by information, and the 32nd section gives the same power in the same general terms to the County Court when the income falls below the specified sum. All these powers are by the Act of 1860 transferred to the Charity Commissioners.

It is not disputed that even independently of the Trustee Act, the Court of Chancery on information filed has jurisdiction to appoint additional trustees of a charity; and it is not disputed that there was also statutory jurisdiction in express terms, and for this purpose, conferred upon the Court of Chancery by the Trustee Act of 1850, section 32. Well, that being so, the jurisdiction of the Court of Chancery is clear, and consequently, it appears to me the jurisdiction of the Charity Commissioners is equally clear.

Then it is said, and this is the third objection on general grounds, that even assuming the Court had jurisdiction, it could not exercise the jurisdiction in the case of the trustees of a Church of England school, when the effect of the exercise might be that the new trustees, either alone or in combination with one of the existing trustees, might take advantage, or use the powers given to them by the Elementary Education Act, by which the school could be handed over to a School Board. All I can say is that that is no restriction on the exercise of the jurisdiction. It might or might not make the Court very careful in exercising it; but the mere fact that the Legislature has decided that a certain majority of the trustees, two-thirds in number, shall in effect to a certain extent change the objects of the charity, by allowing scholars not professing the religious opinions of the Church of England to attend a Church school, or what was formerly a Church school, is not a reason why additional trustees should not be now appointed. As I said before, if there is such a thing in contemplation, the only effect it appears

to me it should have would be to make the Court appointing very careful in its selection, and very careful in inquiring whether it is necessary that there should be additional trustees.

The only other objection of what I may call a public character is this: It was said, "At all events you cannot exercise this power as regards a Church school, because the 46th section of the Act of 1853 contains restrictions which prevent your appointing trustees who might use the powers of the Elementary Education Act to the prejudice or supposed prejudice of the Church of England." It appears to me that that is not the meaning of the 46th section. The 46th section is this—"Nothing herein contained shall diminish or detract from any right or privilege which by any rule or practice of the Court of Chancery or by construction of law now subsists for the preference of the exclusive or general benefit of the Church of England, or the members of the same Church, in settling any scheme for the regulation of a charity or in the appointment or removal of trustees, or generally in the application or management of any charity." Now I agree that that section would have prevented the Court from appointing any but Church of England trustees. I think it would be almost impossible to read that section, knowing what the practice of the Court of Chancery was as regards the appointment of trustees for Church charities, to say that the Court would have been authorised to appoint any but members of the Church of England as trustees of this charity, which was certainly undoubtedly and indisputably a Church charity, and to that extent I should have been disposed to say if the facts which I was told by mistake, turned out to be true, that one of the trustees was not a member of the Church of England, there would have been a fatal objection to the appointment. However, it turned out that was a mistake, and as I said before it does not appear to me that there is any other right or privilege reserved to the Church of England by this section except that which I have mentioned.

This being so it appears to me that all the public objections, all the objections

which could be of any possible validity, so far as this case is concerned as governing other cases are clear, and do not cause, in my mind at all events, any feeling of doubt or hesitation.

I now come to what I will call the private objections, which certainly are of a somewhat different character, not quite so easy to deal with, but as it appears to me can be disposed of without my expressing any very decided opinion on any one of them.

It is said that assuming there is jurisdiction, still the Charity Commissioners have not exercised a wise discretion in exercising it at all, that is one objection; or secondly, in exercising it by the selection of the particular three persons they have selected. Now the first observation I have to make on that is, that this is an appeal and a statutory appeal. What the difference may be between a statutory appeal and a re-hearing, it is not necessary to define; but undoubtedly there is some and not an immaterial difference, not being to the advantage of the appellant, in a statutory appeal. The second consideration is this, that it has been laid down as a general rule by Courts of Appeal, and considered so good a rule by many that the House of Lords actually inserted it in the Judicature Bill before it was sent down to the House of Commons, that in cases where a decision depended on the personal discretion of a Judge, no appeal should be allowed at all. That is the general rule, that is as I understand it as the law now stands, not without exception. That enactment not having passed or not being in force, I think there is an exception, I think there may be a case of miscarriage so palpable and so gross that even in a statutory appeal, the Appellate Court would be justified in reversing the order on account of the mistake or miscarriage of the Court below even as to the exercise of the discretion; but I think there must be an exceedingly strong case made out in order to induce the Court of Appeal so to interfere, and I do not think there is any such a case made out upon the present occasion.

Now the first objection is—that the Charity Commissioners ought not to have appointed any additional trustees.

The facts are these. There are two

clergymen, the Rev. Dr. Bates and the Rev. Goodenough Hayter. They are the joint Rectors of a parish. In this parish there is a Church school, which was founded a great many years ago, and to the foundation of which Dr. Bates contributed in the most efficient manner, both by his personal exertions and the expenditure of his money. He therefore considered himself, and in my opinion had a right to consider himself, to some extent as one of the founders of the school. This school, however, had been for between sixteen and seventeen years managed, controlled and maintained, that is, in the sense of obtaining subscriptions and incurring pecuniary liabilities by the other rector, the Rev. Mr. Hayter, and, on the whole, he seems to have managed it pretty well. There were a boys' school and a girls' school, and he seems to have actually managed the schools and appointed masters, although, of course, nominally the assent of Dr. Bates was required.

In August, 1870, the master of the boys' school left. At that time there was no School Board in the parish, although there was no doubt some intention on the part of some of the inhabitants of electing one. For some reason or other, which I prefer not to inquire into, the two rectors cannot agree in nominating a new schoolmaster. Dr. Bates does not think fit to entrust Mr. Hayter with that office, which he had so well performed for sixteen years, the management of the school, and rather than concur with him, or rather than let him appoint alone a schoolmaster, he preferred that the poor children of the parish should go without education. Mr. Hayter, on the other hand, rather than agree to appoint a clergyman who seems to have been duly qualified, and who was proposed by Dr. Bates, also determined that it was better that the schools should be shut up, and, between the two, these unfortunate children were left entirely deprived of education for two or three years.

Now I must say this is a lamentable state of things. It is not for me to say which was primarily or which was secondarily censurable of these two clergymen. I think it must be obvious to everyone that they were both in some

degree censurable. Either party, by abating his extreme pretensions, could have allowed the schools to remain open and these poor children to receive the inestimable blessing of a good and sound education. However, both parties preferred to stand on their extreme rights, and the result was that the whole of this charity, so far as the boys were concerned, came to nothing. The children were uneducated, and then application is made to the Charity Commissioners to appoint new trustees.

What could the Charity Commissioners do? It is, at least, very doubtful whether they could have removed these clergymen, they being *ex officio* trustees of the charity, so doubtful, that I think no lawyer (and these Charity Commissioners are lawyers) would have thought of exercising such a jurisdiction. The only course open to them was to appoint at least three who should outvote these two, and who would appoint a schoolmaster if necessary or do any other act which might be required for educating the poor children of the parish. Therefore, so far as regards the expediency of exercising their discretionary power of appointing additional trustees, I have no doubt that they well exercised their discretion.

The next point is this—were the three gentlemen whom they did appoint so entirely objectionable, so grossly and clearly unfit, that I should be justified in saying the order appointing them should be discharged? Now I will consider who they were, and how they came to be appointed. It seems that there was in November of the same year a School Board elected. In consequence, as some say, of the quarrels in the parish between the clergymen, and in consequence, as others say, of the conduct of one or both of the clergymen, the witnesses assert that it was impossible, in their opinion, to get up sufficient subscriptions to continue the school on its old footing; and they state, they being gentlemen of position and respectability, that in their opinion the best thing to be done was to transfer the school to the School Board. Mr. Hayter was of the same opinion. Dr. Bates had, and I do not say, either unnaturally or improperly, very strong con-

scientious objections to such a proceeding, because it deprived the school of that special or denominational character as regards religious teaching, which he, in common with many others, thinks absolutely essential to a sound education.

That being the state of matters, the chief landowners in the parish, beginning, I see, with Lord Leicester, eighteen in number, send a memorial to the Charity Commissioners, and ask them to appoint additional trustees. Dr. Bates, with the assistance of a brother, formerly a member of the Chancery Bar, who acted for him, opposed the appointment. The Charity Commissioners were fully informed of what was going on ; they were told that one party desired that the school should be transferred to or placed under the management of the School Board, and that the other party opposed it. They knew that Mr. Blyth, one of the three persons proposed, was the Chairman of the School Board. As regards the others, they were a Mr. Overman, and a gentleman, also a clergyman, of the name of Kearslake. I do not find that any specific objection was made to Mr. Overman ; in fact, none is alleged now, except the belief of Dr. Bates, which appears to be ill-founded, for it is positively denied on oath by Mr. Overman, that he was in any way pledged to the transfer, or was even inclined to the transfer, and a similar belief as regards Mr. Mitchell, a third person who was actually nominated, but not then proposed. As regards the position of Mr. Overman and Mr. Mitchell, I may say, once for all, that they have put in an affidavit in which they say not only are they members, and as they say attached members of the Church of England, but they were desirous that their school should remain a denominational school. They further say that if their wishes alone had been consulted, they never would have consented to the transfer of the school to the School Board, but they felt that under the circumstances in which the parish was placed it was impossible to carry on the school in that way ; and, therefore, though with reluctance, they acceded to the transfer. So much for their being pledged beforehand to any such course.

Now what do the Charity Commissioners do ? Mr. Bates, acting for the Rev. Dr. Bates, objected to the Rev. Mr. Kearslake, although a clergyman of the Church of England ; he said he was a nephew of Mr. Blyth, and would do whatever Mr. Blyth wished. The Charity Commissioners said, "Very well, we are going to nominate Mr. Blyth, who is a partisan on one side ; we think of nominating Mr. Overman, who is not a partisan at all ; will you nominate a partisan on your side, so that we will nominate a partisan on each side, and an indifferent person ?" Mr. Bates accepts the offer, and nominates Mr. Mitchell, and the Charity Commissioners appoint Mr. Mitchell. That is, they take Mr. Blyth, who wishes for the transfer, Mr. Mitchell, who is the nominee of the Rector, Dr. Bates, who opposes the transfer, and Mr. Overman, who is simply a memorialist, who has taken no part in the matter, and says he will not pledge himself either way.

Is this such a gross and improper appointment that this Court can set it aside ? How does it then happen that Dr. Bates objects to the nomination of Mr. Mitchell that he had made himself ? Because Mr. Mitchell, under the circumstances I have mentioned, however strongly he felt regarding the preference to be given to denominational education, felt still more strongly the necessity of some education of the poor children, and therefore voted against Dr. Bates on the question of transfer which has induced Dr. Bates to believe, contrary to the fact, that Mr. Mitchell had been all through an enemy in disguise, and that he was throughout pledged to the transfer, and had obtained the nomination of Mr. Bates, acting for Dr. Bates, under false pretences. All this, as I said before, is utterly denied, and on the evidence before me, it appears to me clear that the Charity Commissioners wished to act most fairly and impartially in the matter. Neither Mr. Blyth nor Mr. Mitchell were in any sense pledged ; they had not done more than express an opinion. Mr. Blyth was well known to be in favour of the transfer. Mr. Mitchell, as far as the Charity Commissioners were concerned,

was equally well known to be opposed to the transfer. As I said before, Mr. Overman was impartial. As regards the rectors, they were one and one; and consequently the Charity Commissioners, in appointing three additional trustees, got a board of five, two of whom were apparently of one opinion, two of another, and the fifth neutral, and the Board so constituted has, under the special circumstances stated in the affidavit, decided that the best thing to be done is that the school shall be transferred to the School Board.

Now I must say—without pledging myself to this, that I should have appointed all three of these gentlemen, which I do not think at all necessary to consider in any way—that I am clearly of opinion that there has been no such gross miscarriage, no such utter want of exercise of discretion as ought to induce a Court of Appeal to interfere in the matter. Under these circumstances, considering that all the objections have failed in my opinion, I must dismiss this petition, and, of course, the costs must follow the result.

Solicitors—Messrs. Warry, Robins & Burgess, for plaintiff; Messrs. Raven & Bradley, for defendant.

MALINS, V.C.

1873.

Dec. 12.

1874.

Jan. 16.

In re ROW'S ESTATE.

Will—Construction—“Survivor” read “Other”—Lands Clauses Act, 1845—Tenant in Tail—Payment out of Court without Disentailing Deed.

A testator devised freeholds in moieties to the use of A. and B. respectively for life, with remainder to the use of their respective children equally as tenants in common in tail, and in default of issue of either A. or B., then to the same uses in favour of the “survivor of them” and her issue as thereinbefore declared concerning their original shares; remainders over. A. died leaving a child, who thereupon became tenant in tail of A.'s moiety. Subsequently B. died without issue:—Held, that A.'s

child then became tenant in tail of B.'s moiety, “survivor” being read “other.”

Fund in Court exceeding 400l. paid to tenant in tail without a disentailing deed having been executed.

William Row, by his will dated the 22nd of April, 1828, devised certain freeholds to the use of John T. W. Pitcher for life, with remainder as to one undivided fourth part thereof in respect of each of them the testator's daughter, Charlotte Pitcher, and his granddaughter, Eliza Pitcher, and his two natural daughters, Margaret A. W. Pitcher and Harriet W. Mercer, to the use of trustees upon trust to pay the income of the said premises to the said Charlotte Pitcher, Eliza Pitcher, Margaret A. W. Pitcher and Harriet W. Mercer in equal shares for their respective separate use. And from and after the decease of any one or more of them, then as to one undivided fourth part of the said premises in respect of each of them who should so die, to the use of the child or children of each of them so dying equally, if more than one, as tenants in common in tail, with a clause of accruer on the death of any children without issue to the surviving children as tenants in common in tail. “And in default of such issue then as to the share or shares of such of them, the said Charlotte Pitcher, Eliza Pitcher, Margaret A. W. Pitcher and Harriet W. Mercer, whose issue should so fail, to such uses upon such trusts for the benefit of the survivors and survivor of them as tenants in common, and their and her respective issue, as were thereinbefore directed and declared touching their original share and shares,” with an ultimate limitation to the testator's right heirs in fee. By a codicil, dated the 5th of December, 1831, the testator revoked the estate in remainder, limited by his will after the death of John T. W. Pitcher, as to the two-fourths limited to the said Charlotte Pitcher and Eliza Pitcher and their issue, and directed his trustees to stand possessed of such two-fourths, from and after the death of the said John T. W. Pitcher, in trust for the said Margaret A. W. Pitcher and Harriet W. Mercer for their lives and for their children and other

issue after their deaths, in like manner as in his said will was expressed concerning the two-fourths thereby devised to or in trust for them in the events aforesaid.

The testator died in 1832.

In the year 1846, the Wilts, Somerset and Weymouth Railway Company entered into an agreement with John T. W. Pitcher, the tenant for life, for the purchase of certain lands forming part of the freeholds subject to the uses of the said will and codicil, and the lands so agreed to be purchased were subsequently conveyed to the company by the tenant for life. The purchase money was duly assessed by two surveyors at 880*l.*, and was paid into Court and invested in 876*l.* consols. The dividends were paid to John T. W. Pitcher during his life.

John T. W. Pitcher died in August, 1866. Harriet W. Mercer married in 1838, survived her husband, and died in 1867, having had one child only, the petitioner, John J. Mercer, who attained twenty-one in September, 1862.

Under an order of Malins, V.C., dated the 19th of July, 1867, the sum of 438*l.* consols, being one moiety of the 876*l.* consols was sold, and the proceeds, after deducting succession duty, were paid to the petitioner, and the other moiety was carried to the account of Margaret A. W. Pitcher, and the income thereof was paid to her during her life.

Margaret A. W. Pitcher survived Harriet W. Mercer, and died on the 18th of January, 1873, without having married. The petitioner then claimed to be entitled as tenant in tail in possession to such last-mentioned moiety, and presented this petition for payment out to him accordingly.

The following questions arose: First, whether the petitioner was entitled to this moiety as tenant in tail in possession, and secondly, whether the fund could be paid out to the petitioner without his executing a disentailing deed.

Mr. E. S. Ford, for the petitioner, upon the first point, submitted that Margaret A. W. Pitcher having died without issue, the petitioner was entitled to her share as tenant in tail in possession, and that the word "survivor" in the

gift over in the will should be read "other"—

Badger v. Gregory, Law Rep. 8 Eq. 78;

In re Arnold's Trusts, 39 Law J. Rep. (N.S.) Chanc. 875; s. c. Law Rep. 10 Eq. 252;

Waite v. Littlewood, 42 Law J. Rep. (N.S.) Chanc. 216; s. c. Law Rep. 8 Chanc. App. 70.

MALINS, V.C., said he was satisfied that in this case "survivor" must be read "other."

Mr. Ford, then, upon the second point submitted that the fund might be paid out without the execution of a disentailing deed—

Morgan's Chancery, 4th ed. p. 37, and cases there cited.

[MALINS, V.C., thought he had made many orders for payment of money out of Court to a tenant in tail without requiring a disentailing deed.]

In

In re The South Eastern Railway Company, 30 Beav. 215; s. c. 30 Law J. Rep. (N.S.) Chanc. 602 (Lord Romilly, M.R.);

Re Holden, 1 Hem. & M. 445 (Wood V.C.);

Re Holden's Estate, 10 Jurist, N.S. 308 (Stuart, V.C.);

Re Watson, 10 Jurist, N.S. 1,011 (L.J.J.);

and

Notley v. Palmer, Law Rep. 1 Eq. 241 (Kindersley, V.C.),

a disentailing deed was not required.

But in

In re Butler's Will, Law Rep. 16 Eq. 479,

the Lord Chancellor (Selborne), sitting for the Master of the Rolls, required a disentailing deed to be executed. He believed that the Master of the Rolls had followed that decision.

Mr. H. A. Giffard, for the railway company, referred to—

Godefroi & Shortt on Railway Companies, p. 216,

and cases there cited.

MALINS, V.C., said that if the Lord Chancellor, sitting for the Master of the Rolls, and the present Master of the Rolls

had decided the other way, it would be disrespectful on his part to decide that the money could be paid out without a disentailing deed. The point had better be mentioned to the Lords Justices.

The point was accordingly mentioned to the Lord Chancellor (Selborne), and Lords Justices sitting together, who refused then to decide the question, but gave the petitioner leave to bring on the petition before the full Court as an original petition, subject to the Vice-Chancellor's opinion.

The result of this application having been mentioned to Malins, V.C., his Honour said that until he was overruled, he should always follow the rule as laid down in *Re Watson (ubi supra)*, and the other cases cited in *Daniell's Chancery Practice*, 5th ed. p. 1656, as the practice was a convenient one. The order must therefore be as prayed: costs according to the Act.

Solicitors—Messrs. Warry, Robins and Burges, agents for Messrs. Watts, Yeovil, for petitioner; Messrs. Young, Maples & Co., for the company.

JESSEL, M.R. }
1874. }
Jan. 26. }

PALMER v. JONES.

Executor of Executor—Original Executor insolvent—Breach of Trust by Original Executor—Costs.

An executor died insolvent, having misapplied the assets. An administration suit having been instituted against his executors, who had received part of the testator's estate, they duly accounted for what they had received:—Held, that they were entitled to the costs of accounts against themselves, but not to costs of accounts against the estate of the insolvent executor, and that as to other costs of suit, being parties in both capacities, they should have half the costs.

Mary Palmer died in 1863, having by will appointed W. J. Palmer her executor. W. J. Palmer applied part of the estate to his own purposes.

W. J. Palmer died in 1864, having appointed E. Jones and R. Luckes his executors.

This suit was subsequently instituted against the executors of W. J. Palmer and his widow and residuary legatee for the administration of the estate of Mary Palmer.

The usual administration decree was made with the usual direction for an account of what W. J. Palmer had received in respect of Mary Palmer's estate, and in case the defendants did not admit assets of W. J. Palmer, then for administration of W. J. Palmer's estate.

The estate of W. J. Palmer proved insolvent, and on this being discovered the accounts were not further prosecuted against it.

It appearing that the defendants had received part of the estate of Mary Palmer, the accounts were prosecuted against them in respect of what they had received.

The defendants duly accounted for and submitted to pay into Court all that they had received or were liable to account for.

The case now came before the Court on further consideration; the only question raised was, whether the defendants were entitled to costs.

Mr. Southgate and *Mr. W. W. Karlake*, for the plaintiff, contended that the defendants as representing an insolvent executor who had committed breaches of trust were not entitled to any costs.

Mr. Fry and *Mr. Bevir*, for the defendants, the executors, contended that they were entitled to full costs.

THE MASTER OF THE ROLLS said that the defendants were entitled to so much of the costs as were incurred in taking the accounts against themselves, and not to any of the costs incurred in taking accounts against the estate of the insolvent. As to costs of appearance and other costs of suit, they were parties in two capacities: first, as representatives of W. J. Palmer, the insolvent executor, who had committed breaches of trust; secondly, as legal personal representatives of the original testator, and as such having received part of his estate. They were not entitled to costs in the first capacity but only in the second; and in the absence of any precedent on the subject he would give them half such costs.

[Decree—That the defendants, the exe-

cutors, should have the costs as between solicitor and client of taking the accounts against themselves and no costs of the accounts directed against the testator, W. J. Palmer; that they should have half the other costs of suit (including any costs, charges and expenses properly incurred in the suit) as between solicitor and client. The defendants having after decree severed in their defence there would be but one set of costs.]

Solicitors—Messrs. Bridges, Sawtell & Co., agents for Mr. Watkins, Bristol, for plaintiff; Messrs. Westall, Roberts & Co., agents for Mr. F. H. Adams, Upton Bishop, and Mr. Fortune, agent for Messrs. Minett & Son, Ross, for defendants.

SELBORNE, L.C. }
MELLISH, L.J. } *Ex parte* EDWARDS.
1873.
Dec. 5.

*Church Discipline Act (3 & 4 Vict. c. 86),
s. 3—Commission of Enquiry—Fitness of
Promoter—Prohibition.*

Whether it is competent to the bishop to refuse to entertain an application for a commission of enquiry under section 3 of the Act 3 & 4 Vict. c. 86, made by any person whatever, quære.

But at least it is in his discretion to issue such commission when he has been applied to for that purpose.

Therefore an application by the accused person for a prohibition restraining the issuing of the commission until objections to the fitness of the promoter should be determined was refused as unfounded and frivolous.

This was an *ex parte* application by the Rev. John Edwards, Vicar of Prestbury, in Gloucestershire, for a prohibition directed to the Bishop of Gloucester and Bristol, the Venerable Sir George Prevost, and other commissioners appointed by the bishop, and to Mr. Combe, the promoter, to restrain further proceedings under a commission issued by the bishop for the purpose of making enquiry into the grounds of certain charges made against the vicar until certain objections raised by

Mr. Edwards to the fitness of the promoter should have been determined.

The facts were as follows: Certain charges had been made by Mr. Combe against Mr. Edwards that he had been guilty of illegal practices in the services of his church, and the bishop had been applied to to issue a commission under the 3rd section of the Church Discipline Act (3 & 4 Vict. c. 86), which enacts—"That in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical . . . it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general or an arch-deacon, or rural dean within the diocese, for the purpose of making enquiry as to the grounds of such charge or report. Provided always that notice of the intention to issue such commission under the hand of the bishop containing an intimation of the nature of the offence, together with the names, addition and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue."

Against the issuing of this commission a *caveat* had been entered by Mr. Edwards on the 26th of May, 1873. On the 7th of November, 1873, notice of the bishop's intention was given to him, and on the 28th he was served with notice that the commission had been issued, and that the commissioners would hold a sitting on the 8th of December.

On the 4th of December Mr. Edwards made his application *ex parte* for a prohibition before Bacon, V.C. The application was made to the Court of Chancery because, it not being term time, it could not be made to the Court of Queen's Bench.

The Vice-Chancellor declined to make any order, and Mr. Edwards now applied to the full Court by way of appeal from his Honour's decision.

Dr. Stephens and Mr. Phillimore, for the appellant.—The application is made on the authority of

Ex parte Bateman, 39 Law J. Rep. (N.S.) Chanc. 383; s. c. Law Rep. 9 Eq. 660,

in which case it was held that when the Courts of Common Law were not sitting the Court of Chancery would, upon an *ex parte* application, grant a writ of prohibition, and the same case decides that the order will be made absolute in the first instance.

The object of the proviso requiring notice of the intention to issue the commission with an intimation of the nature of the offence, and the name, addition and residence of the party on whose application the commission is about to issue to be sent to the accused fourteen days before the commission shall issue, was to enable the accused to make enquiries into the fitness of the promoter; and although the bishop has a discretion to issue the commission on his own mere motion, yet, if he does so on the application of a promoter, it is open to the accused to object to the fitness of the promoter.

They referred to—

Martin v. Mackonochie, 36 Law J. Rep. (N.S.) Eccles. 25; s. c. Law Rep. 2 Ad. & E. 116;

Elphinstone v. Purchas, 39 Law J. Rep. (N.S.) Eccles. 28; s. c. Law Rep. 3 Ad. & E. 66;

The Queen v. The Archbishop of Canterbury (Denison's Case), 6 E. & B. 546; s. c. 25 Law J. Rep. (N.S.) Q.B. 346;

The Queen v. The Archbishop of Canterbury (Poole's Case), 1 E. & E. 545; s. c. 28 Law J. Rep. (N.S.) Q.B. 154.

THE LORD CHANCELLOR.—This application is, in my opinion, not only quite unfounded, but absolutely frivolous. The statute which has been referred to imposes on the bishop the duty of issuing in what he considers a proper case a commission and enquiry, and enacts that (in the words of the 3rd section) "it shall be lawful" for him to do so either "on the application of any party com-

plaining, or, if he shall think fit, of his own mere motion."

In my mind there is a serious doubt whether it would be competent to the bishop to refuse to entertain an application under that section made by any person whatever. But at least it is in his discretion to issue a commission when he has been applied to for that purpose.

The present application asks the Court to restrain the bishop from doing that which the statute says he may or ought to do, on the ground that he is not doing something else which the statute neither directly nor indirectly makes it his duty to do.

The object is to enter into a preliminary enquiry as to issuing the commission, and it has always appeared to me that proceedings under the Church Discipline Act are sufficiently onerous both on the promoter and on the accused, entailing upon them a double enquiry, to which, if this application were acceded to, would now be added a third enquiry, hearing and receiving evidence as to the status of the promoter.

I consider this application frivolous, and it must be refused.

MELLISH, L.J.—I am entirely of the same opinion. The question is exclusively one of the construction of the statute. There is nothing extraordinary or unusual in the first proceeding in a suit being *ex parte*.

Assuming that, on the construction of the section in question, the bishop has a discretion whether he will issue the commission or not on account of the character or position of the promoter,—which is by no means certain, for the words "it shall be lawful" have under some circumstances been held to be compulsory—he may, at all events, act either on his own mere motion or on the application of any other person; and there is nothing in the Act to suggest that the accused person is to be heard on the question whether or not the promoter is a proper person to apply for a commission of enquiry. The proviso in the section, which has been much relied on in the argument, is that the accused is to have fourteen days' notice of the name and description of the promoter. That pro-

viso, in my opinion, is for the purpose of enabling the accused when before the commission at a subsequent stage to raise any objections as to the status or character or motives of the promoter. It is quite right that he should have such notice for that purpose, but I quite agree with the Lord Chancellor that the application must be refused.

Solicitors—Messrs. Brooks, Tanner & Co., for the applicant.

JESSEL, M.R. }
 1874. } TALBOT v. TALBOT.
 Feb. 9. }

Next Friend—Death—New Next Friend intervening—Change of Solicitors.

On the death of the next friend of an infant plaintiff whose father and mother were dead, the infant's paternal uncle, by his solicitors (who were not the solicitors of the plaintiff on the record), obtained an order of course appointing them solicitors of the plaintiff in the suit, and another appointing the uncle next friend. On motion by the former solicitors of the plaintiff to discharge these orders,—Held, that they were properly obtained, and motion dismissed with costs.

In August, 1869, A. C. Talbot, an infant tenant for life of the Aston estate, then ten years old, instituted this suit as plaintiff by Mrs. Talbot, widow, his mother, as his next friend, against his two younger brothers—successively tenant for life and tenant in tail in remainder—and the trustees, to obtain a scheme for maintenance and a receiver of the rents.

Messrs. Frere & Co. acted as solicitors for the plaintiff while his mother, the next friend, lived.

The father, by his will, had appointed his widow testamentary guardian of the children; she, by her will, had purported to appoint the Earl of Shrewsbury the plaintiff's cousin, and Mr. Frere guardians of the plaintiff and other children.

The Earl had been appointed guardian *ad litem* of the infant defendants.

On the 1st of January, 1874, the plaintiff's mother and next friend died.

On the 7th of January, 1874, on the petition of the plaintiff, by Harvey Talbot, his paternal uncle, as next friend, alleging that the plaintiff was desirous of changing his solicitors, an order was made appointing Messrs. Nicholson & Herbert his solicitors in place of Messrs. Frere & Co.

On the same day another order was made appointing Harvey Talbot the infant's next friend in the suit in place of his deceased mother. Both these orders were obtained as of course without any evidence.

An application was now made by motion, expressed to be on the part of the plaintiff, by Mr. Frere, one of the partners in the firm of Frere & Co., to discharge the orders of the 7th of January, 1874, and to appoint the Earl of Shrewsbury next friend in the suit; and, if necessary for that purpose, to discharge the order by which the Earl had been appointed guardian *ad litem* of the infant defendants. The infant plaintiff was fifteen. It was stated that he wished Mr. H. Talbot to act as his next friend. The appointment was supported by the paternal grandfather of the plaintiff, and the majority of his other relatives.

Mr. H. Talbot was tenant for life in remainder in case he should survive the plaintiff and his two younger brothers, and they should die without issue.

Mr. Fry and Mr. Montague Cookson, for the motion.—The orders of the 7th of January were irregular. The proper person to apply for the appointment of a new next friend is the solicitor for the plaintiff on the record—*Daniel's Chancery Practice*, 5th ed., p. 75, and a new next friend cannot be appointed without an affidavit of his being a fit person, and of his having no interest conflicting with that of the plaintiff—

Harrison v. Harrison, 5 Beav. 130.

[THE MASTER OF THE ROLLS.—That case does not apply. It was a case of removal of an existing next friend. The Master of the Rolls in that case seems to have thought that, having got a good next

friend, he ought not to let him go without being satisfied that the next friend to be substituted was a proper person.]

In this case Mr. H. Talbot, as tenant for life in remainder, had a conflicting interest; they also contended that he was an unfit person.

Mr. Colquhoun, for Lord Shrewsbury, submitted to act in the matter as the Court should direct.

Mr. Southgate and Mr. Kekewich, for Mr. H. Talbot, were not called on.

THE MASTER OF THE ROLLS.—When the mother and next friend of the plaintiff had died the paternal relatives were the proper persons to be consulted, particularly the paternal grandfather. The paternal uncle and paternal aunt and all the paternal relatives are unanimous in approving Mr. Hervey Talbot, the paternal uncle, as the proper person to be the next friend. He accepts the office and takes the proper steps authorising his solicitor to become solicitor to the plaintiff in the cause. The solicitor takes the proper course, obtains an order of course, to change solicitors, and another order appointing Mr. H. Talbot to be next friend. An objection is taken that this order is irregular, because made without an affidavit of fitness of the next friend; there is no authority cited for this, and I have ascertained, by personal inquiry of the Chief Clerk, that it is not the practice in the office to require such an affidavit.

Then another objection is made that Mr. H. Talbot is unfit, but I consider the evidence insufficient to support the charge. No doubt Mr. Hervey Talbot has a life interest in remainder, but there are three persons before him—one at least an infant tenant in tail—and I do not see that his interest in any way need conflict with his duty.

The motion will be dismissed with costs.

Solicitors—Messrs. Frere & Co., for plaintiff;
Messrs. Parkin & Pagden, for defendant;
Messrs. Nicholson & Co., for Mr. H. Talbot.

JESSEL, M.R. }
1874. } *In re MOWLEM (an infant).*
March 3.

Posthumous Child—Intermediate Rents.

A testator devised land to the first son of J. M. in tail male, and after making other dispositions he gave the residue of his property to trustees upon certain trusts. J. M. had no son at the death of the testator, but one was born about four months afterwards. The trustees of the residue received the intermediate rents:—Held, that these rents formed part of the residue of the testator's estate, the infant son being only entitled to the rents from his birth.

John Mowlem, the testator in this matter, devised all his freehold lands at Swanage to certain trustees to the use of the first and every other son of his nephew, Joseph Mowlem, severally and successively, according to their respective seniorities of age and priority of birth in tail male, and in default of such issue, to the use of certain other persons for life and in tail, with an ultimate limitation to the use of his own heirs; and after making other dispositions the testator devised all the residue of his real and personal estate to the same trustees upon trust for certain persons.

The testator died on the 6th of March, 1868, and on the 6th of July following the first son of Joseph Mowlem was born. As a matter of fact the rents of the testator's estate at Swanage were received by the trustees of his will for some time after his death, but on the 1st of March, 1870, a guardian was appointed to the infant, and on the 21st of February, 1873, an order was by consent made "In the matter of the infant" that the trustees should account for the rents received by them. They brought in an account accordingly of all received after the birth of the infant, and this summons was then taken out to charge them with the rents from the death of the testator. There appeared to have been some idea amongst the parties in chambers that the current rents were apportionable, but this was admitted on all hands in Court to be erroneous, and it was conceded that all

the rents were to be considered as vesting on the first day on which they respectively became payable.

Mr. Fry and *Mr. Rodwell*, for the infant, contended that an infant *en ventre sa mère* was to be considered as born for the purpose of taking a benefit, and referred to the recent case of

Pearce v. Carrington, 42 Law J. Rep. (N.S.) Chanc. 516, 900; s. c. Law Rep. 8 Chanc. 969 (July, 1873);

and cited

Richards v. Richards, John. 754; s. c. 29 Law J. Rep. (N.S.) Chanc. 836 (1860),

and proposed to read some remarks contained in the judgment in the same case in the report in the Jurist (vol. 6, N.S. p. 1145), but the Master of the Rolls held that they could not be read as they were not in the authorised report, adding that Vice-Chancellor Wood often altered his judgments considerably in the reports, and thus retracted, on maturer consideration, anything he had hastily said in Court.

In the course of the argument also, the Master of the Rolls called attention to the fact that under the old law when an uncle might inherit, as qualified heir of his deceased nephew, living the father of such nephew, and be subsequently ousted by the birth of another son of such father, such nearer heir was only entitled to the rents and profits of the land from his birth, and not for the previous nine months.

Mr. Southgate and *Mr. E. S. Ford*, for the trustees, were not called upon.

THE MASTER OF THE ROLLS.—I think, as the Vice-Chancellor Wood said in the case cited (*Richards v. Richards*, *ubi supra*) respecting the rule, that children conceived are considered as born, "This cannot be so for all purposes; otherwise no question as to intermediate rents could ever have arisen, and it is difficult to see how the right of entry and distress could relate back to a time anterior to the birth" (John. p. 764).

Of course, I assume that these rents accrued due before the child was born, and if so, the right to the rents on the part of the child only arose at the time of its birth. If there were no devise in

this case these rents must have belonged to the heir, who must have made an entry. But there was a devise, and that devise passed the legal estate to these trustees, and they entered and received rents due before the birth of the infant. They are, therefore, trustees of these rents for the ultimate devisees of the residue.

Solicitors—Messrs. Bolton & Robins, for the infant; Messrs. Hedges & Brandreth, for the trustees.

JESSEL, M.R. }
1874. }
Jan. 29. } *Re THE TYNE CHEMICAL CO.*
Feb. 26. } (LIMITED).

Companies Act, 1862 (25 & 26 Vict. c. 89), s. 127—*Scotland—Witness—Creditor.*

When a witness in Scotland, summoned under s. 127 of the Companies Act, 1862, objects to be examined, the proper course is to move the Court of Chancery in England that he be ordered to attend for examination before the sheriff of his county, at his own expense.

A creditor of a company may be summoned to ascertain whether the company has an alleged counter-claim against him.

In the winding-up of the Tyne Chemical Company (Limited), the liquidator desired to examine two gentlemen residing in Renfrewshire, in Scotland, and summoned them to appear before the sheriff of that county accordingly. They attended, but objected to be examined, whereupon

Mr. Romer applied on the 29th of January for leave to serve them out of the jurisdiction with notice of motion for the 26th of February, that they might be ordered to attend, at their own expense, before the sheriff of Renfrewshire, to be examined. He submitted that it would be proper to proceed under section 127 in the same manner as under section 115.

Section 127 is in the following words—

"The Court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the estate, dealings or affairs of any company in the course of being wound up, or in regard to the estate, dealings or affairs of any person being a contributory to the company, so far as the company may be interested therein by reason of his being such contributory; and the order or commission to take such examination shall be directed to the sheriffs of the county in which the person to be examined is residing, or happens to be for the time; and the sheriff shall summon such person to appear before him, at a time and place to be specified in the summons, for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds or documents called for, which may be in his possession or power; and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the Court, and shall transmit with such report the books, papers, deeds or documents produced, if the originals thereof are required, and specified by the order or otherwise, such copies thereof, or extracts therefrom, authenticated by the sheriff, as may be necessary; and in case any person so summoned fails to appear at the time and place specified, or, appearing, refuses to be examined or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear, or refusing to give evidence or make production, may be proceeded against by the law of Scotland; and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs, when acting as commissioners under appointment from the Court of Session, and as witnesses and havers are entitled to in the like case, according to the law and practice of Scotland. If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness or as to the production required to be made, or on any other ground whatever, the sheriff may, if he

thinks fit, report such objection to the Court, and suspend the examination of such witness until such objection has been disposed of by the Court."

The Master of the Rolls gave the leave, and on the 26th of February the motion was made, when it appeared that the company had given credit to a firm of Anderson & Son to a large amount; and the liquidator alleged that such credit was given by reason of certain false representations made by the Commercial Bank of Scotland, in answer to enquiries made by the Tyne Chemical Company. Anderson & Son had become bankrupt, and the company had sustained a severe loss by giving them credit. One of the witnesses summoned was the manager of the bank, and the object of the enquiry was to ascertain what were the exact statements made by the bank, and whether Anderson & Son were not at the time insolvent, to the knowledge of the bank. The manager was called on to produce the ledgers containing the accounts of Anderson & Son for two years.

The objections raised by the manager were that these enquiries were not within the terms of the order, which followed the words of the 127th section, and that the bank were creditors of the company in respect of some bills on which Anderson & Son were also liable, so that the company would be examining its own creditor.

Mr. Chitty and *Mr. Romer*, for the company, cited

Clement's Case, Law Rep. 13 Eq. 179 (N.) (1868).

Mr. Roxburgh and *Mr. Bush*, for the witnesses, cited

Re Accidental and Marine Insurance Corporation, Mercati's Case, 37 Law J. Rep. (N.S.) Chanc. 56; s. c. Law Rep. 5 Eq. 22 (1867),

as shewing that a creditor was not liable to be examined.

Mr. Chitty replied.

THE MASTER OF THE ROLLS said that the objection that the matters about which discovery was sought were not within the words of the 127th section, amounted to saying that they did not relate to the affairs of the company. But

the respondent's counsel must try to persuade some other tribunal that that was so. On the second objection, it was unnecessary to discuss *Mercati's Case* (*ubi supra*), as here there were other matters besides the debt to which the examination was directed. The order asked for must be made.

Solicitors—Messrs. Linklaters, Hackwood & Addison, agents for Messrs. Hoyle & Co., Newcastle-upon-Tyne, for applicants; Mr. S. R. Hoyle, agent for Messrs. Hoyle & Co., for respondents.

MALINS, V.C. }
1874. } WILSON v. THORNBURY.
Nov. 14. }

Practice—Production of Documents—Forgery—Comparison of Writings—Plaintiff's Right to Production of Documents, however numerous—Common Law Procedure Act, 1854, s. 27.

The plaintiff, in support of an alleged gift to her by a testator, relied on a writing in her possession purporting to have been signed by him. The defendant, however, disputed the genuineness of the document, and charged the plaintiff with forgery. The defendant having made the usual affidavit of documents, the plaintiff obtained an order in chambers that the defendant should make a further affidavit setting forth all cheques in his possession drawn by the testator during a period of nine years, covering the date of the alleged gift. The defendant then by his further affidavit of documents set forth and consented to produce certain cheques bearing the testator's undoubted signature, but declined to set forth or produce others, which he alleged were forged. Upon a further summons to compel the defendant to set forth and produce the latter cheques,—Held, that the plaintiff's general right to the production of all documents relating to the matters in question in the suit ought not to be extended to the production of all documents signed by the testator, however numerous, and that consequently, on technical grounds, the application must be refused, the Court at the same time intimating its opinion that,

having regard to the charges against the plaintiff, the defendant ought, in fairness, to have acceded to the application.

In a suit involving a question of disputed handwriting the hearing of a summons for production of documents is not the proper stage for ordering the production of writings for purposes of comparison, inasmuch as by the Common Law Procedure Act, 1854, s. 27, disputed writings may be compared only with writings "proved to the satisfaction of the Judge to be genuine," and this proof can only be furnished at the hearing.

Adjourned summons.

The bill was filed for the purpose of establishing a claim by the plaintiff, Mary Ann Wilson, who had formerly been housekeeper to David Thornbury, the testator in the cause, to a house alleged to have been given to her by him in his lifetime. The plaintiff, in support of her claim, relied on a mutilated memorandum of gift purporting to have been signed by the testator. The defendant, D. F. Thornbury, the testator's son and devisee, however, resisted the claim, on the ground that this document, and also others produced by the plaintiff as having been signed by the testator, did not bear his usual signature, and were, in fact, forgeries.

The defendant having made the usual affidavit of documents, the plaintiff obtained an order in chambers that the defendant should make a further affidavit setting forth all cheques in his possession drawn by the testator between the years 1861 and 1870, the period covering the date of the alleged gift. The defendant then by his further affidavit of documents set forth and consented to produce certain cheques drawn by the testator during this period, and bearing his undoubted signature, but refused to set forth or produce certain other cheques in his possession purporting to have been drawn by the testator, alleging that the signatures to them were forgeries, and he relied upon evidence to that effect given by Mr. Netherclift, an expert in handwriting. The plaintiff thereupon took out a further summons to compel the defendant to set forth and produce these latter cheques.

Mr. Cotton and Mr. D. Gardiner, for the plaintiff.—We are here on a question of discovery. These cheques having been put in evidence in the suit, ought to be produced. It may turn out that they favour the plaintiff's case, and that only those cheques have been produced which support the defendant's case. It is only just that the plaintiff, who has been charged with forgery and perjury, should have an opportunity of refuting those charges by making a comparison of the genuine signatures of the testator with those which are disputed. The right of making this comparison is, in fact, given by the Common Law Procedure Act, 1854, s. 27, and 28 & 29 Vict. c. 18. s. 8 (1). They also cited 14 & 15 Vict. c. 99. s. 6.

Mr. Glasse and Mr. Hemming, for the defendant.—The mere fact that evidence has been adduced to prove that these cheques are forgeries does not entitle the plaintiff to their production—

Lord v. Colvin, 5 De Gex, M. & G. 47; s. c. 2 Drew. 205; s. c. 23 Law J. Rep. (N.S.) Chanc. 469.

We ought not to be asked to disclose our evidence on an affidavit of documents. The cheques already produced are amply sufficient to enable the plaintiff to ascertain the genuineness of the documents in her possession. She cannot compel the production of documents which are not really essential to the questions in the suit.

Mr. Cotton in reply.

MALINS, V.C., said that the case raised a question of much difficulty, and one upon which his mind had fluctuated considerably during the course of the argument, so much so, that he had endeavoured to bring the parties to an arrangement. The plaintiff had been housekeeper to Mr. Thornbury, the testator in the cause, and she alleged that her master had given her

the house in question. In support of that allegation she produced a memorandum of gift purporting to be signed by him.

Now, if that was a genuine document, it would go far towards proving her case. But this allegation was met by a counter-allegation that the document was a forgery. It was a matter, therefore, of the highest importance in the case that the truth should be ascertained. He should have been better pleased if the defendant, Mr. Thornbury, had consented to produce all his father's cheques, whether their genuineness were disputed or not. But he had declined to produce several, alleging that the signatures to them were forgeries. It might be that these documents were of the greatest possible importance to the plaintiff, because it might turn out after all that they were signed by the testator. He therefore repeated that he should feel much satisfaction now if the defendant consented to produce them. The plaintiff's right to their production was the first question. Undoubtedly, as a general rule, a plaintiff was entitled to the production of all documents relevant to the matters in question in the suit, and the plaintiff here alleged that these cheques were relevant to the matters in question, the issue being whether the memorandum of gift was a forgery or not. Now if he acceded to the plaintiff's contention, there would be this difficulty, that every cheque the testator signed or purported to sign—there might be a thousand of them—would have to be produced. He hardly thought that the general right to production went so far as that. He therefore doubted whether the order for production already made could be sustained as an adverse order. He thought that the cheques already produced supplied a sufficient means of ascertaining the genuineness of the memorandum and the other documents in the plaintiff's possession. But what he had to decide was, whether the plaintiff was, as a matter of right, entitled to have all these cheques produced? It certainly seemed to him that as she was charged with forgery and perjury, she was, in fairness, entitled to see everything that she thought would enable her to rebut those charges. Now

(1). Section 27 of the Common Law Procedure Act, 1854, is as follows—"Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute." Section 8 of 28 & 29 Vict. c. 18, is in precisely the same terms.

section 27 of the Common Law Procedure Act, 1854, provided as follows. [His Honour then read the section, and continued.] So that if a writing was produced and either party disputed its genuineness, it might be compared with some other writing, which must, however, be a writing "proved to the satisfaction of the Judge to be genuine." The enactment was a wise one, for without production of documents there could not be any full examination. The question was, whether at this stage of the cause he could order the production of these disputed writings. In the present case this was not the hearing of the cause, and therefore the time had not arrived at which the genuineness of any writing could be "proved to the satisfaction of the Judge." It appeared to him that he should not be warranted in ordering the production of these cheques, because he did not think that the general rule ought to be extended to the production of every document a man had ever signed. Therefore, on the whole, he very reluctantly came to the conclusion that these documents ought not to be produced, and that he could not make the order asked. The application must, therefore, be refused; but, under the circumstances, the costs would be reserved to the hearing. He further desired to say that he was acting under a strong feeling that, although technically he could not accede to the application, yet it was one which ought, in fairness, to have been acceded to.

Solicitors—Messrs. Swann & Co., agents for Mr. J. T. Tweed, Lincoln, for plaintiffs; Messrs. Collyer-Bristow, Withers & Russell, agents for Messrs. Wise & Harwood, Boston, for defendant.

JESSEL, M.R. } *In re* THE HERTFORDSHIRE
1874. } BREWERY COMPANY.
Feb. 14.

Winding-up—Company—One of the Subscribers of Memorandum an Infant—Companies Act of 1862, ss. 199, 145, 146, 152.

A company which had been registered as a limited company carried on business for a

short time with more than seven shareholders. On its being wound up under a supervision order it was discovered that one of the subscribers of the memorandum was an infant, thereupon a petition for winding up the company under the 199th section was presented by a creditor and an order made.

The company was registered as a limited company in 1872, several shares were issued to others besides the subscribers, and the company carried on business for several months with at least twenty shareholders.

In May, 1873, a resolution for a voluntary winding up was passed. In June, 1873, an order for winding up under supervision was made and the voluntary liquidator was ordered to give security. The list of contributories was settled, including all the seven subscribers of the memorandum. One of these did not pay, and thereupon the liquidator took out a balance order against him. His father attended at chambers, and produced evidence to shew that he was an infant, and he was struck off the list.

The chief clerk then raised the question whether the company was properly registered and could be wound up under the order. The liquidator applied to the Master of the Rolls in chambers for direction as to what he should do, and the Master of the Rolls suggested that the company might be wound up as an unregistered company under the 199th section.

A petition was accordingly presented by a creditor for a winding up order under this section.

Mr. Graham Hastings, for the petition, applied under the 199th and 145th sections for a winding up order, also that under the 146th section, the proceedings in the voluntary winding up might be adopted; and under the 152nd, that the voluntary liquidator might be appointed official liquidator.

Mr. Walker, for the company.

THE MASTER OF THE ROLLS made the order for winding up the company, appointed the voluntary liquidator official liquidator, directed that he should give a

new bond, but gave leave to the chief clerk to adopt the same sureties for the same amounts as he had before and all proceedings under the supervision order.

Solicitors—Messrs. Halse, Trustram & Co.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	}	SELBY v. NETTLEFOLD.
JAMES, L.J.		
MELLISH, L.J.		
1873.		
Nov. 22, 24.		

Right of Way—Obstruction—Right to go extra viam.

If the grantor of a right of way obstructs it, the grantees may go, extra viam, over the grantor's land; and the grantor or a purchaser with notice from him will not be allowed to obstruct the substituted mode of access so long as the original obstruction exists.

This was an appeal from a decree of Bacon, V.C., granting an injunction to restrain the defendant from obstructing the plaintiff in his free use of a towing path, under the following circumstances:

In 1845 James Moilliet was tenant for life of a considerable quantity of land on both sides of a private canal running northward into the Birmingham and Wolverhampton Canal, a power of sale with his consent being vested in trustees. The towing path was on the east side of the private canal.

In the year above mentioned the trustees, with the consent of the tenant for life, sold and conveyed to George Selby a piece of land on the west bank of the private canal in fee simple; and by an indenture dated the 27th of October, 1845, J. Moilliet, the tenant for life, granted to the purchaser a right of way over the towing path, for the purpose of drawing or towing boats, barges and other vessels along the canal.

In 1850 Moilliet built a bridge over the canal, between the land purchased by Selby and the Birmingham and Wol-

verhampton Canal, in such a way as to obstruct the use of the towing path, so that it was necessary for persons towing barges along the private canal to leave the towing path on arriving at the bridge, and to pass round the foot of the bridge and rejoin the towing path on the other side, passing for this purpose over other land of Moilliet adjoining the road which led over the bridge. The towing path, however, was very seldom used, it being more convenient to propel the barges by poles.

In 1853 the defendants purchased the land south of the bridge on the east side of the private canal, including the towing path; and shortly afterwards, having discovered that Selby claimed some right over the towing path, they accepted from Moilliet 50*l.* as compensation for such annoyance as the right if asserted might cause.

About the same time Moilliet and his trustees sold the land adjoining the bridge on the north side and on the east side of the private canal, including the towing path, to the Patent File Company, from whom the defendants purchased it in 1870.

The defendants having erected a wooden fence along the side of the road leading over the bridge, in such a way as to prevent the plaintiff from crossing it by the foot of the bridge, he filed his bill to restrain the defendants from obstructing him in his free use of the towing path, and from permitting the fence to remain so as to cause an obstruction; and Bacon, V.C., having made a decree in the terms of the prayer, the defendants appealed.

Mr. Fitzjames Stephen, Mr. Eddis, and Mr. W. Phipson Beale, for the appellants.

Mr. Kay and Mr. G. W. Lawrence for the respondents.

The following cases were referred to—

Absor v. French, 2 Shower 28; s. c.

nom. Asser v. Finch, 2 Lev. 234;

Bullard v. Harrison, 4 M. & S. 387;

Robertson v. Gantlett, 16 Mee. & W.

289; s. c. 16 Law J. Rep. (N.S.)

Exch. 156;

Taylor v. Whitehead, Dougl. 745;

Arnold v. Holbrook, 42 Law J. Rep.

(N.S.) Q.B. 80; s. c. Law Rep. 8

Q.B. 96;

Reynolds v. Edwards, Willes, 282;
Harrison v. Parker, 6 East, 154;
Llewellyn v. The Earl of Jersey, 11
 Mees. & W. 183; s. c. 12 Law J.
 Rep. (N.S.) Exch. 243;
Horne v. Widlake, Yelv. 141;
Payne v. Shedden, 1 Moo. & R. (N.P.
 Rep.) 382 [Patteson];
Lovell v. Smith, 3 Com. B. Rep. N.S.
 120;
Hawkins v. Carbines, 27 Law J. Rep.
 (N.S.) Exch. 44;
Cousens v. Rose, Law Rep. 12 Eq.
 366;
Williams v. James, 36 Law J. Rep.
 (N.S.) C.P. 256; s. c. Law Rep.
 2 C.P. 577.

THE LORD CHANCELLOR.—It is admitted that if A. grant a right of way to B. over his field, and then places across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land without trespass.

In this case we think the defendants cannot be treated as purchasers, either from Moilliet or from the Patent File Company, without notice of the plaintiff's rights such as they existed when those purchases were made, and of the manner in which they were then used and enjoyed. When the first of those purchases was made, the bridge and road had been actually erected by Moilliet so as to obstruct the direct use of the towing path, and we hold it to be the right conclusion from the evidence that the plaintiff then practically enjoyed this right of way by passing over Moilliet's land, which was sold to the defendants, and over the street or road, and the land on the other side from the towing path on one side of the bridge to the towing path on the other, and that, as against Moilliet, the plaintiff, in so passing and repassing, was not a trespasser. As between Moilliet and the defendants, who received from Moilliet a money consideration in respect of their being subject to this servitude, we think it cannot be assumed that the defendants would at any time have been entitled in equity to obstruct this substituted mode of access, so as to make it necessary for

Moilliet, if still the owner of the road and the bridge, to remove the original obstruction which was the *status quo* when the defendants purchased. And that original obstruction remaining (in which the plaintiff has acquiesced for a length of time which might make it now very difficult for him in equity to require that original obstruction to be removed), we think that the defendants, having purchased from Moilliet with notice, have no better right as against the plaintiff than Moilliet himself would have had.

The injunction must, however, be varied by limiting it in point of duration to the life of Moilliet, and to the period during which the obstruction of the towing path by the bridge may continue; and it is not to prevent the defendants from substituting for that heretofore in use any other convenient mode of access; and it is to be stated that the order is not to extend so as to authorise the plaintiff to use the mode of access across the defendant's land heretofore used by him, or any other which may be substituted for it, except for the continuous passage along the towing path for the purpose of towing from one side of the bridge to the other side thereof.

JAMES, L.J., and MELLISH, L.J., concurred.

Solicitors — Messrs. Lawrance, Plews & Co., for plaintiff; Messrs. Sharpe, Parker & Co., agents for Messrs. Ryland & Martineau, Birmingham, for defendants.

BACON, V.C. }
 1874. } THE PHOSPHO-GUANO COM-
 Feb. 26. } PANY, LIMITED, v. GUILD.

Practice—Service out of the Jurisdiction
 —Forum—Shares in an English Joint
 Stock Company.

On an *ex parte* motion, founded on an affidavit that the defendant was in Glasgow, leave was given to serve a copy of bill and interrogatories on defendant in Scotland "or elsewhere out of the jurisdiction." Service was effected in Glasgow. On motion to set aside the order for irregularity:—Held, that the order, though irregular in

form, would not be set aside, but no costs were given to the respondent.

A bill was filed by the P. Company, which had its registered office in England, against G., who was resident out of the jurisdiction, asking for a declaration that G. was a trustee of certain shares held by him in the company, for the benefit of the company, and for incidental relief:—Held, that this Court was the proper forum in which to try the matter.

The Phospho-Guano Company was registered under the Companies Act, 1862, its registered office being at Seacombe, in the county of Chester.

The company was formed for the purpose of acquiring the business of Messrs. Peter Lawson & Son, and an agreement dated the 6th of July, 1870, was entered into between the vendors and the defendant, James Wyllie Guild, therein described as a chartered accountant of the city of Glasgow, for the purpose of stating the terms upon which the business was to be handed over to the company. It was, amongst other things, arranged that the capital of the company should consist of 400,000*l.*, divided into shares of 10*l.* each, of which 15,000 were to be A shares and 25,000 were to be B shares. The 25th clause of the agreement was as follows—

“The said James Wyllie Guild is merely a formal party to this agreement as representing the said intended company, and shall incur no personal liability whatever hereunder.”

The company alleged that they had discovered that Guild, at the time he purported to be acting for the company, had, in fact, entered into a secret agreement with Messrs. Lawson & Son, one of the terms of which was that the 25,000 B shares should be retained by him for promoting expenses and remuneration.

In December, 1873, the company filed their bill against Guild, who was the sole defendant, praying that he might be declared a trustee of all benefits which he had received under any secret agreement, for a discovery, and an account, and that the certificates of such of the 25,000 B shares as were unsold might be deposited with the Court until the matters in dispute were settled.

NEW SERIES, 43.—CHANC.

On the 10th of January, on the *ex parte* application of the plaintiff, an order was made for service of a copy of the bill, and interrogatories on the defendant “in Scotland or elsewhere out of the jurisdiction of this Court.”

The defendant now moved to have this order discharged, and stated by affidavit that he was born and had always lived in Scotland, and had no property in England except his interest in this company.

Mr. Kay and Mr. Everitt, for the motion.—The order, as drawn up, is clearly irregular. Had the defendant been in Australia, that would have been “elsewhere out of the jurisdiction,” and the defendant would only have had fourteen days to answer.

The Court is not empowered to make an order for service out of the jurisdiction, except for service in a particular place or country—Consolidated Orders X., rule 7. Here the affidavit of service says defendant was in Glasgow, and the order ought to have been for service in Glasgow only.

The decree asked for is entirely personal, and is in effect that defendant may repay certain money and deposit certain share certificates, which, it is stated, are in his possession in Scotland. The suit then ought to have been brought in the Scotch Courts, and not here. No decree made on this bill could be enforced against the defendant.

Service out of the jurisdiction is entirely within the discretion of the Court, and will not be directed when the only relief sought is personal to the defendant.

Mr. Jackson and Mr. Bedwell, for the company.—The order is perfectly intelligible; and if the addition of the words “and elsewhere” are unusual, it has made no difference, as service was, in fact, effected in Glasgow.

The relief sought is not entirely personal. The domicile of the company is in England, and the shares are, therefore, within the jurisdiction of the Court.

On the merits, the cases shew that the Court is empowered to make the order for service out of the jurisdiction—

Maclean v. Dawson, 4 De Gex & J. 150; s. c. 27 Beav. 25; 28 Law J. Rep. (N.S.) Chanc. 742;

3 A

Drummond v. Drummond, 35 Law J. Rep. (N.S.) Chanc. 780; s. c. (on app.) 36 *ibid.* 153; s. c. Law Rep. 2 Eq. 335 and 2 Chanc. 32.

The case of

Cookney v. Anderson, 1 De Gex, J. & S. 365; s. c. 31 Beav. 452; 32 Law J. Rep. (N.S.) Chanc. 427,

is now overruled by the decision in *Drummond v. Drummond* (*ubi supra*).

Mr. Kay, in reply.—In all the cases mentioned in which service has been allowed there have been several defendants, some of whom only were out of the jurisdiction. Here Mr. Guild is the sole defendant.

BACON, V.C.—Both the points raised by this motion are of considerable interest no doubt, and I will first deal with the question as to the regularity of the order which was obtained *ex parte*. I think that order was irregular in the form in which it was drawn up; but, being drawn up upon an affidavit stating that the residence of the defendant was in Glasgow, I think the order must and ought fairly to be read as authorising a service in Glasgow. The use of the words "or elsewhere," if the words "in Scotland" had followed, would have been, in my opinion, wholly regular. I have said I think there was an irregularity in the terms in which it was drawn up; but I think I should regard the substance of the case rather than the mere irregularity which has been committed in the terms of the order; and since I find it proceeded upon an allegation to the Court that the defendant was resident in Glasgow, and that under this order he had been served in Glasgow, I do not think I ought to set aside the order upon that ground. I do not think, however, that the application of the defendant in that respect was so unreasonable as that I ought to give costs against him, although I decline to accede to his application.

But the other point that has been argued is of greater importance and greater interest than the first. The bill, as it has been described, relates to certain shares, among other things, in a joint stock company in England. The shares cannot be anywhere but in England. The property

of which they are shares is in England, and it is to an English interest alone that part of the suit relates. No doubt that is mixed up with a personal demand against the defendant. The defendant is bound to answer for his acts relating to those shares, and that is all, as I understand, that the bill seeks against him. He is as much a subject of the Queen as if he was resident in England, and is called upon to account for his dealings with these shares. The subject-matter is in England, every part of it except only his personal conduct. If a decree is made which the plaintiff asks for, the possibility of his dealing with the shares will be removed, and the necessity of his depositing the certificates will be established. However that may be, that need not be anticipated; but upon the statements in the bill, which I take not as proved but as uncontradicted, the suit relates solely to property in England which the defendant is liable, upon the allegations in the bill, to answer for; and I think, therefore, the bill must be answered by him in England. I think that is the meaning of all the statutes that have been passed and all that has been said by the Judges relating to service abroad. There might have been some danger owing to the vagueness of those words, "or elsewhere," if a man had been called upon to answer within fourteen days when he was in some foreign country elsewhere than in Scotland; but no such danger can happen in this case. The fourteen days may or may not be sufficient, and if any application is made to extend that time now, I shall readily listen to it. I think the irregularity in the order is one which does not entitle or require me to discharge the order. That would be mere formality, putting the plaintiff to obtain to-morrow a similar order; and since I find that service has been duly effected within the city of Glasgow, I cannot upon that ground discharge the order. I can make no order as to costs. If any application is made to extend the time I will readily listen to it.

Solicitors—Messrs. Gregory, Rowcliffes & Rawle, agents for Messrs. Hall, Stone & Fletcher, Liverpool, for the plaintiffs; Messrs. Clarke, Son & Rawlins, for the defendant.

MALINS, V.C. } THE UNITED LAND COMPANY
1873. } (LIMITED) v. THE GREAT
Nov. 4, 5. } EASTERN RAILWAY COMPANY.

Railway Company—Severed Lands—Communications—Level Crossing—Right of Way.

The authorities establishing the principle that a right of way cannot be increased by imposing an additional burden on the servient tenement, do not apply to lands taken by a railway company.

A railway company bought lands, which at the time of the purchase were either waste or marsh lands or were used solely for agricultural purposes, subject to the obligation of making communications across their railway for the convenient occupation and enjoyment of the lands severed by it; and they contracted to make and maintain, and made and maintained, such communications by means of four level crossings, three of which were thirty feet, and the remaining one twenty feet in width. The severed lands afterwards passed into other hands and became building sites:—Held, that the enjoyment of the lands meant, not merely the use and enjoyment thereof for the purposes for which they were used at the time of the contract, but the use and enjoyment thereof in any manner that subsequent events might render expedient, consistent with the existence of the railway; and that the right of way being unrestricted as to purpose, the subsequent owners and their tenants and assigns of the houses built upon the lands were entitled to the unrestricted use of the level crossings for all purposes whatever, but so as not to obstruct the proper working of the railway.

In the year 1847, the Eastern Union Railway Company (since absorbed by the Great Eastern Railway Company) having a railway from London to Manningtree, obtained parliamentary powers to make a railway from Manningtree to Harwich. Amongst the lands, which by their Act they were empowered to take, were certain lands near Harwich on the shore of the river Stour, which were originally marsh or mud lands vested in the Crown for the purposes of the defence of the realm by a statute of Queen Anne. At the time of the passing of the Eastern

Union Company's Act in 1847, these lands were let to tenants of Her Majesty for grazing cattle; and by the 19th section of that Act, it was enacted that it should not be lawful for the company to make any deviation from the main line of the railway as laid down on the deposited plans, "through the lands of Her Majesty without the previous consent in writing of two of the Commissioners, for the time being, of Her Majesty's Woods, Forests, Lands, Revenues, Works and Buildings, first had and obtained, any line of deviation shewn on the said plans or otherwise to the contrary notwithstanding; and the said company shall, and they are hereby required at their own costs and charges, to make and construct such convenient communications across, over or under the said railway where it shall be carried through or over the lands of Her Majesty as shall, in the judgment of the Commissioners, for the time being, of Her Majesty's Woods, Forests, Lands, Revenues, Works and Buildings, be necessary for the convenient enjoyment and occupation of the lands of Her Majesty, and such communications when so made shall at all times be kept in good order and repair by and at the expense of the company."

The Crown having the power to alienate these lands, an agreement for the sale of them was entered into between the Crown and the railway, and embodied in an indenture, dated the 25th of February, 1854, made between Her Majesty of the first part, the Hon. Charles Alexander Gore, one of the above-mentioned commissioners, of the second part, and the railway company of the third part, by which, after reciting the taking of the land in question (which amounted to four acres thirty-one perches), and fixing the price, the company agreed as follows—

"The said company shall and will, at their own expense, well and sufficiently execute the following works with good and proper materials, to the satisfaction of the said Charles Alexander Gore or other the commissioner or commissioners, for the time being: Four level crossings at the points marked respectively with the letters A, B, C and D on the said plan, with proper approaches thereto from the lands on the other side

thereof, the crossings at the points A, C and D to be thirty feet in clear width, and the crossing at the point B to be twenty feet in clear width."

The land required by the railway company was subsequently conveyed to them by an indenture, dated the 23rd of May, 1865, whereby they covenanted that they would, at all times thereafter, maintain and keep in good repair the various works which had been lately performed by them on and adjacent to the lands conveyed—specifying the level crossings and the approaches thereto.

The railway was duly made, and the level crossings were constructed, though of a rather less width than was specified in the agreement.

In 1866 an agreement was entered into between the Crown and the Harwich Harbour Company, for the sale of part of the above-mentioned Crown lands, with the use of two of the said level crossings over the railway, to the Harwich Harbour Company; and by an indenture, dated the 1st of November, 1871, the benefit of this agreement was transferred to the plaintiffs, who were a building company, and the Crown lands in question, together with the use of the two level crossings, were conveyed to them.

Before the conveyance the lands or a considerable portion of them had been laid out for building, some plots had been taken, and houses were built or in course of building, the only access to which, except from the sea, would be over the two level crossings in question. In this state of things the defendants, on the 1st of December, 1871, sent the following notice to the secretary of the plaintiffs—

"The attention of the directors of the Great Eastern Railway Company has been called to a prospectus or notice headed 'Harwich Estate, Essex (East), close to the Great Eastern Railway station—Freehold Building Plots'—intimating the offer by the 'United Land Company (Limited)' to purchasers of freehold building plots of land adjoining the Great Eastern Railway at Harwich, and also to a sketch plan presumably referred to in such prospectus or notice. The plan shews two level crossings from the Dovercourt Road on the easterly side of the

railway, to two intended new streets on the westerly side of the railway, to be constructed in connection with the laying out of land on the said westerly side for building purposes. The notice also intimates that two of the streets to be formed (presumably the above-mentioned two streets) will form a direct communication between the Bath side and the Dovercourt Road. I am instructed to give you notice that the Great Eastern Railway Company will not permit the level crossings to be used by the owners or occupiers of any houses to be erected on the said land on the westerly side of the railway."

The railway company also put up a notice at one of the crossings that there was no public thoroughfare over it, and, according to the plaintiffs' evidence, the defendants also on various occasions placed loaded trucks to obstruct the two crossings, the nearest of which was about 700 feet from their Harwich station. The plaintiffs then filed their bill, praying for a declaration that they were entitled for themselves, their tenants, and under-lessees and occupiers of the messuages and hereditaments purchased by them, to the free and uninterrupted use and enjoyment of the said level crossings and each of them, and for an injunction to restrain the defendants from obstructing or impeding such free and uninterrupted use and enjoyment. The suit now came on upon motion for decree.

Mr. Cotton and Mr. Townsend, for the plaintiffs.—The plaintiffs have now all the rights which the Crown had, when the contract for the sale of the lands in question to the railway company was entered into. There was no restriction in the original contract as to the manner in which the communications between the severed lands were to be used, and the plaintiffs have the right of using the level crossings referred to in the bill for any purpose whatsoever, and, therefore, for the purposes of access by their under-tenants or assigns of the houses built between the railway line and the sea. The cases resting on prescription or grant for a limited purpose, such as

Allan v. Gomme, 11 Ad. & E. 759; 3

P. & D. 581; s. c. 9 Law J. Rep.

(N.S.) Q.B. 258,

referred to in *Gale on Easements*, 3rd ed.,

291, have no application, moreover the decision in

Allan v. Gomme (*ubi supra*)

was disapproved of in

Henning v. Burnet, 8 Exch. Rep. 187 ;
s. c. 22 Law J. Rep. (n.s.) Exch.
79.

A grant must always be construed against the grantor—

The South Metropolitan Railway Company v. Eden, 16 Com. B. Rep. 42,

and the company having chosen to enter into a contract of this kind, cannot set up as a reason for not performing it the inconvenience to the public by the interference with their traffic—

Raphael v. The Thames Valley Company, 35 Law J. Rep. (n.s.) Chanc. 659 ; s. c. Law Rep. 2 Eq. 37 ; (on app.) 36 Law J. Rep. (n.s.) Chanc. 209 ; s. c. Law Rep. 2 Chanc. 147,

even if such inconvenience was likely to result, of which there is here no evidence.

Mr. J. Pearson and *Mr. Smart*, for the defendants.—The plaintiffs cannot increase their rights by altering the character of the lands. The object for which these level crossings were made was not to give any advantage to the public, but simply as a means of communication between portions of lands and fields, either waste or occupied, and used only for grazing purposes. This was the nature of the occupation when the right of way was granted, and a right of way granted for one purpose cannot be used for another, nor can a right of way be increased by imposing an additional burden upon the servient tenement—

Williams v. James, 36 Law J. Rep. (n.s.) C.P. 256 ; s. c. Law Rep. 2 C.P. 577.

So in

Ballard v. Dyson, 1 Taunt. 279,

a right of way for carriages was held not to extend to a right of way for cattle. And in

Cowling v. Higginson, 4 Mee. & W. 245 ; s. c. 7 Law J. Rep. (n.s.) Exch. 265,

and

Dand v. Kingscote, 6 Mee. & W. 174 ;
s. c. 9 Law J. Rep. (n.s.) 279,

the nature of the occupation, and the

purpose for which the right of way was granted, were held to limit the right of user. To put the object of these level crossings at the highest, they were accommodation works for agricultural purposes, constructed without any reference to giving access for future building, and they must be limited to their original purpose—

The Queen v. Brown, 8 B. & S. 456 ;
s. c. 36 Law J. Rep. (n.s.) 322 ;
Law Rep. 2 Q.B. 630.

The decision in

Allan v. Gomme (*ubi supra*)

is directly in our favour, and cannot be considered to have been overruled by

Henning v. Burnet (*ubi supra*), which contains no decision on the point in question, but only an *obiter dictum* of Baron Parke.

Mr. Cotton was not called upon to reply.

MALINS, V.C.—The point raised by this case is one of great importance to the plaintiffs, who are a building company, and also to the Great Eastern Railway Company who say that the rights claimed by the plaintiffs, if they exist, will be productive of great inconvenience to them. A question is also raised of very considerable importance to the public in general, or at all events to the owners of land, as to what is the effect of having a communication under or across a railway. In this case the question relates solely to a particular sort of communication across the railway, called a level crossing.

The question arises in this way. The Great Eastern Railway, under that general name, has absorbed several other companies. In the year 1847, the Eastern Union Railway Company having made a railway running from London to Manningtree, obtained the Act referred to in this case, empowering them to make a railway from Manningtree to Harwich, with branches thereout and for other purposes. To make the railway it was necessary to take certain lands belonging to the Crown, which the Crown had the power to alienate, and the Act in giving the company the necessary powers of deviation, restricts them with regard to the Crown lands in a manner in which they are not restricted with regard to the

lands of private individuals. [His Honour here read the 19th section of the Act, and continued.] These communications, then, are to be such as shall, in the judgment of the Commissioners for the time being, be necessary for the convenient enjoyment and occupation of the lands of Her Majesty, and such communications were made.

Now, what is the meaning of the enjoyment of the lands of Her Majesty? When we speak of the enjoyment of land, it is not usually meant that the land is to be enjoyed in the precise mode or for the precise purpose for which it is used at the then present time. The use and enjoyment of land means the use and enjoyment of it in any manner that subsequent events may render expedient. Nothing can, in my opinion, be more narrow than the attempt to put upon the language of this Act of Parliament the construction that, because the land was used in a particular manner at that time, it must necessarily be used in the same manner for all future time, or actually be blocked out from all communication with the outer world. My opinion is, that the meaning of the Act of Parliament is that there was to be such communication made as should, as far as practicable, consistently with the existence of the railway on the land, render the land as enjoyable and as free to be used as if the railway had not been constructed at all. That indeed is the object of all railway legislation. Necessarily railways cannot be made without invading the rights of private individuals. Therefore all persons are bound to submit their rights to the public, and those who are most reluctant to part with their property are obliged to do it compulsorily by Act of Parliament. But at the same time as the legislature throws upon them the obligation of parting with their land, it protects them as far as possible by obliging the company which takes it for the purpose of constructing the railway, to make such communications as shall either be agreed upon, or be prescribed by the particular Act of Parliament, or be settled by the tribunal appointed for the purpose. Therefore, when one part of an estate is severed from another by a railway, it is always a condition that sufficient commu-

nication shall be made either over the railway by a bridge, under the railway by an arch, or across it by a level crossing. But I apprehend, whatever the mode of communication, the object is that the rights of the landowner shall be in no way prejudiced, except so far as they are prejudiced by the actual construction of the railway. He is to have as much enjoyment and as free use of his land after the railway is constructed as he had before, so far as the exercise of those rights does not interfere with the rights of the railway company, and the rights of the public in running over the lands upon the railway.

Now this being the condition imposed on the railway, they took the land, and the period arrived when it was necessary for them to agree with the Crown as to the price to be paid for it. That contract was entered into by the instrument of the 25th of February, 1854. Now this is land which had been, as I understand, to a certain extent reclaimed; some of it was mud land which at that time it was probably considered highly unlikely would ever be built upon. At the same time the changes are so great in the conditions of land and society, that that which might appear highly improbable at one time ever to become building land, in the course of a few years turns out quite the contrary. At all events this was land vested in the Crown, which the Crown had a right to turn to the greatest possible advantage.

When the price of land is settled, as between a landowner and a railway company, there are two things to be considered—first, the absolute value of the land taken; and secondly, the damage by severance. The damage by severance is frequently greatly mitigated by the nature of the communications which are made between the two portions of the land severed by the railway. If, therefore, the land is so situated that a level crossing can be conveniently made, the damage by severance would be comparatively small; so also if there could be a cattle creep or an arch. But if the circumstances are such that no communication can be made, then the damage by severance is greatly increased. Therefore, in assessing the

damage by severance the nature of the communication forms a consideration, and it was one which the Crown in settling with this railway would consider, and if convenient communications could be made, it would mitigate the price to be paid for the land. In the contract of the 25th of February, 1854, all this was taken into consideration. [His Honour here read the contract.]

Now as to the intention of the parties it is perfectly plain that if it had been in their contemplation that this land was to be used merely for agricultural purposes it would have been wholly unnecessary to require that the crossings at three places should be thirty feet and at the other twenty feet wide; because for the largest waggon used on a farm no such width could be required, and it would be utterly useless to have those dimensions unless the parties contemplated at that time that this land might at some future period be used for building purposes, that it might become the site of part of the large town of Harwich, or of another town, or at all events be used for any purpose which the owners for the time being might think necessary.

Then it has been very strenuously argued that when a right of way is granted for one purpose it cannot be used for another. I quite agree. The law is perfectly settled that if one man has a right of way over the land of another, to go to a particular place, he cannot use it for the purpose of going to that place and a place beyond it; because the servient tenement is only subject to a certain use and a certain inconvenience. He has agreed that it shall be used for a particular purpose, and having agreed that it shall be used for that particular purpose, he is not bound to submit to its being used for any other purpose. But this is not the case of a servient tenement. I cannot look upon the railway as the servient tenement. The question is, what is the effect of land being taken by a railway company? I say again it is an inconvenience to which the landowner is bound to submit, but to which he does submit upon terms of making the best bargain he can with

regard to the price and the communications; and when he or the Legislature has settled what those communications are to be, I apprehend the true view of the case is that the owner has the most unlimited power of using the land on either side for which the communications are made for any purpose which may be expedient at any time, however distant, to which he may desire to apply his land.

So even if it were the common case of private use, I should entirely concur in the views expressed by Mr. Baron Parke in *Henning v. Burnet* (*ubi supra*), that "where there is no restriction, the right of way to go to land without saying that it is for any particular purpose, is to go to it for any purpose to which the land can be applied." It is very true, as Mr. Pearson says, that this dictum does not overrule the decision of the Court of Queen's Bench in *Allan v. Gomme* (*ubi supra*), on which Mr. Baron Parke was then commenting; but the opinion he there expresses is supported by the late Lord Chief Justice Bovill in *Williams v. James* (*ubi supra*), in which both the Lord Chief Justice and Mr. Justice Willes laid down the same rule, viz., that the right of going to land unrestricted as to purpose, is a right to go to it for any purpose whatever. If, therefore, this were to be regarded as a question of right of way over the land of an individual, the purpose not being restricted, the right of way over this level crossing being unrestricted, would, in my opinion, be a right of way for any purpose whatever, and would therefore carry the right of using the level crossing for the purpose of going to buildings afterwards erected on the land.

Now this being the contract, it is carried into effect by a conveyance executed by the railway company dated the 23rd of May, 1865. The only material circumstance there, is that there is no recital of the fact of the works having been constructed, but the contract itself shews very distinctly that they had been constructed. What, then, does this instrument do? Does it abandon anything? On the contrary, it keeps up all those rights; for it contains a covenant

by the company to maintain and "keep in good and substantial repair and condition the several works which have been lately performed by them on and adjacent to the said land," specifying the four level crossings in question, "and the gates and approaches thereto from the lands on either side thereof; also the road, thirty feet wide from the crossing at the point C." Then the level crossings have been made. It appears that they have not been made of the dimensions required by the contract of 1854; but I understand the plaintiffs make no complaint as to that, and therefore all that I conceive the plaintiffs are entitled to is the maintenance of the level crossings as they existed in 1865, at which time the Crown expressed its satisfaction with the works as then constructed; and beyond the condition in which they were at that time, I apprehend the plaintiffs can sustain no right.

Upon these grounds it appears to me on principle as well as upon contract, that the plaintiffs are entitled. It appears so to me, upon the broad principle that the right of the Crown is to use the land for any purpose to which it can by possibility be applied, and the obligation to construct these level crossings was an obligation to make such communications and of such width (for that is plainly shewn by the dimensions of the crossings) as would enable persons who should erect buildings on these lands to use them for the purposes of those buildings.

I am also of the same opinion upon the contract between the parties.

Then what right have the railway company to complain? They say it is "inconvenient." The railway company, however, were bound to anticipate those inconveniences, which were not difficult for them to foresee. It was obvious that being so immediately contiguous to the rising town of Harwich, it was highly probable that these lands would be applied for building purposes. Therefore, if their object was to have that restricted use of the communications which they contend for, they should have contracted for it, and not having done so, they are, in my opinion, bound to submit to the use of the level crossings for any

purpose whatever to which they can be applied.

With regard to the existence of inconvenience, the evidence on the subject is very slight. [His Honour then referred to the evidence, as mere expressions of opinion unsupported by facts, and after noticing that the nearest level crossing was 700 feet from the station, said that he did not believe that any practical inconvenience had arisen, and that in his opinion the level crossings could be used with advantage to all occupiers of the houses now built or proposed to be built on this land, without injuring the interests of the railway company. His Honour then concluded:] However that may be, it is a matter which I cannot enter into. The company have taken the land upon the condition that there should be these level crossings, and I am clearly of opinion that these level crossings may be used for any purposes to which the land may be applied.

The plaintiffs have therefore established their right, and there will be a declaration in the terms of the prayer, with the addition of the words, "but not so as to obstruct the proper working of the railway."

Solicitors—Mr. Henry Smith, for the plaintiffs;
Mr. W. H. Shaw, for the defendants.

BACON, V.C. }
1874. }
Feb. 19. }

ASKEW v. BOOTH.

Will—Married Woman—Separate Estate—Savings—Balance at Bankers—Intestacy.

A married woman with separate estate over which under a settlement she had power of disposition notwithstanding coverture, gave by will the whole of the funds constituting such separate estate upon trust for her nephews and nieces, and also bequeathed all funds purchased out of the savings of her separate estate upon the same trusts. She died, leaving a large balance on her current account at her bankers:—

Held, that the testatrix had not purchased any funds out of the savings at her bankers, and that such savings were undisposed of, and passed to her husband as administrator.

The bill in this suit was filed to administer so much of the estate of Mary Ann Rowley, as under certain indentures of settlement she had a power of appointment over, and as she did appoint by her will.

By settlements executed on the occasion of the second marriage, in the year 1844, of the testatrix with the defendant, John Jephson Rowley, certain property was settled upon trust to pay the income to the testatrix during her life, then to J. J. Rowley during his life, and, subject to certain trusts in favour of children which did not take effect, then as well the capital as the income of the trust premises was to be in trust for such persons as the said testatrix should by deed or will (notwithstanding coverture) appoint.

In 1852 the testatrix was separated from her husband, and there never was any issue of the marriage.

By her will, dated the 28th of March, 1870, the testatrix, in exercise of her power of appointment, gave the whole of the trust funds and premises subject thereto to the defendants, Samuel Rooth and William Askew, upon trust, after payment of her just debts, funeral and testamentary expenses, for certain of her nephews and nieces, and then continued her will as follows—"And I also appoint, give and bequeath all funds and property whatsoever or wheresoever, which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use, to the same persons and upon the same trusts and in the same manner, and as part of the property hereinbefore appointed."

The testatrix died in July, 1872. Probate of her will was granted to Samuel Rooth and William Askew, and in the month of September following general letters of administration of her estate and effects were granted to her husband, John Jephson Rowley.

Amongst other property the testatrix left a sum of 1,780*l.* standing on her cur-

rent account at her bankers. This sum had been accumulated by her out of income derived from her separate estate. Another question now arose, whether it passed under her will to her trustees, or whether it was undisposed of, and so passed to her husband as her administrator.

Mr. Bagshawe, for John Jephson Rowley, contended that the testatrix had not disposed of the savings at her bankers, and that they therefore passed to her husband—

Johnstone v. Lumb, 15 Sim. 308; s. c. 15 Law J. Rep. (N.S.) Chanc. 386;
Humphery v. Richards, 25 Law J. Rep (N.S.) Chanc. 442;
Re Rosenthal's Settlement, 6 W. R. 139.

Mr. Kay and *Mr. Owen*, for the trustees.—The testatrix evidently intended that all property over which she had disposing powers should pass under her will to her trustees, and the words used by her are sufficient to cover her savings. The Court is always anxious to prevent an intestacy.

Mr. Eddis and *Mr. M. Cookson*, for one of the legatees.—These are funds "purchased" out of the savings of separate estate. The legal meaning of the word purchase is to acquire, and that is the meaning which applies to this case.

BACON, V.C., held that he could not, without introducing some words into the will, hold that the testatrix had disposed of the money standing on her current account at her bankers at the time of her death, and that money at a bankers could not come under either of the terms "funds" or "property." He therefore declared that there was an intestacy as to this sum, and that, subject to the liability to pay the debts of the testatrix, the husband was entitled to it as administrator.

Solicitors—Messrs. Frere, Forster & Frere, for plaintiff; Messrs. Dobinson & Geare, agents for Messrs. W. & B. Wake, Sheffield, and Messrs. Singleton & Tattershall, agents for Mr. W. E. Tattershall, Sheffield, for defendants.

LORDS JUSTICES.

1873.

July 24, 25.

Dec. 2.

CAVANDER v. BULTEEL.

Constructive Notice—Partners—Joint Occupation of Land—Title.

B. & C. carried on business together in partnership, under articles by which the real estate upon which their business was carried on, and of which they were seised as tenants in common in fee, was made partnership assets. B., to secure a separate debt, mortgaged his moiety of the estate to bankers, who were aware when they took the mortgage that the premises were in the occupation of the partners, and that they carried on their business thereon. B. absconded, leaving partnership debts which C. was obliged to pay:—Held, that the bankers had constructive notice that the property belonged to the partnership, and that C. was entitled to be paid out of the property what was due to him from the partnership in priority to the bankers' claim under their mortgage.

This was an appeal from a decree of Wickens, V.C.

By deed, dated the 29th of December, 1863, a freehold piece of land was conveyed to such uses as H. Bewlay and the plaintiff Cavander should jointly appoint, and in default of such appointment, as to one moiety to Bewlay in fee, and as to the other moiety to the plaintiff in fee. The plaintiff and Bewlay erected a manufactory on the land and carried on thereupon the business of cigar and tobacco manufacturers under articles of partnership, dated the 3rd of December, 1864, by which the land was made partnership property. In June, 1866, Bewlay mortgaged his moiety of the premises to the bankers of the partnership to secure a debt due to them on his separate account. The mortgage deed recited the conveyance to Bewlay and the plaintiff, but did not refer to the partnership otherwise than so far as it described the premises as being in the occupation of Bewlay, and used by him for the purposes of his business as a tobacco manufacturer. In June, 1870, Bewlay absconded, leaving unpaid partnership debts to a

large amount, which the plaintiff was obliged to pay, and in consequence a considerable sum became due to the plaintiff from the partnership. The only partnership asset remaining was this property. There remained due from Bewlay to the bankers an amount exceeding the value of his moiety in the property. The plaintiff filed his bill against the bankers and others for partnership accounts and for a declaration that he was entitled to be paid out of the property in priority to the bankers' mortgage debt the amount which should be found due to him. Vice-Chancellor Wickens dismissed the bill as against the bankers. The plaintiff appealed from this decree.

It appeared that the bankers who, as stated above, were the bankers of the firm, were well aware when they took the mortgage of the existence of the partnership between Bewlay and Cavander, but on the hearing in the Court below there was no sufficient evidence to shew whether they were also aware that the property was in the occupation of the partnership. When the case came on upon appeal in July, 1873, the Lords Justices postponed the hearing of it for the purpose of obtaining further evidence upon this point. The bankers on the 2nd of December attended in Court and admitted that when they took the mortgage they were aware that the partnership business was carried on upon the premises.

Mr. Lindley and Mr. Jason Smith appeared on behalf of the plaintiff in support of the appeal. They argued that the bankers had constructive notice at the time of taking their mortgage of the title of the partnership to this property. They knew that Cavander and Bewlay were partners; that the property was in their joint occupation for business purposes, and that they had a joint power of appointment enabling them to deal with the property. They had abstained from making enquiries which they ought to have made, and must be taken to have known what they would have ascertained if they had made them, viz., that the land was the property of the partnership—

Jones v. Smith, 1 Ha. 43; s. c. 1 Ph. 244; s. c. 11 Law J. Rep.

(n.s.) Chanc. 83; and on appeal 12 Law J. Rep. (n.s.) Chanc. 381; *West v. Reid*, 2 Ha. 249; s. c. 12 Law J. Rep. (n.s.) Chanc. 245; *Ware v. Lord Egmout*, 4 De Gex, M. & G. 460; s. c. 24 Law J. Rep. (n.s.) Chanc. 361; reversing 23 Law J. Rep. (n.s.) Chanc. 499; *Daniels v. Davison*, 16 Ves. 249; *Holmes v. Powell*, 8 De Gex, M. & G. 572; *James v. Litchfield*, 39 Law J. Rep. (n.s.) Chanc. 248; s. c. Law Rep. 9 Eq. 51.

Mr. Bristowe and Mr. Batten, for the bankers.—The knowledge of the fact that the property had been conveyed to Bewlay and Cavander as tenants in common, and that the land was in their joint occupation under the conveyance did not put the bankers upon their enquiry and was not constructive notice of the claims of the partnership. The doctrine of—

Daniels v. Davison (*ubi supra*), applied only to a case where the possession was not according to the title. The contrary was the case here. The doctrine of that case would not now be extended. The plaintiff had been guilty of laches in allowing the deed to remain in Bewlay's possession.

No reply was called for.

LORD JUSTICE JAMES said—Having before us this morning the evidence of the two bankers who candidly stated their knowledge at the time when they took their mortgage that the business of the firm was carried on upon this land, the only ground upon which the Vice-Chancellor decided this case is entirely removed. The Vice-Chancellor thought that at the time when the mortgage was taken the bankers had no notice that the firm of Bewlay & Co. was in possession of the premises. The question is whether the knowledge which the bankers now admit they had of that occupation was notice to them of the rights of the partners. I am of opinion that in this case the bankers had ample notice of the rights of the partners. To hold this is no extension of the rule in *Daniels v. Davison* (*ubi supra*) that notice of the property being in the possession of a person is notice of that person's title

thereto. It was said that the rule would not apply where the title was that of two tenants in common. But the title of a partnership is a distinct thing from the title of two tenants in common of freeholds. A partnership must be presumed to be in possession of the entirety of the property for the purposes of their trade. And they being thus in possession, the same result must follow from a knowledge of their possession as in the case of any other owner. It is admitted that the principle would have applied if there had been a third partner who was not one of the tenants in common, and it is difficult to suggest any ground of distinction between the two cases. Here was a firm in possession of the property; that was notice to the bankers who were bound to enquire as to the rights of the firm. It was much more natural that these bankers should have had notice that the partners, who were their customers, had some interest in the property than that the purchaser in *Daniels v. Davison* (*ubi supra*) should have been put upon his enquiry. Then it was urged that the plaintiff was guilty of some negligence in allowing the deed of conveyance to remain in Bewlay's hands. But I see no ground for imputing to him any such negligence, having regard to Bewlay's co-ownership of the property. I am of opinion that the decree must be reversed and that the plaintiff is entitled to the declaration he asks for.

LORD JUSTICE MELLISH.—I am of the same opinion. I should be sorry to extend the doctrine of constructive notice, but this case comes exactly within the authority of *Daniels v. Davison* (*ubi supra*). The bankers knew when the plaintiff and Bewlay became tenants in common of these premises, and they knew that they were carrying on their partnership business on these very premises. They had notice, therefore, that the partners had entered into an agreement of a greater or less extent for a partnership either at will or for years. The bargain between them might be, as in this case, that the property should be partnership assets, or it might be to some other effect regarding the property. The bankers, knowing of the occupation for the pur-

poses of the partnership, were bound to enquire what the bargain was. I agree that there is no evidence of laches on the plaintiff's part and that his claim is entitled to priority over the claim of the bankers.

Solicitors—Mr. Weall, for plaintiff; Messrs. Wedlake & Letts, agents for Mr. Edmonds, Plymouth, for defendants.

MALINS, V.C.	}	HATTON v. HAYWOOD.
1878.		
Nov. 4.		
SELBORNE, L.C.		
JAMES, L.J.		
MELLISH, L.J.		
1874.		
Jan. 15, 19.		

Judgment Creditor—Writ of Elegit—“Actual Delivery in Execution”—Charge on Equitable Estate—“Incorporeal” Hereditaments—Statute 27 & 28 Vict. c. 112.

To entitle a judgment creditor to a valid charge on his debtor's real estate, under 27 & 28 Vict. c. 112, there must be actual delivery in execution under the writ of elegit. The Act makes no distinction in that respect between hereditaments corporeal and incorporeal.

Where the estate of the judgment debtor is equitable only and therefore incapable of delivery in execution the creditor should obtain the decrees of the Court of Chancery vesting in him the estate of the debtor, and this will be equivalent to delivery in execution in the case of legal estates.

The plaintiff recovered a judgment at law against the owner of the equity of redemption in certain real estate. The judgment was duly registered, and a writ of elegit, also duly registered, was issued against the lands of the judgment debtor, and delivered to the sheriff for execution, but in consequence of the debtor's interest in the lands being merely equitable, the sheriff was unable to execute the writ, and he accordingly returned “nihil.” The debtor subsequently became bankrupt. A bill having been filed by the judgment creditor for a declaration that his judgment constituted a valid charge on his debtor's equity of redemption, a

demurrer for want of equity was allowed by one of the Vice-Chancellors, and upon appeal the judgment was affirmed by the full Court. Thornton v. Finch (4 Giff. 515; s. c. 34 Law J. Rep. (N.S.) Chanc. 466) observed upon.

Demurrer.

The bill stated as follows—

Henry Austin, previously to and at the time of his bankruptcy hereinafter mentioned, was possessed of or entitled to certain lands or hereditaments in Middlesex, subject to certain mortgages or incumbrances thereon.

On the 4th of January, 1870, the plaintiff recovered judgment against the said H. Austin in an action at law for 800*l.*, and costs. The judgment was entered upon a warrant of attorney given by the said H. Austin to the plaintiff, to secure payment to the plaintiff of 377*l.* and interest. The judgment was duly registered in the Middlesex registry.

On the 9th of January, 1872, a writ of elegit, directed to the sheriff of Middlesex, was issued out of the Court of Queen's Bench, upon the judgment, against the goods, chattels, lands, tenements and hereditaments of the said H. Austin, and was duly registered in the Court of Common Pleas, pursuant to the statute 27 & 28 Vict. c. 112.

On the 10th of January, 1872, the writ was delivered to the sheriff for execution, but he could not execute the same, being unable, by reason of the existence of the said prior mortgages or incumbrances, and by reason of the estate or interest of the said H. Austin being merely equitable, to discover any goods, chattels, lands, tenements or hereditaments of the said H. Austin, in his, the said sheriff's, bailiwick, and the sheriff returned the writ “nihil.”

In July, 1872, the said H. Austin was adjudicated a bankrupt, and the defendant was duly appointed trustee of his estate.

Under these circumstances, the plaintiff alleged he had, by virtue of the said judgment, a charge in equity on the estate and interest of the said H. Austin in the aforesaid lands, tenements and hereditaments.

The defendant subsequently sold Austin's equitable interest in certain land, under a contract entered into by Austin with the purchaser, and received and retained the purchase money; and was about, and, as it was alleged, with a view of defeating the plaintiff's charge under his said judgment, to concur with the prior mortgagees in selling Austin's interest in the other lands, tenements and hereditaments aforesaid, and to retain the balance of the purchase moneys, after satisfying the prior mortgages, without satisfying the plaintiff's judgment debt.

The plaintiff then submitted that, under the circumstances, he was unable to procure the said lands, tenements and hereditaments to be delivered in execution to him, and that he had no remedy except in a Court of equity. He accordingly prayed that the said judgment, previously to and at the time of the bankruptcy of the said H. Austin, constituted a good and valid charge in equity on the estate and interest of the said H. Austin in the said lands, tenements and hereditaments, subject to the prior mortgages and incumbrances thereon, or on the surplus proceeds of the sales thereof, after satisfying such prior mortgages and incumbrances, and that the amount of the plaintiff's said judgment debt and the costs of suit ought to be paid to him out of such surplus proceeds; and for other relief.

The defendant demurred to the bill, for want of equity.

Mr. J. Pearson and *Mr. Whitehorne*, for the demurrer.—This bill is clearly demurrable, for the Act 27 & 28 Vict. c. 112 enacts (section 1) that no judgment shall affect any land "until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment." Here the land was not delivered in execution under the plaintiff's judgment, and therefore he has no interest therein, either at law or in equity—

Earl of Oork v. Russell, 41 Law J. Rep. (N.S.) Chanc. 226; s. c. Law Rep. 13 Eq. 210;

In re The Cowbridge Railway Company, 37 Law J. Rep. (N.S.) Chanc. 306; s. c. Law Rep. 5 Eq. 413.

This bill seems to have been filed on the authority of

Thornton v. Finch, 4 Giff. 515; s. c. 34 Law J. Rep. (N.S.) Chanc. 466;

but there the order was obtained by consent; the question as to the rights of the judgment creditor was not argued, inasmuch as the judgment debtor did not appear. See also the observations on that case in *Williams on Real Property*, 7th ed. addendum to p. 82, where it is submitted that there was no ground for the doubt stated in the marginal note as to the application of the statute to an equity of redemption. The judgment creditor has no lien on the land until he has got a return from the sheriff—

Guest v. The Cowbridge Railway Company, 37 Law J. Rep. (N.S.) Chanc. 909; s. c. Law Rep. 6 Eq. 619, 623.

The object of the Act, 27 & 28 Vict. c. 112, was, as the preamble expresses, to assimilate the law affecting real estate to that affecting pure personal estate in respect of judgments, and no judgment could affect personal chattels unless they were actually taken in execution under a writ of *fi. fa.* The allegation in the bill as to the warrant of attorney given to Austin by the plaintiff would also, if it were necessary to rely upon it, of itself afford sufficient ground for a demurrer, for the bill does not state that the warrant, or a copy thereof, was filed within twenty-one days after the execution thereof; if it was not so filed it was void, under section 26 of the Debtors Act, 1869.

Mr. Townsend (*Mr. Glasse* with him), for the bill.—We submit that we have satisfied the terms of the statute, and have a charge upon the land, inasmuch as we obtained the writ of *elegit*, we registered it, we placed it in the hands of the sheriff, and we got a return to it. We did, in fact, all we could.

"Actual" delivery, in the 1st section of the Act (27 & 28 Vict. c. 112) cannot mean "manual" delivery, for the word "land" is, by section 2, to be taken to include hereditaments, corporeal "or incorporeal," and incorporeal hereditaments are incapable of manual delivery. If the

Act had intended to apply to hereditaments that could not be delivered, it should have said so specifically. As Wood, V.C., said in

In re The Cowbridge Railway Company (ubi supra),

it could not have been intended that all the remedies given by 1 & 2 Vict. c. 110, should be swept away by a side wind. In that case the petition was dismissed, because the petitioners, the judgment creditors, were wrong in form; but the Vice-Chancellor expressly said that they might assert their equitable rights by bill, and have the legal impediment removed out of their way. Vice-Chancellor Wood's view was approved of by Giffard, V.C., in—

Guest v. The Cowbridge Railway Company (ubi supra).

It is also expressly laid down in *Seton on Decrees*, 3rd edit. p. 456, that equity will assist a judgment creditor in obtaining execution where some legal impediment prevents the creditor from obtaining his full rights at law, and will also give him execution on the equitable interests of the debtor. We submit, therefore, that this bill is sustainable.

MALINS, V.C., said that if execution had been delivered under the judgment upon the writ of *elegit*, it was clear the plaintiff would have brought himself within the statute 27 & 28 Vict. c. 112, and would have had an interest in the land. But, instead of taking execution, the sheriff returned "nihil," and while the return was in force the judgment debtor became bankrupt. The question was whether the judgment creditor had any interest in the lands of the judgment debtor. Now an Act on this subject was introduced into Parliament in 1864, and was referred to a select committee, on which he himself sat. Great care was bestowed upon the Act, the object of which could not be better expressed than in the preamble. The law was at that time in an anomalous state, and he could never understand why a judgment creditor should, by virtue of his judgment, have a greater interest in his debtor's lands than in his chattels. By virtue of his judgment he had, under the old law, a lien on his

debtor's lands, and was, in fact, a mortgagee. The Act 1 & 2 Vict. c. 110. s. 14 said that the judgment creditor should be in the same position as if the debtor's lands had been charged by writing under his hand. So that every judgment creditor became a necessary party to a suit for foreclosure or sale. This state of things involved a monstrous risk to purchasers. The remedies given by statute generally turned out to be practically useless, and nothing was left for the judgment creditor, the debtor having, in most cases, already mortgaged his lands to the utmost. On the occasion of every purchase it used to be necessary to search for judgments in every Court, the expense of which was very great. Therefore, to facilitate the transfer of land, this Act (27 & 28 Vict. c. 112) was passed. Nothing could be clearer than the object of this Act as stated in the preamble, that it was "desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes and recognisances."

Nothing could be more clear than the object of the legislature, that "no judgment, statute or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been *actually* delivered in execution, by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute or recognisance." Then it was said there were many interests in land which were incapable of delivery, such as rents, tithes, &c., and that therefore such interests could not be included in the Act. The 2nd section, however, said that the word "land" was to be taken to include hereditaments, "corporeal or incorporeal," that is, every kind of interest in land. He could not concur with Lord Hatherley in the opinion that the meaning of the Act was doubtful. He thought it was better to take the plain words of the Act, and in doing so he held that, unless certain things were done by the judgment creditor, he took no interest in the lands of his judgment debtor. The Act assimilated the law on the subject relating to real estate to that relating to pure per-

sonal estate, and said there must be actual delivery in execution. If *In re The Cowbridge Railway Company* (*ubi supra*), had been before him he should have held, without any doubt, that the judgment creditor took no interest unless he obtained actual delivery. Looking at *Guest v. The Cowbridge Railway Company* (*ubi supra*), he was inclined to think that Lord Hatherley did not really entertain the opinion in the other Cowbridge case that actual delivery was not necessary. As to *Thornton v. Finch* (*ubi supra*), he regretted the case was reported, because it had no real authority. The only persons before the Court were the mortgagees, who had no interest in the question, because they would be paid, and were paid. The only person interested in contesting the plaintiff's claim, the judgment debtor, did not appear: the question, therefore, was not argued, and he was of opinion that if he had had the case argued before him he should have adhered to the Act, which said that no judgment creditor could have any interest in any land, corporeal or incorporeal, unless he had actual possession of it by a writ of *elegit*. There was no good reason why a judgment creditor should have an interest above the other creditors, he having no contract. All creditors should share alike under a bankruptcy, unless one of them had put himself in the advantageous position given by the Act of Parliament. He, therefore, adhered to his decision in *Earl of Cork v. Russell* (*ubi supra*), and held that the plaintiff had no interest. The demurrer must, therefore, be allowed.

The plaintiff appealed.

Mr. Glasse and Mr. Townsend appeared for the appellant.

Mr. J. Pearson and Mr. Whitehorne, for the respondent.

The following additional authorities were cited upon the appeal—

Neate v. The Duke of Marlborough, 3 Myl. & Cr. 407;

Smith v. Hurst, 10 Hare 30, 49n.; s. c. 22 Law J. Rep. (n.s.) Chanc. 289;

Johnson v. Burgess, 42 Law J. Rep. (n.s.) Chanc. 400; s. c. Law Rep. 15 Eq. 398;

Mildred v. Austin, Law Rep. 8 Eq. 220;

Re Bailey's Trusts, 38 Law J. Rep. (n.s.) Chanc. 237;

Beavan v. Earl of Oxford, 6 De Gex, M. & G. 492;

1 & 2 Vict. c. 110;

2 & 3 Vict. c. 11;

3 & 4 Vict. c. 82;

18 & 19 Vict. c. 15;

22 & 23 Vict. c. 35;

23 & 24 Vict. c. 38;

27 & 28 Vict. c. 112.

THE LORD CHANCELLOR.—I think the decision of the Vice-Chancellor, by which he allowed the demurrer, was quite right. The preamble of the statute (27 & 28 Vict. c. 112) expresses that it is desirable to assimilate the law as to freehold, leasehold and copyhold estates to that respecting personal chattels in regard to statutes and recognisances.

The statute was manifestly founded on a large public policy, the object of which would be defeated if a narrow construction were put upon it, the intention being to assimilate the law affecting freehold, leasehold and copyhold estates to that affecting personalty, that law being that the chattels are not transferred until there has been what is practically an actual delivery in execution.

Then it is suggested that a construction making so great a change as that would throw some impediments in the way of the exercise of rights given by earlier statutes to judgment creditors; but the Act only affects judgments entered up after the passing of the Act; and, though it would, I think, have been a retrograde movement if Parliament had taken away from creditors all means of following their debtor's property without driving him to bankruptcy, yet, if the Legislature had thought fit to do so, that would, of course, have been binding.

Then what are the words used for assimilating the law as to realty (including chattels real) to the law as to pure chattels? The 1st section says that no judgment shall affect any land until such land has been "actually delivered in execution by virtue of a writ of *elegit* or other lawful authority." Now, it seems to me

that the statutes, so far from justifying the narrow construction of limiting the term "land" to land capable of being delivered in execution at law, tend to shew the opposite.

The 2nd section of 27 & 28 Vict. c. 112, says that the term "land" shall include all hereditaments, not only corporeal, but also incorporeal, which could not have been delivered in execution at all under the old law, and several others which were included in the 11th section of the statute 1 & 2 Vict. c. 110.

Then it is said that an interest in land which could not have been actually delivered in execution by the sheriff's return, such as equities of redemption, was not intended to be included. That would be a very arbitrary construction, and defeat the object of the Act as expressed in the preamble, and would put a narrow construction on the generality of the enacting clause. The words "actually delivered in execution," it is said, must contemplate something that may be actually delivered in execution, and there is, no doubt, some force in that argument; for one would have expected to find some mode indicated by which such interests could be got at for the purpose of enabling judgment creditors to obtain the fruits of their judgment; and it would be unlikely that the Legislature should say that that should be done which, with respect to some lands, could not be done at all. But even if, according to a sound construction of the Act, it appeared that the Legislature had done that, this Court can only give effect to the intention.

Then there is the 4th section, which says that every creditor to whom land has been delivered in execution shall be entitled to a summary remedy, but unless the land has been actually delivered in execution, he is not entitled. The same principle of construction seems to follow as to that section. Judgment or recognisance was to affect land under the first Act, only when it has been actually extended.

In *In re Cowbridge Railway Company* (*ubi supra*), the Vice-Chancellor said that it was not to be presumed that the Legislature intended absolutely to sweep away the benefits conferred on judgment credi-

tors by the 1 & 2 Vict. c. 110, without expressly referring to that statute, but that a bill must be filed to remove legal impediments. Well, I agree with that, more especially as that construction is confirmed by a sound construction of the statute as compared with the other enactments.

The 1 & 2 Vict. c. 110, largely extended the rights of judgment creditors, first, by enacting that the whole land instead of half should be subject to judgment debts; and, secondly, by enacting that as to all the real property of the debtor of every description including property which could not have been taken in execution by writ of *elegit*, and also every kind of property over which he had any disposing power, a judgment should be a charge which, as to the extent of it, should be exactly the same as if he had by writing under his hand agreed to charge the land, the remedies being made universal without reference to one kind of hereditament or another, with no distinction between those which at law are capable of being taken in execution, and those which are not. That appears to me to be not only the sound, but the necessary construction of the Act of Parliament.

The later statute leaves untouched all the rights given by the earlier one except so far as it expressly takes them away, and is to be read as if it had referred to the 1 & 2 Vict. c. 110, and said lands should not be specifically bound by judgments or recognisances by virtue of the 13th section of the former Act until actually delivered in execution. But the inchoate right (given by the first Act) to a charge on the lands and the right to have that charge perfected would still remain, and would be sufficient foundation for a suit in equity instituted for the purpose of perfecting that inchoate right.

The case of *Thornton v. Finch* (*ubi supra*) shews that though the land was such as could not be specifically bound under the Act until actually delivered in execution, yet the inchoate right arising from the judgment and the 1 & 2 Vict. c. 110, is such as can be the foundation of a bill in equity to make it a perfect charge.

And on the face of the section itself, though perhaps it is not worded with such clearness as is desirable in an Act of Parliament, yet we have that which shews that the statute does not make it absolutely necessary that the process of delivery in execution should be a legal one, for the words are that the delivery in execution shall be "by writ of *elegit* or other lawful authority," which points to such a delivery in execution as the subject is capable of, and that, it appears to me, would be sufficient to satisfy the language of the statute. In any case in which before the statute the judgment creditor might have come into equity to remove a legal obstacle, the judgment was the foundation of the claim for relief, and then the relief given, being in such a case a delivery in execution, whether in the form of a writ of assistance or sequestration, or the appointment of a receiver, would be sufficient to satisfy the statute, and thereupon the land would be bound. If so, the creditor is in no worse position under this enactment for getting the fruits of his judgment than he was before; but the land is clear from any charge until the creditor has done all he can to perfect his charge.

If that is the true construction of the Act, the cases of *The Cowbridge Railway Company* (*ubi supra*) and *Thornton v. Finch* (*ubi supra*) are consistent, and the difficulty which *prima facie* arises under the 5th section of the Act of 1864 is got rid of, because, though as shewn by the case of *Carter v. Hughes* (1), there can be only one extent at law, so that if that were the only mode of delivering in execution there would be a difficulty as to prior and subsequent charges under that section, yet if the Court of Chancery has the power where there is a legal obstacle to perfect the charge in equity that difficulty is removed. That construction, therefore, is not only required by authority, but also very satisfactory as removing the difficulties on the different sections with reference to one another; and if the difficulties were greater than they are as to the way in which judgment creditors are to work out their remedies, we should

be unwilling to repeal the provisions of the Act, and that would practically be the effect of overruling this demurrer.

I am therefore of opinion that the appeal must be dismissed with costs.

JAMES, L.J.—I am of the same opinion. It appears to me that independently of the 5th section the words of the Act of Parliament are too plain to admit of any doubt. The 1st section provides that judgments shall not operate as a charge until the land has been actually delivered in execution. That must mean delivery in execution having regard to the subject matter; and that must be from the nature of things sometimes only symbolical, and at others may be actual. Where the subject matter is a legal estate in land, there can be no doubt it may be delivered in execution by reason of the extent; but in this case there could be no delivery by the sheriff, because there was nothing which the sheriff could get by extent.

The 5th section certainly presents some difficulty, because there never could be that to which it could apply; and there never could be prior or subsequent charges. But I am satisfied there is no inconsistency between the sections. There may well be an existing charge consistently with the 1st section prior to the charge of the creditor who had obtained execution. Here, as at the time of the bankruptcy the land had not been delivered in execution, there was nothing to give the judgment creditor a charge upon it, for the bill was not filed until after the bankruptcy had taken place.

MELLISH, L.J.—I am of the same opinion. I think that any difficulty there may be in the construction of the first section is removed when once it is discovered what is the meaning of the words "actually delivered in execution."

In the first place, what is the legal effect of the return of the sheriff? The return of the sheriff does not, by itself, put the creditor in possession of the land itself. The effect of the sheriff's return is to vest in the creditor the debtor's interest in the land. When the return is made, if the land is actually in the possession of the debtor, the creditor can bring his action of ejectment and recover possession; or, if the debtor's interest is a reversion, he

(1) 2 Hurl. & N. 714; s. c. 27 Law J. Rep. (N.S.) Exch. 225.

may sue for and recover the rent, and so obtain possession of the reversion.

Then, when we come to equitable estates, what is it that vests the debtor's interest in the creditor? The decree of this Court does so, and therefore the decree of this Court does, in respect of equitable interests, that which the return of the sheriff does as to legal interests.

It follows that the difficulties raised on all the sections come to an end, and there is no reason to depart from the natural construction of the Act and say that a judgment shall be a charge on land which has not been actually delivered in execution.

Solicitors—Messrs. Hurford & Taylor, for the plaintiff; Messrs. Sheffield & Sons, for the defendant.

HALL, V.C. }
1874. }
Feb. 16. }

LANE v. SEWELL.

*Will—Construction—Specific Bequest—
"In or about House and Premises"—Pur-
chase by Testator—"In transitu."*

A testator bequeathed his leasehold mill to trustees upon certain trusts, and all the corn and other articles which at his decease should be in or about his dwelling-house, mill or premises, he gave to his two sons absolutely:—Held, that a cargo of wheat consigned to the testator, and in course of transit on the day of his death, passed to the executors and not to the sons.

John W. Lane, of Cirencester, by will dated October, 1868, bequeathed the messuage or dwelling-house in which he then resided, and the mill, called "The Barton Mill," with the warehouse, counting-house, stable, buildings, yards, garden and meadow adjoining or belonging to the said messuage and mill, and all other the premises which he held under the lease granted to him thereof by the late Earl Bathurst, for all his estate and interest therein, together with the benefit of the lease, and all the fixtures in the messuage,

and the machinery, engines, gear, tackle, fixtures and plant in or about the said mill and other buildings, unto three trustees, their executors, administrators and assigns, upon certain trusts; and he bequeathed all his furniture, plate, linen, china, and books, fixtures, goods and chattels, and all the corn, grist, sacks, implements and utensils, mill team, mill wagons, mill carts and other articles which at his decease should be in or about his said dwelling-house, mill and mill premises, unto his two sons, John and George, absolutely, and in equal shares. The testator gave the residue of his real and personal estate to his two sons, John and George, equally.

The testator died on the 4th of May, 1871.

An admission put in by all parties as supplemental to the certificate of the Chief Clerk shewed that on the 15th of April, 1871, the testator by letter ordered a quantity of wheat from Messrs. Lucy & Co., a firm at Gloucester, and on the 17th of April he was debited with the wheat in their books. No special contract was made as to the delivery or payment, but the ordinary course of dealing between the testator and Messrs. Lucy was for cash at two months. The firm at Gloucester after receiving a note, dated the 2nd of May, 1871, that they could send the wheat at once, delivered on the 4th of May 1,920 bushels at Gloucester Railway Station, consigned to the testator, who died on that day. On the following days (5th and 6th of May) the remainder of the cargo was delivered at the same station. The whole reached Cirencester in due course of transit, and was carted by the testator's men from the station there to the mill. The value of the whole of the wheat was 863*l.* 10*s.*, which the executors paid on the 27th of June, 1871, to Messrs. Lucy & Co., and the representatives of the testator's sons claimed to be entitled to the 863*l.* 10*s.*, or to such sum as had been produced by the sale and disposal of the cargo of wheat in question.

Mr. Greene and Mr. L. Field, for the plaintiff legatees, contended that no part of the cargo of wheat passed under the words "in or about" the mill premises to the bequest to his sons—

Lord Brooke v. Earl of Warwick, 2 De Gex & S. 425.

[The case is reported, but not on this point, 18 Law J. Rep. (N.S.) Chanc. 137.]

Mr. Bristowe, Mr. Bush and Mr. W. Barber, for the representatives of the sons, claimed the value of the wheat delivered at Gloucester station on the 4th of May.

Mr. Bevir, for the trustees.

HALL, V.C., decided that the whole of the wheat belonged to the residuary estate, and that the case cited did not apply to property which had never been in the testator's possession.

Solicitor—Messrs. Peacock & Goddard, for plaintiffs and defendants; Mr. J. Hubbard and Mr. H. W. Trinder, for representatives of testator's sons.

JESSEL, M.R. }
1874. } CROSSLEY v. MAYCOCK.
Feb. 18. }

Contract—Acceptance, qualified or absolute—Reference to further Document.

The owners of land in answer to a written offer to buy it, wrote saying they had received the offer, and added, "which offer we accept and now hand you two copies of conditions of sale which we have signed; we will thank you to sign same, and return one of the copies to us":—Held, that this was not an unqualified acceptance, and did not make a contract.

This was a demurrer to a bill for specific performance, the question being whether a contract was established by a letter from the defendants to the plaintiffs making an offer, and an answer by the plaintiffs to the defendants expressing their acceptance of the offer and enclosing conditions of sale, the letters and conditions being in the words hereafter set out. The letter from defendants to plaintiffs was as follows—

"Collyhurst Chambers,
"Bond Street, Manchester,
"October, 1873.

"Messrs. James Crossley & Sons.

"Gentlemen,—We beg to submit our offer for the plot of land on the east side

of Tuel Lane, Sowerby Bridge, viz., two pounds per yard superficial. The purchase to be completed and possession given up on or before the 21st day of January, 1874. This offer to remain in force until Wednesday, the 29th inst., at six o'clock. An earlier answer will oblige if you can make it convenient.

"We are, gentlemen,

"Yours respectfully,

"Maycock & Bell."

The answer was as follows—

"Centre Mills,
"Sowerby Bridge,
"27th October, 1873.

"Memorandum from James Crossley & Co. to Messrs. Maycock & Bell.

"Gentlemen,—We are in receipt of your note offering us 2l. (two pounds) per superficial yard for the plot of land called the Brick Field, situated on the east side of Tuel Lane, which offer we accept, and now hand you two copies of conditions of sale which we have signed. We will thank you to sign same and return one of the copies to us.

"Yours truly,

"James Crossley & Co."

The conditions of sale enclosed in last letter were as follows—

"An agreement made and entered into this 28th day of October, 1873, between Francis Whitworth Crossley, James Herbert Crossley and Charles Benjamin Crossley, all of Sowerby Bridge, in the parish of Halifax, in the county of York, cotton spinners and drysalers (hereinafter called the vendors), of the one part and Maycock and Bell, of Manchester, of Sowerby Bridge, architects (hereinafter called the purchasers), of the other part. Whereby the vendors agree to sell, and the purchasers to buy at the price or sum of 2l. per superficial square yard, all the plot of land containing by estimation 1,630 superficial square yards or thereabouts, bounded on the south end by Wharf Street, on the west side by Tuel Lane, and on the north end by the Rochdale Canal, and situate in Warley, in the parish of Halifax aforesaid, and which said close of land is now in the occupation of the vendors. The vendors will at their own expense make and deliver to the purchaser or his solicitor,

an abstract of the vendors' title, commencing as to a moiety thereof with the admittance of Charles Crossley, dated the 21st day of May, 1851, and the purchaser shall make his objections and requisitions (if any) in respect of the title, and send the same to Francis Jubb, of Halifax, the solicitor of the vendors, within fourteen days from the delivery of the abstract, and all objections or requisitions not made within the period aforesaid, shall be taken to be waived, and the production and inspection of all deeds, copies of Court rolls, evidences and muniments of title, which are not in the possession of the vendors, and all journeys incidental to such production or inspection, and the procuring and making of all certificates, attested stamp office or other copies or extracts of or from any register deeds, Court rolls, wills or other documents whatsoever, and all declarations or other evidence, whether the same or any of them be required for identification, verification of the abstract or any other purpose whatsoever, shall be at the expense of the purchaser, and every recital or statement in any deed, will or other document, shall be deemed conclusive evidence of the facts or matters recited or stated, and the purchaser shall not be entitled to call for the production of, or make any objection on account of the non-production of any deeds or muniments of title of which the vendors hold no covenant for production or of which they shall produce attested copies, nor to require any covenant or make any objection on account of the want of any covenant for the production or furnishing copies of any of the muniments of title which are not in the vendors' possession, and the vendors shall be at liberty if they think fit on any objection being made to the title, and whether before or after making an attempt to remove the same, and so that it shall not be compulsory on the vendors to make such attempt, to rescind the contract for sale on paying to the purchaser the deposit money without any interest, costs or other charges, but this condition shall not prejudice the right of the vendors to compel the completion of the contract, if they shall think fit. Upon payment of the purchase money the vendors shall execute proper assurances to the purchaser, such

assurances and the perusal and execution thereof by trustees, mortgagees and all other necessary parties except the vendors and all deeds of covenant for the production of deeds and assignment of outstanding terms to be at the expense of the purchaser. The purchase shall be completed on or before the 21st day of January next, and if not completed on that day, the purchaser shall pay interest on the balance of the purchase money remaining unpaid at the rate of 5*l.* per centum per annum, from that day until the purchase shall be completed. The purchasers to pay on the signing hereof the sum of 10*l.* per centum upon the purchase money on account thereof."

Mr. Southgate and *Mr. North*, for the demurrer, were stopped by the Court.

Mr. Fry and *Mr. Jolliffe* submitted that a reference in a letter to a document which might or might not receive the approval of the recipient was no objection to an unqualified acceptance contained in the letter. They cited

Fowle v. Freeman, 9 Ves. 354 (1804);

Gibbins v. The North Eastern Metropolitan Asylum District, 11 Beav. 1; s. c. 17 Law J. Rep. (N.S.) Chanc. 5 (1848);

Skinner v. M'Douall, 2 De Gex & S. 265; s. c. 17 Law J. Rep. (N.S.) Chanc. 347 (1848);

Chinnock v. Marchioness of Ely, 4 De Gex, J. & S. 638; s. c. 34 Law J. Rep. (N.S.) Chanc. 399 (1865).

THE MASTER OF THE ROLLS.—The only question in this case is what is the true construction of a letter dated the 27th of October, 1873, and written by the plaintiffs to the defendants. The defendants had made an offer to purchase some land at 2*l.* per yard, and the answer made by the plaintiffs was in the following words—
[His Honour then read the letter.]

The principle which governs these cases is plain. If there is a simple acceptance of an offer, and then a statement that the writer desires that the agreement should be put into more formal terms in accordance with the offer and acceptance, the mere reference to the intention or design of putting the agreement into more formal terms will not

prevent this Court from giving performance of a final agreement which has been arrived at. If, however, the agreement is conditional on the acceptance of some further terms, specified or to be specified by the party himself or his solicitor, then there is no final agreement.

That being so what is the meaning of this letter—

“Which offer we accept, and now hand you two copies of conditions of sale, which we have signed.”

Surely that is an allegation that it is accepted, subject to those conditions of sale. That is an acceptance subject to the conditions. And the conditions are very special, such as no purchaser would be bound to accept under an open contract. That is not a final, but a conditional acceptance. The purchaser need not comply with such conditions, but has an option of assenting or not. Therefore there is no final contract, and the demurrer is valid.

Solicitors—Messrs. Bower & Cotton, agents for Mr. F. Jubb, Halifax, for plaintiffs; Messrs. Fritchard, Englefield & Co., for defendants.

JESSEL, M.R. }
1874. } GOULD v. TWINE.
Feb. 26, Mar. 5. }

Plaintiff in Contempt—Stay of Proceedings—Motion to dismiss—Defendant's Remedies for Costs—Practice.

When the plaintiff is in contempt for non-payment of costs of an interlocutory application, and the defendant has obtained an order staying further proceedings on the plaintiff's part until such costs are paid, a motion by the defendant asking the Court to fix a time for payment of the costs, and in default to dismiss the bill, is irregular.

In this suit the plaintiff had on the 29th of May, 1873, made an interlocutory application which was refused with costs.

On the 25th of July the taxing master's certificate was filed, taxing the costs at

11l. 14s. 2d. On the 5th of December the defendants obtained an order staying further proceedings, until the plaintiff cleared her contempt for non-payment of these costs.

On the 20th of February, 1874, the defendants served the plaintiff with notice of a motion that the plaintiff might be ordered to clear her contempt on or before the 26th of March, 1874, and that in default of her doing so and paying the costs of that motion the bill might stand dismissed with costs.

Mr. Davey, for the applicants, submitted that as the defendants could not make the ordinary motion to dismiss for want of prosecution, because the plaintiff could not proceed in face of the order which had been made—

Futvoys v. Kennard, 2 Giff. 110; s. c. 80 Law J. Rep. (N.S.) Chanc. 262 (1861),

it would be just and proper to give them an order in the terms now asked for. If such an order were not granted, the plaintiff might wait twenty years, and then pay the costs and continue the suit. It was true there was no direct authority for such an order, but it ought to be made on the analogy of cases in which a second suit was brought while the costs of a first suit were unpaid, and cases where security for costs was ordered to be provided, and was not provided. He cited

Giddings v. Giddings, 10 Beav. 29, s. c. 16 Law J. Rep. (N.S.) Chanc. 183 (1847);

Lantour v. Holcombe, 11 Beav. 624 (1849);

Princess of Wales v. Earl of Liverpool, 3 Swanst. 567 (1819);

Ernest v. Govett, 2 N.R. 486.

Mr. Whitehorne, for the plaintiff, mentioned

Camac v. Grant, 1 Sim. 348 (1827), in which case it appeared from a memorandum in

2 Sim. 570,

that the order was not drawn up because Sir Anthony Hart considered that it was irregular. And

Fort v. Bank of England, 10 Sim. 616 (1840).

Mr. Davey replied.

[The case stood over for a week in the middle of the arguments at the Master of the Rolls' suggestion to enable counsel on both sides to make a further search for authorities.]

THE MASTER OF THE ROLLS.—The practice of the Court of Chancery is very old and well settled, and the course of it is as binding as any number of authorities.

This is a simple case, in which the plaintiff has failed in some motion, and been ordered to pay the costs of it, and has failed to do so, and so got into contempt. According to the practice of the Court, and before the recent act abolishing imprisonment for debt, the defendants could have recovered their costs in two ways, either by a writ of *fiery facias* on the goods of the debtor, or an attachment of the person. But besides those they had a third remedy, namely, to ask the Court to stay proceedings in the suit until the costs were paid. But they had no other remedy but these.

Now this is an application, in addition to all existing remedies, to ask the Court to say that if the costs are not paid the suit itself is to be dismissed. I am not aware of any authority for such an application. Some one must have heard of such an application if there had ever been one. I have asked the most experienced registrar and the most experienced counsel of the Court, and they have never heard of any such application. And I am not devoid of some experience myself, and I have never heard of one. Therefore I think I am warranted in saying that no such application has ever been made.

Then I am not at liberty to grant such an application now. I am bound by the established practice of the Court, and I cannot extend it.

I have been referred to some cases resolvable into two classes; the first, where the plaintiff, having failed in a former suit, brings a new suit for the same matter without having paid the costs of the former suit; but that is a most vexatious proceeding. The second, where an impecunious plaintiff files a bill and is ordered to give security for costs, that is to say, to take an initiatory step

to entitle him to bring a suit at all, and if he does not do so, his bill is dismissed.

Neither of those classes includes this case. I am asked, however, to extend them to it by analogy; but I could not do so even if the analogy held. I must, therefore, refuse the motion with costs, which will be set off against the former costs.

Solicitors—Messrs. Lovell, Son & Pitfield, for applicants; Mr. Richard Sherwood, for the respondent.

BACON, V.C. }
1874. } WILLIAMSON v. WILLIAMSON.
March 6. }

Lessor and Lessee—Underlease—Covenant not to assign or underlet without License.

A lease of mines was granted by S. to W., the latter covenanting not to assign or underlet without the consent of S. W. died and his representative agreed, with the consent of S., to underlet a portion of the property in the lease to B., the underlease to contain "like provisions and conditions" as the original lease. The rest of W.'s interest in the lease was then assigned to O., subject to the agreement with B. On question raised by O., as underlessor, as to whether the lease to B. should be so framed as to necessitate the original lessor or the underlessor being consenting parties to any future assignment or underlease by B.—Held, that the lease must be so framed that the consent of the original lessor only should be necessary.

This was a summons adjourned into Court to decide whether a provision in an agreement for an underlease not to assign or underlet without leave meant without the leave of the original lessor, or without the leave of the underlessor.

By an indenture of lease, dated the 20th of April, 1861, Viscount Sidmouth granted to Hugh Henshall Williamson a lease for forty years, from the 29th of

September, 1860, of certain coal and iron-stone mines, and the lease contained a proviso for re-entry if the lessee should let or part with possession of the premises or any part thereof, for all or any part of the term thereby granted to any person without the consent of Viscount Sidmouth, his heirs or assigns, except to a wife, child or children, or partner or partners. The lease also contained a covenant to the same effect.

Hugh Henshall Williamson died in December, 1867, and his will was proved by the sole executor, John Henshall Williamson.

On the 21st of July, 1871, J. H. Williamson, with the consent of Viscount Sidmouth, entered into an agreement with Baddeley for an underlease to him of a portion of the mines in the lease for twenty-nine years and a half from the 23rd of March, 1871, and the agreement contained the following clause—

“That in such underlease shall be contained the like provisions, conditions and stipulations, in all respects as are contained in the said respected lease, except the covenant on the part of the lessee to leave a barrier between the mines thereby demised and the mines under the adjoining lands.”

In March, 1872, Baddeley, with the consent of Lord Sidmouth, assigned all his interest in the agreement of the 21st of July, 1871, to a trustee for the Wedgwood Coal and Iron Company, and in February, 1873, the Wedgwood Company took possession and commenced to work the mines.

On the 26th of July, 1872, the Chatterley Iron Company contracted to purchase the whole of the leasehold interest of the testator, H. H. Williamson. The contract was confirmed by an order in the suit of *Williamson v. Williamson*, and was completed by a conveyance, dated the 21st of May, 1873. Both the agreement and conveyance were made subject to the agreement of the 21st of July, 1871, between J. H. Williamson and Baddeley.

A draft underlease from J. H. Williamson to Baddeley had been prepared before the conveyance to the Chatterley Company, but the Chatterley Company declined to be bound by this, and it was

ultimately arranged that the draft underlease should be settled in chambers.

The Chatterley Company, as underlessors, refused to allow the underlease to be settled in the terms of the draft prepared on behalf of Williamson, and contended that the underlease ought to contain a clause which would prevent Baddeley from assigning or underletting without their consent, and the matter was adjourned into Court to settle this question.

Mr. Kay, *Mr. Whitehorne* and *Mr. E. R. Cook* appeared for Baddeley, and contended that the intention of the agreement was that Lord Sidmouth's consent alone should be necessary for any assignment or underlease.

Mr. Joshua Williams and *Mr. Everitt*, for the Wedgwood Company, were stopped by the Vice-Chancellor.

Mr. Eddis, *Mr. Ohitty* and *Mr. Whitehead*, for the Chatterley Company.—The true meaning of the term, “like provisions,” is corresponding provisions, and the intention of the agreement was that throughout the underlease the names of the underlessors should be substituted for that of the original lessor. This is, and has for a long time been, the usual course—

Jarman's Bythewood, vol. 4, p. 573;

Davidson's Precedents, vol. 5, p. 176.

All the other covenants, for example, the covenant for payment of rent, are entered into between the underlessors and the underlessee, why should this be an exception?

Mr. Batten, for the plaintiff in the suit.

BACON, V.C.—Nobody has more sincere respect than I have for the valuable assistance which *Mr. Jarman's* book of precedents and *Mr. Davidson's* book have given to the profession generally. I can see no ground why I should make these new lessors, as they are called, usurp or take the place of Lord Sidmouth. Lord Sidmouth, the owner of the property, exercising a paramount right, leases to *Mr. Williamson*, and says you shall never underlet without my consent. *Mr. Williamson* goes to Lord Sidmouth and asks his permission to underlet, and on one occasion, having got that consent,

he makes his agreement for an underlease. How does that deprive Lord Sidmouth of his right and power? How does it give it to anybody else? Mr. Williamson enters into the agreement accordingly, and says having got Lord Sidmouth's consent that I shall make a lease to you I will make it to you on similar provisions to those which are contained in Lord Sidmouth's lease to me; but there is not a word that you shall not assign without my consent. Of course you cannot assign without Lord Sidmouth's consent. That is a similar provision, and that is properly inserted. It can make no difference that somebody has bought Williamson's interest, or acquired it under the consent of the Court. Am I to introduce into the lease a term which Williamson never stipulated for, which would be inconsistent with the real nature of the transaction, and say, this lessee whom Mr. Williamson chooses to trust with the lease on the conditions he mentioned shall be subject to another condition, and besides getting Lord Sidmouth's consent shall go and get the consent of the Chatterley Company? There is no ground whatever for it that I can see. If Baddeley had filed a bill against Williamson the agreement could only have been enforced or carried into specific performance, and where is the stipulation to be found in this agreement that Williamson's consent to any transfer made by Baddeley should be first obtained? Not only it is not there, but there is no necessity for it, because the whole property is bound and protected by the stipulation that there shall be no underlease, except that which Lord Sidmouth consents to. That is the only question I have to consider, and that is my view.

Solicitors—Messrs. Wedlake & Letts, for plaintiff; Mr. Worthington Evans, agent for Messrs. Hand, Blakiston & Everett, Stafford, for Chatterley Iron Company; Messrs. Lewis, Munns & Longden, for Wedgwood Company.

JESSEL, M.R. }

1874.

Feb. 14. }

STEWART v. NURSE.

Costs—Taxation—Higher or Lower Scale—Value at Testator's Death.

In estimating the value of an estate of a testator for the purpose of ascertaining whether costs are to be paid on the higher or lower scale, the value of the estate at the death of the testator is to be looked at, although the costs of a suit to get in part of the assets may reduce that amount.

This was a suit instituted by beneficiaries for the administration of the estate of a testator, A. S. Stewart, against his executor.

At the date of his death the testator had been engaged in partnership in the business of a woollen draper.

By leave obtained in this suit, a suit to realise the testator's share in the partnership was instituted.

The amount of the separate assets of the testator was about 200*l.*, the value of the partnership about 1,900*l.*, to a half of which, viz., about 950*l.*, the testator was entitled. The share of the costs of the partnership borne by the testator's estate was 300*l.*, which reduced the amount realised to about 650*l.*, making the total of the assets carried over to the credit of the administration suit less than 1,000*l.*

The taxing master had taxed the costs of the defendant in this suit on the lower scale.

A summons was now taken out by the defendant asking that the taxing master might be directed to review his taxation and tax on the higher scale.

Mr. Bevir, for the summons, was stopped by the Court.

Mr. W. Pearson, for the plaintiff, contended that for the purpose of estimating the amount of the testator's estate for the purpose of this suit only what was actually realised and carried over to the credit of the suit was to be regarded.

THE MASTER OF THE ROLLS said that it was well settled that in order to ascertain for the purpose of costs the value of the testator's estate, the value of it at the

time of the death must be looked at, and here it was clear that the value at the time of the death was £50l. The fact that subsequently 300l. was wasted in costs made no difference. There would be an order that the taxing master should review his taxation, and tax the costs on the higher scale, and that the costs of the summons should be costs in the cause and added to the taxation.

Solicitors—Messrs. Stevens & King, for plaintiff;
Messrs. G. L. P. Eyre & Co., for defendant.

HALL, V.C. }
1874. }
Jan. 29, 30, 31. } DE LISLE v. HODGES.
Feb. 11. }

*Settlement—Power of Appointment—
Diminished Fund—“Residue.”*

A settlement made in 1822 contained a power for R. H. by deed or will to appoint a sum of 37,914l. 13s. 9d. consols, among his nephews and nieces, the children of his brothers and sisters named in the settlement. A sum of 800l. consols was afterwards added to the settled funds. In 1853, when the plaintiffs were appointed trustees of the fund, and from that time to 1870, it consisted of 27,170l. 15s. 4d. consols, and 80,000l. on mortgage. Between 1850 and 1870, R. H. made various appointments of the fund, specifying it by its original description, all of which he revoked. In 1870 R. H., by deed, appointed “the 37,914l. 13s. 9d. consols, and the 800l. consols,” in trust after his death, as to five specified sums of consols, parts of the 37,914l. 13s. 9d. and 800l. consols, or other the securities of which the same might for the time being consist, for five of his said nephews and nieces (naming them). He appointed “the residue of the said two sums of 37,914l. 13s. 9d. and 800l. consols, or other the stocks, funds or securities of which the same might for the time being consist, or upon which the same might for the time being be invested,” in trust for

O. H., a daughter of one of his said brothers. The sums so appointed, less the residue, amounted to 37,000l. The appointor died in 1872. At that time the trust funds consisted only of the sum of 27,170l. 15s. 4d. consols, and the 8,000l. mortgage; and they were now represented by a fund in Court of 36,901l. 1s. 6d., together with the January dividend thereon, viz., 546l. 11s. 11d. cash. On the question whether the appointees, prior to O. H., should abate so as to allow her to take a proportionate share of the diminished funds:—

Held, that the funds must be distributed rateably between the appointees, exclusive of O. H.

Motion for Decree.

The bill in this suit stated that by a settlement executed on the 28th of May, 1822, a sum of 37,914l. 13s. 9d. consolidated 3l. per cent. annuities was settled subject to the life interests of Benjamin Hodges and Richard Hodges, his son, and in the event (which happened) of there being no child of Richard Hodges, upon the following trusts:—

“In trust for all and every of the nephews and nieces of Richard Hodges, being the child and children lawfully to be begotten of W. R. Hodges, B. G. Hodges, C. Mazzinghi, and A. A. Whitgreave” (being the other children of Benjamin Hodges).—“In such parts, shares or proportions, and for any one or more of the nephews and nieces of Richard Hodges in particular, and in exclusion of any other or all the others of them, and to be and become a vested interest, and to be paid and payable at such age or ages, time or times, and with, under and subject to such powers, provisos, restrictions and limitations, for the benefit of some or one of the nephews and nieces of Richard Hodges, as he, by deed or will, shall from time to time or at any time direct or appoint; and in default of any such direction or appointment, or so far as any such direction or appointment shall not extend:—Then it is hereby declared and directed that the trustees of the fund and the survivors or survivor of them, his executors and administrators, shall stand possessed of and interested in the sum of 37,914l. 13s. 9d., 3l. per cent.

consolidated bank annuities, or the stocks, funds and securities to be substituted in lieu thereof, or such part or parts thereof as shall remain unapplied or undisposed of under the trusts and powers created by these presents, in trust for all and every of the nephews and nieces of Richard Hodges, being respectively the children of W. R. Hodges, B. G. Hodges, C. Mazzinghi, and A. A. Whitgreave, as aforesaid lawfully begotten who being a son or sons shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain that age or be previously married, in equal shares and proportions, share and share alike, with full benefit of accruer and survivorship to and amongst such nephews and nieces, in case of any dying before his, her or their share or shares shall become vested in him, her, or them; and if there shall only be one such nephew or niece who, being a son, shall live to attain the age of twenty-one years, or, being a daughter, shall live to attain that age or be previously married, then in trust for such one nephew or niece."

By the will of Benjamin Hodges, dated the 5th of October, 1822, and a codicil thereto, dated the 19th July, 1823, a sum of 800*l.* consolidated 3*l.* per cent. annuities was settled on the trusts declared by the indenture of settlement of the sum of 37,914*l.* 13*s.* 9*d.* after the death of B. Hodges.

B. Hodges died on the 23rd of April, 1827, and the sum of 800*l.* consolidated 3*l.* per cent. annuities was transferred into the names of the trustees of the settlement upon the trusts thereby declared of the sum of 37,914*l.* 13*s.* 9*d.*

Between the year 1850, and the date of the deed poll hereinafter mentioned, Richard Hodges had, in exercise of the power in the settlement for the benefit of his nephews and nieces, executed several appointments of the trust funds among them. Those appointments contained powers of revocation and new appointment; and as they are particularly referred to in the judgment, *infra*, it is unnecessary to say more as to them here.

The bill in the suit then stated that several appointments of new trustees were

duly made, and that various sales and re-investments of the trust funds took place, under the powers of the settlement; and that ultimately by an indenture, dated the 1st of July, 1853, the plaintiffs and F. Squire (since deceased), became the trustees of the settlement.

At the date of that appointment of new trustees, the sums of 37,914*l.* 13*s.* 9*d.* and 800*l.* consolidated 3*l.* per cent annuities had by the various sales and re-investments, and after payment of the costs of that appointment, become represented by 27,170*l.* 15*s.* 4*d.* consolidated 3*l.* per cent annuities, and 8,000*l.* invested on a mortgage of an estate belonging to Richard Hodges called the Sugnal Hall Estate.

The bill then stated that by a deed-poll dated 30th of November, 1870 (which referred to the prior appointments and also contained a power of revocation), Richard Hodges appointed as follows—

"That from and immediately after the decease of Richard Hodges the trustees of the settlement shall stand and be possessed of and interested in the sum of 37,914*l.* 13*s.* 9*d.* consolidated 3*l.* per cent. annuities so standing in their or some or one of their names in the books of the governor and company of the Bank of England, or other the stocks, funds, and securities of which the same now consist or hereafter shall or may consist, or upon which the same or any part or parts thereof is now or hereafter shall or may be invested upon the trusts, and for the intents and purposes hereinafter expressed and contained of and concerning the same:—And also, that from and immediately after the decease of Richard Hodges, the trustees, or the survivor of them, or other the trustees or trustee for the time being of the will and codicil of my late father, B. Hodges, deceased, shall stand and be possessed of and interested in the sum of 800*l.* consolidated 3*l.* per cent. annuities so standing in their or some or one of their names in the books of the governor and company of the Bank of England, or other the stocks, funds, and securities of which the same now consist or hereafter shall or may consist, or upon which the same or any part or parts thereof is now or hereafter shall or may

be invested upon the trusts and for the intents and purposes hereinafter expressed and contained of and concerning the same (that is to say) provided always, and I, Richard Hodges, do hereby declare that the direction and appointment of the two several sums of 37,914*l.* 13*s.* 9*d.*, and 800*l.* consolidated 3*l.* per cent. annuities is so made, and the two several sums shall be held by the trustees upon the trusts and for the intents and purposes following (that is to say), as to the sum of 7,000*l.* consolidated 3*l.* per cent. annuities, part of the said two several sums of 37,914*l.* 13*s.* 9*d.* and 800*l.* consolidated 3*l.* per cent. annuities, or other the stocks, funds or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my nephew, Sydney Hodges, son of my brother, W. R. Hodges, his executors, administrators and assigns absolutely:—And as to the further sum of 7,000*l.* consolidated 3*l.* per cent. annuities, further part of the two several sums of 37,914*l.* 13*s.* 9*d.*, and 800*l.* consolidated 3*l.* per cent. annuities, or other the stocks, funds or securities of which the same may for the time being consist or upon which the same may for the time being be invested, upon trust for my niece, Julia George, daughter of my brother, William R. Hodges, her executors, administrators and assigns, for her and their own absolute use and benefit free from the debts, contracts or engagements of her present or any future husband:—And as to the further sum of 7,000*l.* consolidated 3*l.* per cent. annuities, further part of the two several sums of 37,914*l.* 13*s.* 9*d.*, and 800*l.* consolidated 3*l.* per cent. annuities, or other the stocks, funds and securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece, J. A. Baroness French, daughter of my sister, the Countess C. Mazzinghi, her executors, administrators, and assigns, for her and their own absolute use and benefit free from the debts, control, contracts, or engagements of her present or future husband:—And as to the further sum of 6,000*l.* consolidated 3*l.* per cent. annuities, further part of the two several

sums of 37,914*l.* 13*s.* 9*d.* and 800*l.* consolidated 3*l.* per cent. annuities, or other the stocks, funds and securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece, Teresa Eyston, daughter of my sister, A. A. Whitgreave, her executors, administrators and assigns, for her and their own absolute use and benefit free from the debts, control, contracts or engagements of her present or any future husband:—And as to the further sum of 10,000*l.* consolidated 3*l.* per cent. annuities, further part of the two sums of 37,914*l.* 13*s.* 9*d.*, and 800*l.* consolidated 3*l.* per cent. annuities, or other the stocks, funds or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my nephew, Frederick Hodges, son of my brother, B. G. Hodges, his executors, administrators and assigns absolutely:—And as to the residue of the two sums of 37,914*l.* 13*s.* 9*d.*, and 800*l.* consolidated 3*l.* per cent. annuities, or other the stocks, funds or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece, Caroline, daughter of my brother, B. G. Hodges, her executors, administrators and assigns for her and their own absolute use and benefit free from the debts, control, contracts, and engagements of any husband with whom she may intermarry."

Richard Hodges died on the 25th of July, 1872, without having been married, and leaving his above-named nephews and nieces.

At the death of Richard Hodges the trust funds consisted of the sum of 27,170*l.* 15*s.* 4*d.* and the 8,000*l.* mortgage money. In 1873, the mortgage was paid off, and the money invested in a sum of 9,730*l.* 6*s.* 2*d.* consols.

The bill in this suit was filed on the 30th of April, 1873, and by an order made in the suit on the 24th of July, 1873, the trust funds were brought into Court. They now consisted of the sum of 36,901*l.* 1*s.* 6*d.* consols, together with the January dividend thereon, amounting to 546*l.* 11*s.* 11*d.*

The object of the suit was to ascertain the various interests of the parties entitled to the settlement funds; and the bill therefore prayed that their rights in the sums of 36,901*l.* 1*s.* 6*d.* consols and 546*l.* 11*s.* 11*d.* cash might be ascertained and declared; and that the trusts of the sum of 37,914*l.* 13*s.* 9*d.* consolidated 3 per cent. annuities, settled by the indenture of settlement, and of the sum of 800*l.* like annuities, settled by the will and codicil aforesaid, and of the funds now representing the same, might be carried into execution by the Court.

The questions in the case were, whether, inasmuch as the settlement funds now subject to the power of appointment, were insufficient to pay the appointees in full, they should abate rateably so as to allow the residuary one a proportionate share; or whether, inasmuch as there was in fact no residue, after satisfying so far as possible the prior appointees, the residuary one took nothing.

Mr. Dickinson and *Mr. G. W. Hemming*, for the plaintiffs, stated the facts of the case.

Mr. Karslake and *Mr. Cracknall*, for Sydney Hodges.—The rules of law which govern this case are clear. The only question is, whether the case itself falls within them. We say that the word residue “means simply residuum, or what is left.” When nothing is left of a fund after satisfying thereout the prior donees, the party intended to take the residue of the fund *ex necessitate* gets nothing—

Petre v. Petre, 14 Beav. 197;

Harley v. Moon, 1 Dr. & S. 623; s. c.

31 Law J. Rep. (N.S.) Chanc. 140.

Mr. H. R. Young, for W. K. George and his wife.—This is a case depending on the construction of two deeds. The question is not one as to the effect of an appointment by deed under a power contained in a will, or of an appointment by will. The acts of the parties, *i. e.*, the language of the settlement and the last deed-poll by appointment, must be construed “strictly.” So construed, it is impossible to hold that Caroline Hodges can, under the circumstances, take anything. It seems clear on the authorities, that if instead of a deficiency in the funds to be distributed amongst the

appointees, there had been an increase or “overplus,” Caroline Hodges would have been entitled to claim the whole of that overplus. She must, therefore, on the principle, “*Qui sentit commodum sentire debet et onus*,” be now held not entitled to anything—

Oke v. Heath, 1 Ves. sen. 135;

Lefevre v. Freeland, 24 Beav. 403;

Booth v. Alington, 6 De Gex, M. & G.

613; s. c. 26 Law J. Rep. (N.S.)

Chanc. 138.

Mr. H. S. Millman, for the Baroness French, *Mr. Greene* and *Mr. Romer*, for Frederick Hodges, and *Mr. Field*, for G. B. Eyston and his wife, were stopped by the Court.

Mr. Lindley and *Mr. Bagshawe*, for Caroline Hodges.—The recitals of the appointments made between 1850, and the last, which alone is set out in the bill, should not be overlooked. From them it appears that the appointor constantly described the funds which he was appointing, and did so very precisely. He not only said he was desirous of appointing the same, but of doing it in “the shares and proportions,” and in the “manner therein mentioned,” and “amongst his nephews and nieces,” whom he also named. He thereby clearly shewed that he then meant *all* his nephews and nieces to take something. But there is nothing in the appointment of 1870 which is not equally open to the same observations. For by that deed he indicates that his intention to divide the funds is not to be left to mere conjecture. He specifies the general funds; he makes the division by appointing, in the first instance, particular parts of them, and he does so till he comes to the last part. It is true that he does not then mention the precise amount of that part; but supposing he had done so, and had inserted the amount, *viz.*, 1,714*l.*, must not all the appointees have abated rateably? Then what possible difference can it make so far, that instead of the figures, he uses the word “residue?” He means the same thing in both cases; and meaning the same thing, the consequences must be identical. If it is contended that the division he is contemplating is not that of a *de facto* existing fund, it is

to be remembered that the fluctuation in the amount of the funds from time to time depended only on the change of the market value of stock—an accident which could not in itself in the least affect his real intention. He in terms deals with the funds by their original designation. In some parts of the deed he omits, in others, he uses the words “or other the stocks, funds or securities of which the same may for the time being consist, or upon which the same may for the time being be invested”—clearly shewing that either he meant to deal with a distinct and specified fund, or the substituted securities were to be divided “amongst the same persons and in the same proportions and manner” as the original funds, which he precisely designates. But where a man gives a specified fund in certain proportions to persons whom he names, he means all the donees to take something; and if the donor makes the gift out of the specified fund, or a fund that may be substituted for it, he equally intends all to take something. One test of the accuracy of our view is this—Suppose that Sydney Hodges, for example, had died in 1871: then, if the other side are correct in their arguments, they must contend that Caroline Hodges would take the appointed share of Sydney Hodges, as in the case of a lapsed legacy. But that is not law. Then again they say, if there had been an “overplus,” Caroline would have taken it. Certainly not. All the appointees would have had their shares increased rateably. In conclusion, we say that Caroline Hodges is, under the circumstances, as appointee of the “residue” of a specified fund appointed in certain shares to persons by name, entitled to a part of that fund; and that her part is a sum rateably equivalent to the 1,714*l.* which she would have taken if there had been no variation in the original amount.

In the course of their argument they cited the following authorities—

- Page v. Leapingwell*, 18 Ves. 463;
Earum v. Appleford, 5 Myl. & Cr. 56; s. c. 10 Law J. Rep. (n.s.) Chanc. 81; affirming s. c. 10 Sim. 274;

- Lord St. Leonards on Powers*, 461 (last edit.);
Wright v. Weston, 26 Beav. 429;
Elwes v. Causton, 30 Beav. 554;
Miller v. Huddleston, 37 Law J. Rep. (n.s.) Chanc. 421; s. c. Law Rep. 6 Eq. 65;
Hewitt v. George, 18 Beav. 522;
Walpole v. Apthorp, Law Rep. 4 Eq. 37.

Mr. Karslake, in reply.—This case, though one of two deeds, is very like many cases of powers under testamentary instruments, for the appointment is not *inter vivos*. So regarded, it seems settled law that the word “residue” always means what is left after satisfying prior specific dispositions—

- Dyose v. Dyose*, 1 P. Wms. 305;
Vivian v. Mortlock, 21 Beav. 252;
 and that where there is no residue as here, there can be no one who can take any—

- The Attorney-General v. The Drapers' Company*, 4 Beav. 67;
Hawkins on Wills, 66.

We must suppose that the appointor knew the true state of the funds he had so often dealt with, and that there was at all times a possibility of their fluctuation and diminution. It is not immaterial for our case that the portions named by the appointor are not all equal. Why they should not have been so, we cannot say, because we cannot tell a man's inmost motives. As to the argument that Caroline Hodges would, according to our construction, have taken the lapsed share, if any, that is not correct. For in this case, such lapsed share would have passed under the gift in default of appointment, in the settlement of 1822. On the whole case, having regard to all the authorities on the subject, there is none in fact opposed to our contention, which gives simple effect to plain language, and holds a “residue” to be what it really is, viz., a gift, after other specific gifts, as such, of something either more or less; or of nothing; as the case may be, and here is.

HALL, V.C.—The question in this case is one of the construction of the appointment made by the deed poll stated in

paragraph 7 of the bill. A copy of that deed has been used in the course of the argument. The deed contains some material parts which are not set out in the bill, and to which parts I shall refer.

By the settlement which is stated in the bill a sum of 37,914*l.* 13*s.* 9*d.* 3*l.* per cent. consolidated annuities was settled in the event which happened, so that Richard Hodges had a power of appointing it by deed or will among his nephews and nieces.

Under the will of Benjamin Hodges, a further sum of 800*l.* 3*l.* per cent. consolidated annuities became subject to the same trusts and powers as the 37,914*l.* 13*s.* 9*d.* stock.

Those two funds together amounted to 38,714*l.* 13*s.* 9*d.* consols.

In 1853, the trust funds consisted of 27,170*l.* 15*s.* 4*d.* consols, and 8,000*l.* invested on the mortgage of an estate belonging to R. Hodges. The settlement contained a power for the trustees to change the investments, which power became exercisable with the consent in writing of R. Hodges, under which power the investment of the original trust funds had at the date of the deed poll afterwards mentioned been in part varied as above mentioned, and further changes of investment were capable of being made. The settlement authorised the acquiring as new investments public stocks or funds on government or real securities, or loans or investments upon such other security as R. Hodges should direct.

By a deed poll dated the 30th of November, 1870, R. Hodges exercised his power of appointment. That deed contained recitals of previous appointments in which were contained powers of revocation; and according to the recitals, each of the prior appointments recited that R. Hodges was desirous of appointing the two original trust funds I have above mentioned, amongst his nephews and nieces in the shares and proportions thereinafter expressed, and the operative part of each appointment was expressed to have been for the purpose of carrying the said desire into effect, and in consideration of the natural love and affection which R. Hodges had for his nephews and nieces thereafter named. The funds

appointed by such prior appointments were, according to the recitals thereof, the two funds above mentioned; and according to such recitals, the powers of revocation and the revocations and appointments mentioned those two funds only:—although there had, before all but the first of such appointments, been the above mentioned changes of investment. The deed poll of the 30th of November, 1870, after reciting as I have stated, recited the desire of R. Hodges to revoke the then subsisting appointment of the two funds, and to appoint the same (*i.e.* the two funds) amongst his nephews and nieces thereinbefore named, in the shares and proportions, and in manner thereafter expressed. The first operative part of the deed revokes the last preceding appointment of the two funds; and the second operative part in pursuance of the said desire, and in consideration of the natural love and affection which R. Hodges had for his nephews and nieces thereafter named appoints the 37,914*l.* 13*s.* 9*d.*, “or other the stocks, funds and securities of which the same now consist or hereafter shall or may consist, or upon which the same, or any part or parts thereof is now or hereafter shall or may be invested upon the trusts, and for the intents and purposes hereinafter expressed.” And also the 800*l.* consols, with the addition of like words, or other, &c.

The deed then proceeds to declare that the appointment so made, and the said two sums (omitting the words “or other, &c.”) shall be held by the trustees upon the trusts following:—As to the sum of 7,000*l.* consols, part of the said two several sums, specifying them or other the stocks, &c., upon trust for a married nephew:—As to the further sum, &c. (then follow several similar appointments). The deed then proceeds thus—“And as to the residue of the said two several sums (specifying them) or other the stocks,” &c. “Upon trust for my niece, Caroline, daughter of my said brother, Benjamin.” Then follows a power of revocation which is expressed to be to revoke the direction and appointment thereby made of the said two several sums specifying them, not adding the words “or other the stocks, &c.”

R. Hodges died in July, 1872. The trust funds then and now existing are insufficient to satisfy the several appointments which precede the last trust, *i.e.* the one for the niece, Caroline. The question is, is Caroline to take nothing, and are the others to abate? or is the appointment to Caroline, although expressed to be of the residue, the same in legal operation, as an appointment of 1,704*l.* 13*s.* 9*d.*, the balance of the two funds or other the stocks, funds and securities upon which that sum was then or might thereafter be invested?

On behalf of Caroline it has been contended that the latter is the correct view, and that the present case is to be decided as Sir Wm. Grant decided that of *Page v. Leapingwell* (*ubi supra*). In that case Sir Wm. Grant held that the testator had clearly shewn that he considered he was dealing with and appointing not less than 10,000*l.*; and that the last donee in the series of legatees, to whom the "overplus" was given, was under the gift of overplus entitled to be treated as if he had had given to him a specified sum, *i.e.* as if the sum had been stated in figures—a sum equal to the balance of the sum of 10,000*l.* after paying the sums previously given. There not being in fact in that case 10,000*l.* all the beneficiaries were required to abate rateably. It is to be observed that under the gift of "overplus," Sir Wm. Grant considered that had there been more than 10,000*l.*, the excess would have passed as "overplus."

In *Petre v. Petre* (*ubi supra*) a testator having a power of appointment by will over a sum of stock bequeathed two sums of 5,000*l.*, and 5,000*l.* sterling thereout, to A. & B., and "the residue" to his son. The stock became in equity liable to his debts, and by payment thereof, and of the costs of the suit, the fund became less than 5,500*l.* sterling. The Master of the Rolls held that the pecuniary and residuary legatees were not liable to abate proportionably, but that the residuary gift failed altogether. The Master of the Rolls said, "the authority of *Page v. Leapingwell* (*ubi supra*), applies where the testator disposes "of an estate which he assumes will produce a given sum, or is dealing with an ascertained fund, in which

cases it is indifferent, whether, after he has given certain portions, he specifies the remainder by stating its amount, or by comprising it under the term of residue. But in this case so far from knowing the amount of the fund, the testator could have no conception of it, for it was impossible to ascertain the amount until the fund had been realised by a sale and the charges on it known. If in this case it appeared that the testator thought he was dealing with a sum of 7,100*l.* sterling, and he had divided it into different proportions, the loss would then fall on all the persons interested in proportion to their shares, although the last portion were called the 'residue;' but that is not the case here."

In *Elwes v. Causton* (*ubi supra*) a testatrix bequeathed various sums of her Bank Stock, part of 9,000*l.* like stock, to several legatees, and all the residue of her said Bank Stock to C. C. The stock at her death was insufficient to pay the specified sums. It was held that all those legacies, including the residue to C. C., must abate in proportion. The Master of the Rolls said, "I am of opinion that this case comes within the principle acted on in *Page v. Leapingwell* (*ubi supra*), which was followed by me in the cases cited. If a man dealing with a sum of stock of a specific amount, says I bequeath so much to A., so much to B. and the rest to C., the fund must be divided in those exact proportions; and if the stock falls short, the loss must be apportioned amongst all the legatees in the same proportion." The distinction between this case and the case cited by Mr. Lindley is this, that the latter was a case of a legacy payable out of stock, and there was no gift of the residue, which makes all the difference. If a man says I have 1,500*l.* stock, of this I give 1,000*l.* to A. and the rest to B., it is the same as if he said I give 1,000*l.* of it to A. and 500*l.* to B., and both A. & B. are equally objects of his bounty."

Many other cases were cited in the argument. I do not refer to them because most of them had some special circumstances, and the law is really not in question. The question is, does

the deed poll of the 30th of November, 1870, deal with, or at all events make an appointment to be operative in reference to and regulated by specific funds of an unvarying amount? or does the appointor assume that a given sum will be available? or does the deed poll not so deal with the trust fund? I think the deed poll does not so deal. The appointor in specifying what each appointee is to take superadds the words "or other the stocks, funds or securities," &c., such words expressly referring to variations of investment already made or thereafter to be made. I think the present case cannot be brought within the case of *Page v. Leapingwell* (*ubi supra*) and cases of that class. I do not overlook this; that the two funds are more than once (three times) mentioned without the addition, "or other the stocks," &c., but the places where those words are omitted do not include any of the parts of the instrument in which the particular sums to be taken by each are declared, neither do I overlook this, that the two funds specified would not (and, no doubt, the appointor knew that, when the deed poll was executed) suffice by a considerable sum to provide for the appointees prior to Caroline. The appointor commenced his appointments, *i.e.* made the first recited appointment, when the two specified sums remained unchanged; and he continued to refer to those two funds subsequently to the change of investment. He did not, I think, in terms or in effect, declare that those two funds should be considered as continuing for the purpose of measuring and apportioning the benefits taken by all the appointees. So to hold would, I think, be to depart from the ordinary meaning and force of the word "residue," upon conjecture, and not upon the construction afforded by intention, clearly manifested upon the face of the instrument. I am not, I consider, warranted in treating the words, "or other," &c., as merely supplementary and subordinate. Much reliance was placed on the recital mentioning that the appointment was to be in shares and proportions, but that recital is, I think, insufficient to shew that Caroline was at all events intended to take rateably with

the other appointees. On the whole I hold that the trust funds must be distributed rateably among the appointees exclusive of Caroline.

Solicitors—Messrs. Young, Jackson & Co., for plaintiffs and some of defendants; Messrs. Saunders & Hawksford, for Sydney Hodges; Messrs. Gedge, Kirby & Millett, for Fredk. Hodges; and Messrs. Harting & Son, for Caroline Hodges.

JESSEL, M.R. }

1874.

March 19. }

FARRER v. SYKES.

Practice—Unfiled Affidavits—Motion on Affidavit of Service.

Although unfiled affidavits may be read on an ex parte application, they cannot be read when the respondent has been served but does not appear, and the application is made on an affidavit of service on him of the notice of motion.

Mr. Chitty and Mr. W. C. Druce made a motion in this suit.—The defendant had been served with notice of the motion, but he did not appear on it, and it was brought on on an affidavit of service upon him. Owing to some accident, the affidavits in support of the motion had not been filed, but they had been duly sworn, and the originals were produced in Court, and Mr. Chitty proposed to read them in support of the motion, the plaintiff's solicitor undertaking to file them immediately.

THE MASTER OF THE ROLLS said that it was true that unfiled affidavits might be read on an *ex parte* application, but he knew of no authority for extending the same liberty to an application on affidavit of service. The plaintiff's solicitor had better file the affidavits at once, and the motion could be made later in the day.

[This course was accordingly adopted, and an order was made on the motion in the afternoon.]

Solicitors for the applicants—Messrs. Shum, Crossman & Crossman.

LORDS JUSTICES. { THE WILTS AND BERKS CANAL
1874. NAVIGATION COMPANY v.
March 10. THE SWINDON WATER-
WORKS COMPANY.

Canal Company — Water — Riparian Proprietor—Injunction.

An injunction will be granted at the suit of a canal company entitled to take water from a stream to prevent abstraction of the water though damage is only shewn to have taken place in an exceptionally dry season.

At law, an action could be brought and nominal damages recovered for the abstraction of the water, though no real damage was shewn, to prevent an adverse title being acquired by prescription,—semble.

Where a canal company lawfully buy land to enable them to take a stream and construct a culvert for that purpose, they acquire in respect of that land, and of the culvert constructed, the rights of ordinary riparian proprietors.

Though a canal company may be entitled to sell any surplus water from their canal, they are only entitled to an injunction to prevent interference with a feeding stream so as to cause damage to their navigation or their ordinary use of the water as riparian proprietors.

This was an appeal from a decree of V.C. Malins.

The company of proprietors of the Wilts and Berks Canal Navigation were the successors of a company incorporated by Act of Parliament (34 Geo. 3. c. 90) in 1795, by which the company were enabled to form a canal from the Rivers Thames and Isis, near Abingdon, to the canal between the River Kennet and the River Avon, at or near Trowbridge, with certain cuts or branches, and to supply the said canal and cuts respectively whilst the same should be making, and at all times for ever after the same should be made, with water from all such springs as should be found in making the same, and from all rivers, springs, brooks, streams and watercourses whatsoever which were or should be found within the distance of two thousand yards from any part of the said canal and cuts respectively, or from any reservoir or reservoirs belonging thereto as

NEW SERIES, 43.—CHANC.

therein mentioned; and for that purpose to cleanse, scour, deepen, enlarge, or straighten any such rivers, brooks, streams, or watercourses, or any others that might come or be brought into the same respectively, and to make one or more reservoir or reservoirs for the purpose of supplying the said canal and cuts or any part thereof with water as therein mentioned.

The Act contained various clauses as to compensation, and by s. 57, the owner of any injured mill could require the company to purchase it.

In the year 1807 the company took a small stream called the Wroughton, which passed under the summit level of their canal, to supply the canal with water.

On this stream, before it reached the canal, were formerly seven ancient water-mills, and to obtain the use of the stream the canal company purchased the lowest of these mills, Waytes' Mill, and constructed a culvert from the mill-pond into their canal, with a hatch, by means of which the water could be allowed to run to waste under the canal when not required. Since that time the mill had been disused.

The Wroughton was a tributary or sub-tributary of the Thames, and by subsequent Acts passed in 1813 and 1820, another company was formed and amalgamated with the Berks and Wilts Company, for constructing the North Wilts Canal, which was a branch canal joining the main canal some distance below the summit level. By these Acts the North Wilts Canal was forbidden to take water from any tributaries of the Thames, or elsewhere than from the summit level of the Wilts and Berks Canal, and it was contended that this prevented the Wilts and Berks Canal from any longer drawing their supply from the Wroughton. The Lords Justices, however, took a strong view to the contrary, and it is not necessary to mention the point further.

In 1856 the defendants, the Swindon Waterworks Company, were incorporated under the Joint Stock Companies Acts, without any special Act of Parliament. They commenced business in 1864, and constructed works at the Seven Springs, the principal source of the Wroughton, on

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the site of the highest mill (Baker's Mill), which they bought up for that purpose in the year 1866. They also bought up the lower mills between Baker's Mill and Waytes' Mill, and from the Seven Springs to a point below their works they constructed a culvert with hatches, which enabled them either to allow the water to run into the stream, or to divert it for their own purposes.

In the year 1870, after a very dry season, the canal company ran short of water, and they then discovered that the waterworks company had shut off the stream by means of their hatches. Shortly afterwards they filed the present bill. There was evidence that during the autumn of 1870 the supply in the canal was short, and that barge owners were in consequence unable to send their barges by the canal.

It appeared that the plaintiffs had for some years before 1867 sold water from their canal, and it was alleged that in 1870 they were desirous of selling water from the North Wilts branch, but it was not shewn that they let water down through the locks for the purpose of bringing it to the lower pounds for sale.

The bill prayed a declaration that the defendants were not entitled to stop the water, and for an unqualified injunction to prevent them from doing so. The defendants on the other hand claimed by their answer an absolute right to stop it.

A motion for an injunction stood over to the hearing, and at the hearing the Vice-Chancellor refused the injunction, chiefly on the ground that the canal company, who were not now doing a large trade, could only exercise their rights to take water subject to the requirements of the public, and also on the construction of the Acts above-mentioned, forbidding the North Wilts Canal to take water from tributaries of the Thames.

The plaintiffs appealed.

Mr. John Pearson and *Mr. Roupell* for the appellants.—Actual damage is shewn. But apart from that we rely on—

Williams' Saunders (ed. 1871), 626;

Bonomi v. Backhouse, E. B. & E. 622;

s. c. 27 Law J. Rep. (N.S.) Q.B.

378;

Harrop v. Hirst, 38 Law J. Rep.

(N.S.) Exch. 1; s. c. Law Rep. 4 Exch. 43,

as shewing that the plaintiffs are entitled to be protected, the defendants having set up an absolute right to divert the water.

Mr. Glasse and *Mr. Bristowe* (with them *Mr. W. W. Karlake*), for the defendants, contended that the Acts prevented the plaintiffs from taking the water. They also contended that the water could only be taken and used for the purposes of navigation, and was not really wanted for those purposes. The canal company had always wanted to sell their water, but now, owing to the competition of the defendants, they could not get a customer. Whatever the strict legal right might be, this Court would not interfere unless there was substantial damage. The real motive of the suit was obvious.

Before calling for a reply,

THE LORDS JUSTICES asked *Mr. Pearson* whether the plaintiffs desired more than the use of the water for the purposes of navigation.

Mr. Pearson.—We have become riparian proprietors of the stream, and if we are ever compelled to give up our undertaking we may wish to sell the mill with riparian rights. We desire to have those also protected.

LORD JUSTICE JAMES.—I am of opinion that the plaintiffs, the company, are right on the question of legal right which is asserted by this bill. The plaintiffs obtained an Act of Parliament many years ago, by which they were entitled to supply their canal with water from the streams within a certain distance, and among other streams, there was a stream within that distance called the Wroughton Stream. They availed themselves of their powers in respect of the Wroughton Stream about the beginning of this century, and in order to get the water from that stream they acquired by purchase a mill, a little distance from the line of the canal, and made a new channel, which they lawfully might do under these circumstances, to divert the water into their canal. That has been a lawful stream from that time to this, and with regard to that stream—that is the old channel of the Wroughton Stream down to the point of

diversion, and from the point of diversion into their canal, which it reaches at the middle of the summit level—with regard to that stream they acquired all the rights of a riparian proprietor. They also acquired all the rights of a riparian proprietor which were vested up to the time of the purchase in the then owner of that mill. That being so, they have the ordinary right of a riparian proprietor in this country to prevent any other riparian proprietor above him from diverting the stream so as to cause that stream to flow otherwise than in its accustomed channel so far as he is concerned; a right to have the natural flow of water into his land, and through his land, and into his artificial canal, if he has had that a sufficient length of time, exactly as it has been before during past years. On the other hand all streams are *publici juris*, and all the water flowing down the stream is for the common use of mankind who live on the banks of the stream, and therefore, no doubt, any person living on the banks of the stream has a right to use the water for himself, his family and his cattle, and for all ordinary domestic purposes, such as brewing, washing, and so on, that is to say, the common purposes of water in the ordinary mode of using water.

The defendants in this case are a water company, who have been minded, from public motives partly, and partly for private profit, to supply water to the large towns of Old and New Swindon, where, by reason of the works of the railway, a large population has gathered together, and they are seeking to use and divert water for the purpose of supplying those towns. That is not a purpose for which a riparian proprietor is entitled to take the water from its natural course, and that being so, the defendants are diverting water from the stream for a purpose which is not legal, and in a manner which is not legal. The plaintiffs are persons, who, being below them on the stream, have a right to say, You must not divert the water from its natural course. That really is a question of right for the Court to decide. It has been settled that actual pecuniary damage is not necessary to give a right of action or suit, because it is sufficient to shew that there is an interference

with that which is a right, and in a mode that may give a future legal right to interfere with the stream when it may be wanted, or may be useful in a pecuniary point of view to the riparian proprietor below. I am of opinion, notwithstanding the decision of the Vice-Chancellor, that there is a clear legal right in the canal company, whether as owners of the canal, or as owners of the stream diverted into the canal, to say you must let the water flow down its ordinary course. That is assuming we were now merely trying the question in an action at law. In such an action the jury would be directed by the Judge to find a verdict for the plaintiff, but possibly without damages, except so far as damage was incurred in the year 1870, beyond merely nominal damages to shew that there was a legal right invaded, and that the plaintiff was right in having that vindicated by the Courts of this country.

Then, it is said, if such an action were brought with a view of applying to this Court, the question would be whether there was a substantial wrong done, and that this Court will not interfere where there is no substantial damage. In point of fact, it appears to me that in the year 1870 there was substantial damage. It may be that from the small amount of traffic there were not many boats anxious to travel along the canal during the months of September, October, November and December, 1870. But if the canal was reduced two feet or three feet below its proper level at the time when the whole of it was wanted for the purpose of navigation of the boats, it appears to me that that was a serious damage to a canal. It is impossible to say how many barges might have wanted to go along the canal at that time.

Then it is said, that the plaintiffs might diminish the evil by dredging, but the defendants have no right to tell the plaintiffs how and at what time they are to dredge their canal. That only made it more important to keep the water that could be got. In my opinion it was not, in the year 1870, an idle complaint on the part of the canal company when they said, You, the defendants, are taking the water away from us so as to make our canal cease to

be a canal during those months. The defendants not only allege that there was no damage done, but they have put most distinctly and clearly on their answer a claim of right of such a kind as to make it absolutely imperative on this Court, as it seems to me, to determine that question of right, and to declare the right one way or the other; and as the matter now stands—with the bill dismissed with costs by the Vice-Chancellor—it is an adjudication in favour of the defendants that they have the right they claim by the sixty-first paragraph of the answer, which is in these terms—"We deny that we have threatened, though we admit that we intend (unless enjoined by injunction from so doing) to continue the diversion of the Wroughton Stream into our reservoir, for our own purposes and profits, whenever the demand on us for water requires us so to do." It appears to me that the plaintiffs are entitled to have a declaration from the Court that the defendants are not at liberty to divert the water from the Wroughton Stream into their reservoir, for their own purposes and profit, whenever the demand on them for water requires it. I think the defendants are not entitled to make any diversion of the water.

Then the canal company only want water legally as a canal company for the purpose of navigation. If they have surplus water there would be great difficulty in saying whether or not they might sell it to other persons. That is a matter as between them and other persons who would be injured by it, but as far as their constitution goes they are only entitled to take and use the water for the purpose of navigation, and the surplus must be the surplus which arises casually with regard to the water they have so taken. Therefore, it would be right in making the declaration and in granting the injunction, not to grant an injunction that would enable the canal company to play the part of the dog in the manger, and prevent the waterworks company from using the water at a time when the canal company were turning it off as waste, as far as they are concerned, under the canal, which it seems has been the case in 1871, 1872, 1873, and as far as we have gone in 1874. In

making the declaration of right that the defendants are not entitled to divert the water from the Wroughton Stream into their reservoir, the injunction must be limited to restrain the defendants from so diverting the water as to cause any damage or hindrance to the navigation of the canal. That is all it is necessary to do for the protection of the right to the one without unnecessary interference with the objects of the other.

The plaintiffs having succeeded as to their legal right, and the defendants being wrong, that will carry the costs of the suit, but there will be no costs of the appeal.

LORD JUSTICE MELLISH.—I am of the same opinion. I think that the canal company having purchased land on the banks of the stream have the ordinary rights of riparian proprietors with respect to that stream. I am of opinion also, that besides the ordinary rights of a riparian proprietor, they have, under the first Act of Parliament, a right to take the water of the stream for the purpose of supplying the canal with water for navigation. I agree that they have no right to take the water of the stream for other purposes, such as for the purpose of selling the water, and if they do so, probably any person lower down the stream who is prejudiced by being deprived of the water would have a right of action at law against them, although I think if they really took the water into their canal for the purpose of the navigation, and thus happened to have a surplus quantity of water in any particular place, it would be very difficult to say that they might not legally sell. But that is quite immaterial for the purpose of this suit. Although I agree they have the ordinary rights of a riparian proprietor, yet this suit is really brought in respect of their rights as canal proprietors for the purpose of supplying their canal with water.

Now, the argument which has been urged upon us, and which is the real argument to consider, is this—It is said they are only enabled to get the water for the purposes of supplying their canal with water for navigation, and when this suit was brought (for that is the material time I suppose) they did not want it for that

purpose. And it is said they could not bring an action at law for the diversion of the water unless at the time there had been a diversion which took away water which they wanted for navigation purposes. If that was so, and if instead of bringing this suit they had brought an action in January, 1871, then seeing that there had been a diversion of the water in November, 1870, at a time when they did want it (whether to a greater or less extent it is not necessary to consider), the action might have been maintained even if the proposition was correct. The proposition, however, in my opinion is not correct, and although the canal company have only a right by Act of Parliament to take the water for the purposes of navigation, yet having taken it, and having legally made a junction between the stream and their canal for the *bona fide* purpose of supplying the canal with water, they could maintain an action against the proprietor above, who illegally diverted the water, notwithstanding that at the time they did not actually want it for the purposes of navigation. The test of it is this—Supposing the person who had so diverted it had diverted it and used it for twenty years, could he have claimed a right? In my opinion he clearly could. If he had kept up the diversion for twenty years, although they never wanted the water during that period, yet when they came to want it at the end of twenty-one years, having allowed him to divert it, their right would be lost just the same as the right of any other landed proprietor would be lost. For the purpose of maintaining their right, therefore, they would be entitled to maintain such an action.

I quite agree that this Act of Parliament does not give them the entire stream. The proprietors above are not deprived of the rights they have when the stream is diverted—that is to say, all the rights of a riparian proprietor. If the population increases round the stream, and for ordinary purposes such as a riparian proprietor is entitled to use the stream for, the stream gets diverted, the company have no remedy. The Act of Parliament does not give them any property in the stream, but only a right to make a junction within 2,000 yards

of this canal, and take all they can properly obtain, subject to the rights of the proprietors above, and the rights which the millers above may have gained, to use the water for ordinary purposes. If the proprietors above afterwards seek to use it for the purposes for which they are not entitled, it appears to me the plaintiffs have the same right that any other proprietor along the stream would have if his rights were injured, that is to say, a right to use it for ordinary riparian purposes, and a right to use it for the purpose of supplying their canal with water; and having those important rights on the stream, they are entitled to say they will not allow a person above to acquire rights to divert the water which may deprive them of means of exercising their right. Then it is quite plain (indeed I do not know that it is disputed) that the diversion of the water of the stream for the purpose of sending it in large quantities to a town is not within the right of a riparian proprietor. To my mind it follows that at the time this suit was brought they might have maintained an action at law for diversion. Then what relief ought they to have in this Court? I quite agree in the modification which the Lord Justice has proposed, and probably the mere fact that previously to bringing this suit they might have sold large quantities of water makes it more necessary that we should see our injunction does not enable them to get water for purposes for which they are not entitled to it. Just in the same manner as if they brought an action at law for the diversion of the water, though they might maintain the action they could not allege as special damage that they had been deprived of obtaining large quantities of water which they might otherwise have sold for profit. They could not, being only entitled to the water for navigation, have recovered damages for that which prevents them from having the water for other purposes. I quite agree that the injunction should be in the form proposed.

The argument did go to the length of saying on the construction of the Acts of Parliament that really the effect of the Acts was, not only to prevent the branch

canal being supplied from rivers that flowed into the Thames, but also not to allow the summit level to be supplied by water from rivers flowing into the Thames. That is not so at all, for both in the second and third Act the very sections which say that the branch canal shall not be supplied with water flowing from any stream that would otherwise flow into the Thames, say it shall be supplied, and only supplied, from the summit level. It is perfectly plain that the Legislature did not intend to make any restriction as to the mode in which the summit level was to be supplied.

Solicitors—Messrs. T. White and Sons, agents for Messrs. Henry Crowdy, Highworth, for the appellants; Mr. J. Crowdy, agent for Messrs. Townsend & Co., Swindon, for the respondents.

LORDS JUSTICES. }
1874. } HALFHYDE v. ROBINSON.
March 16. }

Partition—Person of unsound Mind not so found by Inquisition—Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 120.

A bill for partition or sale cannot be filed on behalf of a person of unsound mind not so found by inquisition.

Where in the case of a small estate it is desired to deal with a lunatic's realty, without incurring the expense of an inquisition, the proper course is to proceed under the summary powers of section 120 of the Lunacy Regulation Act, 1853.

This was an original petition in Chancery for a vesting order in a partition suit.

The plaintiff in the suit was a person of unsound mind, and was entitled to an undivided third of the property in question—a cottage and about fourteen acres of land—and the bill was filed on her behalf by her uncle as her next friend.

A decree for sale was made by Vice-Chancellor Stuart, all parties desiring a sale, but owing to there being a defect in the title to one of the other thirds, a sale was not regularly proceeded with, but an offer was made by the third tenant in

common to buy the entirety for 600*l.*, which there was evidence to shew was the full value, having regard to the defect in title, and this offer was accepted by the other parties.

The present petition was presented to obtain a vesting order of the plaintiff's share, and on the authority of

Herring v. Clarke, Law Rep. 4 Chanc. 167,

it was presented in Chancery and not in Lunacy; but at the purchaser's suggestion special leave was obtained to present the petition as an original petition to the Lords Justices.

Mr. A. E. Miller and *Mr. Brett*, for the petitioners, referred to section 4 of the Trustee Act, 1850.

[THE LORDS JUSTICES raised the question whether a bill for partition could be filed on behalf of a person of unsound mind not so found by inquisition.]

The whole property would have been wasted if we had made the plaintiff a lunatic. It is not in evidence, but it is the fact, that the plaintiff is an old lady who has been supported for some time past by the next friend, and that this land which is now lying unproductive is her only property. We have evidence that the next friend is a proper person to interfere, and that the price is a fair one. In fact it is most important that the sale should be carried out.

[LORD JUSTICE JAMES.—You might have proceeded under section 120 of the Lunacy Regulation Act, 1850, giving the Court power to act summarily in a proper case where the lunatic's property is under 500*l.* in value.]

If your Lordship thinks it necessary to do that, the most inexpensive course will be to amend the present petition so as to bring it under that section. The bill would have been necessary in any case in order to sell the whole estate.

LORD JUSTICE JAMES.—I think this suit is altogether irregular. I think the suit should not have been instituted by the next friend of a person of unsound mind, and that the filing of the bill was a highly improper proceeding. Then it is said that it was a mere matter of form whether the bill was filed by the plaintiff

or the present defendants; but if it had been filed by the defendants they would have taken the risk of the suit. We can sell the lunatic's interest under the provisions of the Lunacy Regulation Act, 1850, but it must be understood that we are selling under that Act, and that we are not selling in the partition suit, nor adopting the proceedings in that suit in any way. Before the sale is approved of we must know how much will actually come to the lunatic, and there should be evidence as to the whole value of the lunatic's property, so as to bring the case within section 120 of the Act. A petition in lunacy under that section must be presented, or the present petition may be amended by entitling it in lunacy, and stating the whole value of the lunatic's property, and then the matter will be disposed of in chambers, and the sale may be carried out by concurrence with the other parties.

I desire it to be clearly understood that I do not think a bill can be filed on behalf of a person of unsound mind for dealing with his real estate. The consequences might be monstrous if any solicitor or any other person could file a bill on behalf of a person of unsound mind who happened to be a tenant in common.

LORD JUSTICE MELLISH concurred.

Solicitors—Messrs. Duncan & Murton, agents
for Mr. J. M. Head, Reigate, for petitioners.

LORDS JUSTICES.

1874.

March 7.

BIRD v. BIRD'S PATENT
SEWAGE COMPANY.

Company—Sale of Business in Consideration of Shares in another Company—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161—Ultra Vires—Injunction.

A resolution to sell a company's business under section 161 of the Companies Act, 1862, in consideration of shares in another company, must be an agreement to sell to such other company itself; and, therefore, an agreement to sell to an individual in

consideration (in part) of shares in a company he intends to form is ultra vires, even if such agreement is intended to be followed by a resolution to wind up, and a fortiori if it is not.

This was an appeal from a decree of Vice-Chancellor Bacon.

The plaintiff was one of eleven shareholders in Bird's Patent Deodorizing and Utilizing of Sewage Company (Limited), holding twenty fully paid-up shares of 10*l.* each, out of 200, the whole number issued.

On the 16th of October, 1871, the directors, being seven of the other ten shareholders, entered into an agreement in which they were described as directors of the company, and thereafter called the vendors, with Charles Allsop, thereafter called the purchaser, witnessing "that the vendors for and on behalf of the said company, and so far as they have power to bind the same, agree to sell and assign, and the purchaser agrees to purchase all the assets, patents, patent rights, works, leases, premises, stock in trade, book debts, business, goodwill and connection, property and effects of the said Bird's Patent Deodorizing and Utilizing Sewage Company, as and from the date hereof, such sale and purchase to be for the consideration, and under and subject to the several conditions and stipulations hereinafter contained.

"First. The vendors shall forthwith, in accordance with the regulations contained in the memorandum and articles of association of the said company, call an extraordinary general meeting of the shareholders of the said company, and shall use their best endeavours in obtaining the sanction of the shareholders enabling them to carry out such sale or purchase, and shall if necessary endeavour to obtain the voluntary liquidation and dissolution of the said company.

"Second. On such sanction being obtained, the purchaser shall deposit with the vendors the sum of 250*l.* in cash, and if the purchaser shall, with the assistance of the vendors (as hereinafter provided for), succeed in promoting and constituting a new company for working the said patent, he shall within three months from

the allotment of shares of such proposed new company, pay to the vendors or their nominees a further sum of 1,250*l.* in cash, and a sum of 2,000*l.* in fully paid-up shares in such new company.

"Third. And the purchaser agrees to use his best endeavours to form, constitute and promote such proposed new company, and the vendors agree to assist him by all means in their power in promoting and constituting such proposed new company, and if necessary in liquidating and dissolving the old company."

The plaintiff protested against this agreement both before and after it was entered into, but after considerable discussion, at a meeting of the company held on the 9th of December, 1871, resolutions were passed for the adoption of the agreement, for the voluntary winding up of the company, and the appointment of a liquidator with directions to carry out the agreement, with any modifications he might agree upon.

A meeting was held on the 6th of January, 1872, and adjourned to the 15th inst., to confirm these resolutions, but at the instance of Mr. Allsop, who thought a winding up might damage the prospects of the proposed company, only the first resolution was confirmed, and the rest were abandoned. On the resolution being confirmed, the seal of the company was affixed to the agreement.

On the 7th of February, the plaintiff filed his bill, alleging that the resolutions had all been passed, but praying a declaration that the agreement was *ultra vires*, and for an injunction to restrain the directors from parting with the assets and other consequential relief. Subsequently the bill was amended by stating that the winding up resolutions had been abandoned.

The 250*l.* had been paid under the agreement, but owing to the suit nothing further had been done. The bill was filed on behalf of all the shareholders except the defendants, the directors, but the directors stated in their answer, that the other shareholders approved of the scheme. They also in their answer stated that they had abandoned the idea of carrying out the plan without a winding up.

The plaintiff alleged that the sale was

improvident, and in the correspondence which had taken place, pressed for information as to the means of Mr. Allsop, and for further details.

The Vice-Chancellor made a decree according to the prayer, and ordered the directors to pay the costs of the suit. The directors appealed.

Mr. Kay and *Mr. Millar*, for the appellants.—We may have proceeded irregularly, but the arrangement is one that could be carried out under section 161 of the Companies Act, 1862, and the Court will not stop the sale—

Ex parte Fox, 40 Law J. Rep. (N.S.) 433 ; s. c. Law Rep. 6 Chanc. 176.

[LORD JUSTICE MELLISH.—But must not the sale be to an existing company? That decision went partly on the delay, and the company was formed before the plaintiff filed his bill.]

The agreement is not skilfully drawn, but it is obviously only provisional, and intended to be carried out as a sale to a new company.

[LORD JUSTICE MELLISH.—Is it consistent with the duty of directors as trustees to bind themselves personally to use their best endeavours to obtain a winding up, so as to fetter their discretion by their personal interest?]

Section 161 allows an agreement for sale to be entered into antecedently to a resolution to wind up.

Mr. Eddis and *Mr. Samuel Dickenson*, for the plaintiff.—We say that on the original bill the sale was invalid. Section 161 only allows an agreement for sale to a company, and this is an agreement to sell to Mr. Allsop for shares in a company to be formed hereafter. Before the resolution is submitted to the shareholders they have a right to know what the company is in which shares are offered (1).

On the answer of the directors, it is clear that no winding up was intended when the bill was filed.

Mr. Millar, in reply.

(1) *Quere* whether on the construction of section 161, the winding up must not follow immediately on any resolution for sale, since notice of dissent must be given within seven days to the liquidator.



LORD JUSTICE JAMES.—I am of opinion that the decree of the Vice-Chancellor ought to be affirmed. It appears to me that the company were altogether wrong not merely in form, but in the original agreement even if followed by a winding up, since, under section 161 of the Companies Act, 1862, the liquidator could not have sold to Mr. Allsop. That is the only section which gives power to bind dissentient shareholders, and that section only applies, "Where any company is proposed to be, or is in the course of being wound up, altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company." The proposed sale is not a sale to another company, but to an individual who is to be a speculator, and who is able to make as much profit as he can out of the formation of the new company. Under section 161, the various shareholders were entitled to know something more of the company in which they were to become entitled to shares than this, that it was to be any company that Mr. Allsop chose to form.

The matter does not stop here, though the question was important with regard to the costs on the original bill. It further appears that the company had themselves abandoned the winding up when the bill was filed, and were about to carry out the agreement under their own powers. It is true they say in their answer, that they are advised that it is doubtful whether they can carry out the arrangement without a winding up, but they never communicated to the plaintiff their willingness to take this course, and it is very ambiguous, as it appears on their answer, whether they intended to do so. They say they would have gone on under a winding up but for these pending proceedings, but it is not at all clear that they would have done so if no bill had been filed. If the company had desired to avoid litigation, they should have submitted to an injunction, and then have proceeded to wind up the company and passed resolutions to carry out a proper sale. The decision of the Vice-Chancellor is right, and the appeal should be dismissed with costs.

LORD JUSTICE MELLISH.—I am of the
NEW SERIES, 43.—CHANC.

same opinion. I have come to the conclusion that the agreement of the 16th of October, 1871, was not valid as a preliminary arrangement to winding up the company and selling the assets and business to a new company. I am of opinion that a sale under section 161 must be a sale to another company. The section begins—"Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company." I think that must have reference to a particular arrangement with another company. Further on in the section it speaks of the "purchasing company." And then lower down it says that no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company or appointing liquidators. But that has reference, not to a mere proposal, but to an absolute sale to another company. Here by the agreement Mr. Allsop is called the purchaser. The directors on behalf of the company agree to sell, and he agrees to purchase the assets and business of the company. And it is agreed that the directors shall call a meeting and use their best endeavours in obtaining the sanction of the shareholders to the sale, and if necessary endeavour to obtain the voluntary liquidation and dissolution of the company. They did call a meeting of the shareholders, and passed resolutions to sell the business and assets, but not to wind up the company; and the agreement, which professed to be a sale to Allsop, was sealed by the company in pursuance of the resolutions. Then the agreement says that a deposit of 250*l.* is to be made, and that was done. And then—"If the purchaser shall with the assistance of the vendors as hereinafter provided for, succeed in promoting and constituting a new company for working the said patent, he shall within three months from the allotment of shares of such proposed new company, pay to the vendors or their nominees a further sum of 1,250*l.* in cash, and a sum of 2,000*l.* in fully paid-up shares in such company"—Allsop there remains the

purchaser. And then he agrees to use his best endeavours to form the company.

Such an agreement is not valid within section 161 of the Act, and in my opinion the decree properly declared that the agreement and resolutions were *ultra vires*, and invalid, and that an injunction was properly granted to restrain the agreement from being carried out. That injunction cannot prevent resolutions being properly passed to wind up the company.

Appeal dismissed with costs.

Solicitors—Messrs. Winterbotham, Bell & Co., for the appellants; Messrs. Valpy & Chaplin, for the plaintiff.

HALL, V.C. }
1874. }
March 3. }

PRICE v. MAYO.

Administration Suit—Admission of Assets—Form of Decree.

Where an administratrix had distributed the whole of the intestate's assets without making provision for calls on shares:—Held, that there ought to be a decree for payment, and in default for administration.

The defendant Eliza Mayo was the administratrix of Frederick Mayo, who had died intestate in 1870.

Frederick Mayo had held 117 shares in the Albert Life Assurance Company, and Eliza Mayo was duly settled on the list of contributories of the company, which had been wound up in 1869.

An arbitrator (Lord Cairns) was appointed to determine questions arising in the winding up and he appointed the plaintiffs liquidators in 1871.

The defendant, Eliza Mayo, after she was so settled upon the list of contributories, and after paying one call of 1,989*l.* on the shares, distributed the residue of Frederick Mayo's estate without providing for the calls which might become due from his estate in respect of the said 117 shares. Under these circum-

stances the arbitrator gave the plaintiffs leave to file this bill on behalf of themselves and all other the creditors of the said Frederick Mayo, the intestate, to administer his estate and effects.

By amendment the plaintiffs added the next of kin of the intestate as parties, a demurrer was filed to the amended bill by certain of the next of kin for want of equity, and was allowed.

The defendant admitted that she had received, but not that she had in her hands abundant assets to pay the amount of the call now claimed.

Mr. Dickinson and *Mr. Herbert Lake*, for the plaintiffs.—The administratrix by admitting assets has taken the liability on herself, and payment should be ordered, and an administration decree in default.

Mr. Karlake and *Mr. Colt*, for the defendant.—The decree ought to be in the alternative, either for payment on the admission of assets or for administration. There is no precedent for the double decree, which might in fact amount to a preference of this creditor.

HALL, V.C., made the following order—
“ That the administratrix of the said intestate do, on or before the 31st day of March, 1874 (she by her answer admitting assets of the intestate for that purpose), pay to the said plaintiffs, Samuel Powell Price and John Young as the official liquidators of the Albert Life Assurance Company in the plaintiff's bill mentioned, the sum of 1,287*l.*, being the amount of the call of 1*l.* per share in respect of 117 shares in the said company held by the said intestate, together with interest on the said amount of 1,287*l.* to the day of payment, at the rate of 5*l.* per cent. per annum, and that if such sum of 1,287*l.* and interest as aforesaid shall not be paid by the defendant to the plaintiffs on or before the said 31st day of March, 1874, the following accounts and enquiries should be taken and made, viz., an account of what is due to the plaintiffs, and all other the creditors of the said Frederick Richard Mayo, deceased, the intestate in the bill named, an account of the intestate's funeral expenses, an account of the intestate's personal estate come to the hands of the administratrix of his

effects, or to the hands of any other person or persons by the order or for the use of the said administratrix. An enquiry what parts (if any) of the intestate's personal estate are outstanding or undisposed of. And that the intestate's personal estate be applied in payment of his debts and funeral expenses in a due course of administration, and that the said defendant should pay to the plaintiffs their costs of this cause up to and including this decree, such costs to be taxed by the Taxing Master, and that in case of non-payment further consideration should be adjourned, liberty to apply."

Solicitors—Messrs. Lewis, Munns & Longman, for plaintiffs; Messrs. Lumley & Lumley, for defendant.

JESSEL, M.R. }
1874. } GAINSFORD v. DUNN.
March 3, 4. }

Power—Construction—Appointable Fund—Legacies—Residue.

A testatrix, being entitled to exercise a non-exclusive testamentary power of appointment amongst her brother and four sisters, made a will giving her brother and two sisters 5l. a-piece, and giving to her other two sisters all the residue of her property of whatever kind and wheresoever situate, and over which she had any power of appointment:—Held, that the effect of giving the residue of the appointable fund with the testatrix's own property, was to make the legacies payable out of both rateably, and so make the power well exercised.

SPECIAL CASE.

By a settlement dated the 31st of August, 1841, to which Anne Dunn and her brother and sisters, namely, Thomas Dunn, Mary Dunn, Elizabeth Dunn, Sarah Rebecca Dunn, and Jane Isabel Dunn were parties, certain personal property was directed to be held on certain trusts, including a limitation in certain events which happened, in the following words—

"In trust for the said Thomas Dunn, party hereto, Mary Dunn, Elizabeth Dunn, Sarah Rebecca Dunn, and Jane Isabel Dunn, or their respective issue, in such parts, shares and proportions, and in such manner as the said Anne Dunn, either before or after and notwithstanding any coverture, by her last will and testament in writing, or any writing in the nature thereof, shall direct or appoint."

Elizabeth Dunn afterwards married R. J. Gainsford, and Jane Isabel Dunn married H. T. Stainton.

Anne Dunn duly executed a will dated the 20th of November, 1869, in the following words—

"This is the last will and testament of me, Anne Dunn, of Elmfield Northaw, in the county of Devon, spinster. I appoint my sisters, Mary Dunn and Sarah Rebecca Dunn, co-executors. I give and bequeath to my brother, Thomas Dunn, and to my sister, Elizabeth, the wife of Robert John Gainsford, Esq., and Jane Isabel Stainton, the wife of Henry Tibbats Stainton, Esq., the sum of 5l. each; and all the rest and residue of my property, of whatever kind and wheresoever situate, and over which I have any power of appointment or disposition, I give, devise and bequeath unto and to the use of my sisters, Mary Dunn and Sarah Rebecca Dunn, their heirs, executors, administrators and assigns respectively, for their own absolute use and benefit as tenants in common. Lastly I revoke all former wills and testaments at any time heretofore made by me."

The question was raised as to whether the power being non-exclusive was well executed by the will.

Mr. Southgate, Mr. W. S. Owen, and Mr. Kenyon Parker appeared for the parties, contending that the power was not well exercised.

Mr. Roxburgh, Mr. Ince and Mr. Morshed, for the other parties, were not called upon.

The following cases were cited or referred to—

Bench v. Biles, 4 Madd. 187;
Greville v. Browne, 7 H.L. Cas. 689 (1859);
Francis v. Clemow, Kay, 435; s. c.

23 Law J. Rep. (N.S.) Chanc. 288 (1854);
Gyelt v. Williams, 2 Jo. & H. 429 (1862).

THE MASTER OF THE ROLLS.—Certainly there never was a better illustration of the extreme technicality of our law than the case I have before me. One must really state what the law is in order to understand the point raised. Under the old law of appointment, when a power of appointment was given to a person among others in such parts or shares as the appointor should direct, it was held, not irrationally, that the meaning of the person creating the power was that the appointor should appoint a substantial share to each object of the power. It was what they call a non-exclusive power, and it was therefore considered that the author of the settlement intended everybody to take a substantial share. That was not according to the literal wording of the power, but it made sense of it; because if the appointment of a farthing would do, on the principle of *de minimis non curat lex*, it would make every non-exclusive power an exclusive power. However, that doctrine was found inconvenient. No one knew exactly how much a substantial portion of the property was, and it was impossible to say, without resorting to litigation, what the least sum was which the appointor was authorised to appoint. That inconvenience led to an alteration of the law, and the Legislature, under the guidance of a very great lawyer, made this very remarkable alteration—it directed (1 Will. 4. c. 46) that in future no appointment should be objected to on the ground of its being illusory, that is, on the ground of the smallness of the sum or share appointed; but it did not alter the effect of the power, and the consequence of this remarkable alteration of the law has been this, that where the power is non-exclusive, if the appointor forgets to appoint a shilling, or even a farthing, to every object of the power, the appointment is bad, because some one is left out. One would have imagined that the reasonable mode of altering the law would have been to make every power of appointment exclusive,

unless the author of the settlement had pointed out the minimum share which every object was to get. However, that is not the state of the law, and in this present instance an appointment by a lady, who had a power of appointment between her brother and sisters, is objected to, because it is said she has forgotten to appoint a shilling to the brother and other sisters, she intending that two sisters should take the whole of the property. That is the first and most important question. I have to decide as to whether this appointment is bad on that ground. That again depends on the construction of the lady's will, and that again depends on the rules of construction which have been adopted, certainly not with a view to the exercise of a power of appointment, but with reference to a very different subject-matter.

Now the first point is not arguable. There is no doubt that this is a non-exclusive power. The power is "In trust for the said Thomas Dunn, Mary Dunn, Elizabeth Dunn, Sarah Rebecca Dunn, Jane Isabel Dunn, or their respective issue, in such parts, shares and proportions, and in such manner as the said Anne Dunn shall by her last will and testament direct or appoint." Therefore she can only appoint among these persons named, and she can only appoint in such shares and in such manner as she may desire. She made her will, which is very short. She was a spinster. It was stated that she had some personal estate, and that it was small, but my judgment does not turn on the amount of it, and the Special Case does not state the amount of it. She says in her will, "I appoint my sisters, Mary Dunn and Sarah Rebecca Dunn, executors. I give and bequeath to my brother, Thomas Dunn, and to my sister, Elizabeth, the wife of Robert John Gainsford, Esq., and Jane Isabel Stainton, the wife of Henry Tibbats Stainton, Esq., the sum of 5*l.* each. All the rest and residue of my property, of whatever kind and wheresoever situate, and over which I have any power of appointment or disposition, I give, devise and bequeath unto and to the use of my sisters, Mary Dunn and Sarah Rebecca Dunn, their heirs, execu-

tors, administrators and assigns respectively, for their own absolute use and benefit, as tenants in common."

Now it was conceded in argument that if the lady had given a shilling out of the appointed fund to the brother Thomas and to the sister Elizabeth and the sister Jane, then, under the words I have mentioned, the two other sisters, Mary and Sarah Rebecca, would have taken the fund over which she had a power of appointment absolutely. But it was said that the will would fail altogether, because she had given nothing out of the appointed fund to the brother and to the two sisters; and that, as I said before, is a question of construction of the will. It was opened as if it was incapable of argument, but I think it not only capable of argument, but upon consideration I have not even called on the other side. The question is, whether any part of the 5*l.* each given to the brother and the two sisters, is or is not payable out of the fund subject to the power of appointment. The gift is, no doubt, of 5*l.* only at first, and if nothing else had occurred, it would have been a common legacy, out of her personal estate. Then she gives the rest and residue of her property, of whatsoever kind and wheresoever situate, and over which she has any power of appointment or disposition, to the use of her sisters, Mary Dunn and Sarah Rebecca Dunn, their heirs, executors, administrators and assigns, for their own absolute use and benefit. So she has given the residue first of her property, and next of property over which she has a power of appointment, and she has given them together. Now this kind of gift has been the subject of frequent judicial decisions. I may refer to the cases of *Bench v. Biles* (*ubi supra*), and *Greville v. Broune* (*ubi supra*), and the later cases of *Francis v. Olemow* (*ubi supra*), and *Gyett v. Williams* (*ubi supra*), before Vice-Chancellor Wood. Those cases were cases of a gift of residue of real and personal estate, but the result of the cases is this, that where you find a legacy followed by a gift of the residue of real and personal estate, the word "residue" is considered to mean that out of which something given before

has been taken, and the result is, I think in the words of Vice-Chancellor Wood, but certainly in the words of Sir John Leech, to make the residue a mixed fund, and to distribute the legacy proportionably and rateably as taken out of the mixed fund. The question has generally arisen when the personal estate has failed, and it is said the legacy is payable out of the real estate. But in truth it is payable out of both funds by force of the word "residue," and therefore the amount payable out of each depends on the relative value of the two funds. That being so, applying that doctrine to this case, the three sums of 5*l.* each are payable partly out of the testatrix's own property and partly out of the fund appointed. The consequence is, there must be at least a farthing payable out of the funds subject to the power, and since, as I said before, however small the sum is, no appointment is illusory, this is an appointment out of the fund of some portion of the 5*l.* to the brother and each of the two sisters. The consequence is, I hold the power well executed, and the ladies will take, subject to the small legacy, the whole of the appointed fund, and I can give effect to this lady's will. In fact, it is an instance, of which we have so many, of a technicality defeating a technicality, and the true intention of the testator taking effect.

Solicitors — Messrs. Dobinson & Geare; and Messrs. Tanqueray, Willaume & Hanbury, for the various parties.

JESSEL, M.R. }
1873.
Nov. 13. }

BIBBY v. NAYLOR.

Revivor—Foreclosure Suit—Transfer of Interest of Plaintiff—15 & 16 Vict. c. 86. s. 52.

When a decree has been made in a foreclosure suit, and the plaintiff has subsequently transferred his interest, the transferee may obtain an order of revivor under

the 15 & 16 Vict. c. 86. s. 52, whether the transfer took place before or after the chief clerk had made his certificate.

This was a foreclosure suit, in which a decree had been made, and the chief clerk had made his certificate. The plaintiffs had then transferred their interest in the subject-matter of the suit, and the transferee now moved, with the consent of the original plaintiffs, for an order of revivor under the 15 & 16 Vict. c. 86. s. 52. (See *Seton*, Dec., p. 403, 3rd ed.). The application was made *ex parte*.

Mr. North, for the motion, said that the case was identical with

Ingham v. Waskett, 40 Law J. Rep. (N.S.) Chanc. 399; s. c. Law Rep. 11 Eq. 283 (1871),

except that there the assignment was before the chief clerk had made his certificate, whereas here it took place after that had been done.

THE MASTER OF THE ROLLS said that it could not be anybody's interest that a supplemental bill should be filed, and the applicant might therefore take the order asked for.

Solicitor—Mr. W. W. Wynne, agent for Messrs. H. Forshaw & Hawkins, Liverpool, for the applicants.

BACON, V.C. }
1874. }
March 16. }

DAWSON v. SMALL.

Will—Prior invalid Bequest—Gift of Surplus—Charity.

*S. bequeathed 600*l.* arising from such part of his estate as should not be secured upon mortgages or chattels real, to apply the income to keep in good repair the tombstones of himself and several of his relatives, and directed the surplus income to be given away on his birthday in charity:—Held, that the prior gift to keep the tombstones in repair being void, the whole fund went to the charity.*

This was a question on the construction of the will of John Small, late of Guisborough.

The testator by his will dated the 18th of June, 1846, amongst other gifts "bequeathed the sum of 600*l.* sterling, arising out of such part of my personal estate as shall not be secured upon mortgages or chattels real or be invested in government securities, to be invested either in the purchase of land in the parish of Guisborough or in its near neighbourhood; but should the statute of mortmain prevent this, then the said sum of 600*l.* to be invested in government securities, and that the interest, dividends or rent arising therefrom be for ever applied to the following purposes—First. To keep up in good repair all the tombstones and headstones of my relatives and self in the churchyard of Guisborough, with the wall and iron palisading surrounding the same, likewise the two headstones belonging to my family outside of the said inclosure; and if any of the iron or stonework want repairing, that it always be done when wanted, and that all the headstones and tombstones always be kept clean and well painted, and that the letters be recut when growing illegible, and that all weeds and grass be kept from growing in the inside of the said inclosure, and that it be cleaned and scoured twice every year, and that likewise the headstones of my brother James Small, in Seamer churchyard, and of my cousin Robert Wiles, in the same churchyard of Seamer, near Stokesley, and of my cousin Thomas Wiles, in the inclosure of the Guisborough churchyard, be kept in order and painted the same as is directed respecting the others before-named. And I hereby direct and desire that any surplus money that may remain after defraying yearly the expenses as before-stated, shall be given away every year, on the 6th day of September (my birthday) in the vestry belonging to the Wesleyan Methodist Chapel in this town, to poor pious members of the Methodist Society resident in this town above the age of fifty years, and that the said surplus money be paid by the two society stewards belonging to the said chapel. Should there be more than two society stewards a leaders' meeting be called to choose two out of the number, and whose decision shall be entered in a book to be

kept for that purpose, wherein all payments from time to time shall be entered. And I do hereby order that they, the said society stewards for the time being, be the trustees to receive the dividends, rents or profits arising from the investment of the said 600*l.* sterling, hereby bequeathed for that special purpose, and that the two society stewards retain to themselves the sum of 1*l.* each annually as a remuneration for their trouble, and that the said sum of 600*l.* sterling be invested within eighteen months after my decease."

By a codicil to his will the testator confirmed his gift of 600*l.*, but directed that the surplus should be distributed by his executrix, Sarah Dawson.

The testator died on the 7th of January, 1867, and the will was shortly after duly proved by the plaintiffs Sarah Dawson and William Harrison, and the defendant John Lowther Small. Several questions arose upon the construction of the will, and this bill was filed to have the estate administered under the direction of the Court.

The matter now came on, on further consideration, to determine, amongst other matters, the true effect of the gift of 600*l.*

Mr. Swanston and *Mr. John Cutler*, for the plaintiffs.—The bequest to keep up the tombstones is clearly void—

Rickard v. Robson, 31 Law J. Rep. (n.s.) Chanc. 897; s. c. 31 Beav. 244.

Where a prior gift fails and a charity takes the interest in remainder, the charity takes the whole—

Hoare v. Osborne, 35 Law J. Rep. (n.s.) Chanc. 345; s. c. Law Rep. 1 Eq. 585;

Fisk v. The Attorney-General, Law Rep. 4 Eq. 521;

Sinnett v. Herbert, 41 Law J. Rep. (n.s.) Chanc. 388; s. c. Law Rep. 7 Chanc. 232;

Hunter v. Bullock, 41 Law J. Rep. (n.s.) Chanc. 637; s. c. Law Rep. 14 Eq. 45.

Mr. Hemming, for the Attorney-General, concurred in the view taken by the plaintiffs.

Mr. Eddis and *Mr. Torriano*, for John

Lowther Small.—There are so many tombstones in different churchyards to be kept up that, if the interest on the fund could be employed in this way, it would take nearly the whole. The residue, then, being so uncertain, the case comes within that class of cases where, it being impossible to ascertain the surplus, the whole gift fails—

Limbrey v. Gurr, 6 Madd. 151;

Chapman v. Brown, 6 Ves. 404;

Fowler v. Fowler, 33 Beav. 616; s. c.

33 Law J. Rep. (n.s.) Chanc. 674;

Cramp v. Playfoot, 4 Kay & J. 479.

Mr. Chitty and *Mr. Caldecott*, for parties in the same interest.

BACON, V.C.—I think this case is governed by the case of *Fisk v. The Attorney-General* (*ubi supra*). I think the decision of that case not only binds me, but it guides me to the decision of this case. It has been argued as a distinction that, in that case and in some others, there is a gift to individuals. Here the man disposes of the whole of his estate, names executors, and gives 600*l.*, part of his property, to be invested and secured. What is that but a gift to the executors? What are they less than trustees under that gift? What difference, I ask myself, can it make that a person is named to have the management and conduct of that gift, and that it is given to be disposed of by the executors of the testator? There is no sort of distinction. The cases that have been referred to, beginning at *Chapman v. Brown* (*ubi supra*), and *Limbrey v. Gurr* (*ubi supra*), are wholly distinguishable; they are as plain as anything can be. It is a gift of surplus in both cases. In one case it would be impossible to ascertain what would be required to build the chapel, and unlawful to apply the estate for that purpose, if you found it out, and therefore it would be impossible to say that there would be any surplus. There is not any surplus from nothing at all. In the case of *Limbrey v. Gurr* (*ubi supra*), the same observation applies. The testator intended to dedicate a part of his property for the building of alms-houses, and all that was not wanted for building alms-houses was to be given to the inhabitants of the alms-

houses. If the alms-houses could not be built, there could be no persons who could ever inhabit them. So, in this case, the testator sets apart 600*l.* for the charitable purposes which he mentions, one of which is for repairing the tombstones, not saying anything what proportion should be disposed of in that way, and he gives all the surplus for the poor people attending the Methodist chapel of which he was a member. Where is the difference? Nothing is required for maintaining the tombstones; all that there is is surplus. It is exceedingly like *Fisk v. The Attorney-General (ubi supra)*, as I understand that decision, and as I understand the rule in the present case, the obligation, if it may be so called, is discharged. It is an obligation either to be performed or not, as the persons to whom the custody of the money is given think fit; and all that is yielded from the annual income of the devised estates goes, therefore, to the charitable purposes which the testator has pointed out.

I cannot persuade myself that, if anybody made any complaint that the executors had neglected to keep up these tombstones, that that complaint would have any sort of foundation. The obligation is merely honorary, as I said upon some other occasion; but the obligation to give all that is not applied for the purposes first mentioned in favour of these poor people is by no means honorary; it is a trust that must be executed. In my opinion, consistently with all the cases referred to, being unable to find any distinction, as I am wholly unable, between *Fisk v. The Attorney-General (ubi supra)* and the present case, I think that decides the question that has been raised before me to-day, and that the 600*l.* is a good charitable legacy.

Solicitors—Messrs. Pitman & Lane, agents for Messrs. Wetherill & Lloyd, of Guisborough, for the plaintiffs; Messrs. Shum, Crossman & Crossman, and Messrs. Bell, Broderick & Gray, for the defendants; Messrs. Raven & Bradley, for the Attorney-General.

JESSEL, M.R. }
1874.
March 23. }

LAMB v. CRANFIELD.

Voluntary Payment by Mistake—Remedy at Law—Demurrer.

Where money has been voluntarily paid under a mistake the remedy is at law and not in equity.

The material allegations in the bill were the following—

In August, 1872, the plaintiff had been confined in a lunatic asylum.

On the 1st of April, 1873, he was released on probation. On the 16th of May, 1873, he was again placed in confinement.

During the interval that he was at large, i.e., on the 7th of May, 1873, he purchased at an auction certain property for 1,510*l.*

By the conditions of sale it was provided that the purchaser should pay a deposit of 10*l.* per cent. on the purchase money; that requisitions on title should be made within ten days from the delivery of the abstract; and that the purchase should be completed on the 24th of June, 1873; and in default, that the deposit should be forfeited.

The plaintiff by mistake paid by way of deposit to the auctioneer 300*l.*, instead of 151*l.*, having been confined in a lunatic asylum a few days after the sale, he could not complete the purchase.

The defendant claimed to retain the 300*l.* as forfeited deposit, and had resold the property.

The plaintiff charged that, under the circumstances, the defendant had no right to retain any part of the 300*l.*, or that at most he was only entitled to retain the 151*l.*, being ten per cent. on purchase money, and that he ought to pay interest to the plaintiff.

The bill prayed for an account of principal and interest due to him, and a decree for payment of what might be found due.

The bill only stated that the money had been paid to the auctioneer. The defendant put in a demurrer for want of equity.

Tremlett, for the demurrer.—This is a

mere money demand, and the proper remedy is at law. And there is no allegation that the money has been paid to or received by the defendant.

[THE MASTER OF THE ROLLS.—It appears to be a case for an action at law, see Story Eq. Jur. s. 151.]

Southgate and Cottrell, for the bill.—Money paid voluntarily under a mistake cannot be recovered at law, at all events, in case of mistake there is concurrent jurisdiction in equity.

THE MASTER OF THE ROLLS held that it was a case for an action at law, and allowed the demurrer.

Solicitors—Mr. Joel Morris Barnard, for plaintiff;
Mr. F. T. Donne, for defendant.

HALL, V.C. }
1874. }
Feb. 25, 26. }

NEATE v. DENMAN.

Inn of Court—Action at Law on Suretyship Bond by the Inn against a Member of it—Bill to restrain the Action, to cancel the Bond, and for Plaintiff to be at Liberty to retire from the Inn without further Payment or Undertaking as to not practising at the Bar—Demurrer—Appeal to the Judges.

A Court of Equity has no jurisdiction to restrain an action at law by an Inn of Court against one of its own members on his suretyship bond. The proper tribunal is that of the Judges of the superior Courts of England and Wales, in their visitatorial capacity over the Inn.

The bill in the suit prayed a full discovery of all the matters in dispute between the plaintiff and the society relating to the suit; the delivery up to the plaintiff for cancellation of the bond given by him to the society on his call to the bar; an injunction to restrain the defendants, the representatives of the surviving obligees of the bond, from suing him at law upon it; and a declaration that he might be at liberty to retire from the Inn without making any further payment

NEW SERIES, 43.—CHANC.

or entering into any undertaking not to practise as a barrister in the United Kingdom, the Colonies or India.

The defendants demurred to the bill for want of jurisdiction in the Court, and want of equity:—

Held, that the demurrer must be allowed.

Demurrer.

The bill in this suit was filed by Mr. Charles Neate, Fellow of Oriel College, Oxford, and Barrister-at-Law, of Lincoln's Inn, against the Hon. Richard Denman and the Hon. George Denman, executors of the late Lord Denman, and the Right Hon. Sir W. M. James, the treasurer of the Society of Lincoln's Inn.

The bill stated that the plaintiff, in 1832, being a member of Lincoln's Inn, was then called by that Society "to the degree of utter barrister." He then signed the usual bond, with a surety, to secure the payment of his dues to the Society. The late Lord Denman was one of the obligees of the bond. The condition of the bond was this—

"That if the plaintiff should, from time to time, and at all times thereafter during his life, or so long as he should continue a member of the Society of Lincoln's Inn, duly and orderly perform, pay and discharge all such debts, duties and charges, sum and sums of money as should grow due and chargeable upon him for pensions, preacher duties, commons, taxes, fines, penalties, amerciaments, and all other duties whatsoever thereafter to be due or imposed upon him by virtue of any order or orders of the said Society theretofore made, or at any time or times thereafter to be made, or by virtue of or according to the usage and custom of the said Society, then this obligation to be void, or else to remain in full force and virtue."

The plaintiff was not then informed that he could not withdraw from being a member of the Society without the consent of the Masters of the Bench, or that such consent would not be given except upon certain conditions.

In 1845 the plaintiff ceased to reside in London; and with the exception of once acting as a deputy County Court Judge, and in some special lunacy matter, withdrew from practice at the bar. From the

time of his being called to the bar up to the year 1862, he continued from time to time to pay the whole amount claimed from him by the Society, as due up to the last-mentioned year, in respect of any of the items mentioned in the bond, and such payments amounted to upwards of 60*l*. In the year 1869 the plaintiff wrote to the Society expressing his wish or intention to withdraw from it, and received in reply the following form of petition to the Society, to be presented by him to the Masters of the Bench—

“That your petitioner is desirous that his name may be taken off the books of this Society, as he is not now practising at the Bar, and it is his intention not to practise as a barrister in future either in this country or in any of the colonies. Your petitioner therefore prays that your Worships will be pleased to take his name off the books of the Society, and order the bond to be cancelled on payment of all his arrears of dues and duties to the treasurer, and the fine on leaving within one month from the date of the order made hereon.”

Since the time when that petition was sent to him, the terms thereof, as now required to be signed by members of the Society desirous of withdrawing therefrom, have been altered by the addition of the word “India” after “colonies,” and by the substitution of the word “composition” for the word “fine;” by which latter alteration, as the plaintiff believed, the Masters of the Bench of the Society meant to assert more plainly the right of retaining, if they think fit, upon their books for the term of his life, the name of any one who might have been called to the Bar by the Society. The plaintiff signed the above petition, and shortly afterwards he received the following order, dated the 15th of December, 1869—

“Upon the petition of Charles Neate, a barrister of this Society, praying that his name may be taken off the books, as he is not now practising at the Bar, and it is his intention not to practise as a barrister in future either in this country or in any of the colonies, it is ordered accordingly, and that his bond be cancelled on paying all his arrears of dues

and duties and the customary fine to the treasurer of this Society within one month from the date hereof, or this order to be void.”

The plaintiff did not, in fact, pay the amount of dues then owing by him to the Society within the month allowed by the order, and so lost the benefit thereof, and he continued to be, and was now, a member of the Society. The plaintiff further stated by his bill that he was now indebted to the Society in the sum of 23*l*. 11*s*. for dues and charges. In July, 1873, the defendants, the Hon. R. Denman and the Hon. G. Denman, as executors of the late Lord Denman (the surviving obligee of the bond), sued the plaintiff at law for the amount. They did so, as the plaintiff alleged, by the direction of Lord Justice James, as treasurer of the Society. The plaintiff offered to pay the 23*l*. 11*s*., but, wishing to cease to be a member of the Society, desired at the same time to have the bond delivered up to him. The Society, however, declined to release him till he had signed a declaration of intention according to the “altered” form of petition already referred to. The bill then stated that the plaintiff refused to make any such declaration of intention as that which was required of him by the terms of the altered petition; because it would be a restraint upon his using any right that he might otherwise have by law of practising as a barrister without being a member of Lincoln’s Inn or of some other similar Society; and because such declaration was evidently intended to assert for the Inn, or the Masters of the Bench of it, the right of imposing such restrictions; that the making of such declarations a condition of withdrawal from the Inn was contrary to public policy, and, therefore, illegal, as restricting the plaintiff or any person making the same from practising in any part of the United Kingdom; that such condition was, further, contrary to public policy as interfering with the right which our colonies or some of them had, or claimed to have, of regulating the practice of their own Courts; that the Society of Lincoln’s Inn was and claimed to be a private association, and, as such, claimed to exercise the uncontrolled right of admitting whom it pleased to be

members thereof, and administering or allowing the Masters of the Bench to administer, without publicity or accountability to any but themselves, the funds and property belonging to or held in trust for the Society; that the Society had at different times repudiated and successfully resisted the right of the Court of Queen's Bench to interfere with their proceedings by the process of *mandamus*, which right the Court of Queen's Bench would undoubtedly have if the Society were a body corporate or politic, or otherwise claiming to exercise or to possess any public function or character; that, even supposing that such monopoly of conferring the right of admission to the Bar might in some other form be useful and desirable, it was, nevertheless, contrary to public policy that such a monopoly should be enjoyed and made a source of revenue by a private and irresponsible association; that such monopoly was in fact a source of revenue or pecuniary advantage to the Society, and more especially to the Masters of the Bench of it; that no grant of such monopoly or of any share therein was ever in fact made by any charter or letters patent to the Society; and that, even supposing (which the plaintiff did not admit) that any such monopoly could be legally claimed on the ground of prescription by a body corporate or politic, the Society, not having that character, and not being or having been otherwise capable of receiving a grant in its collective capacity, was not capable of making a title to it by prescription; that for the reasons so stated the plaintiff was entitled to be discharged from his liability under the bond, and to have the same delivered up to him, or cancelled, on paying to the defendants or to the Society the dues incurred by him up to the present time, which the plaintiff had already offered and thereby again offered to do on delivery or cancelling of the bond; and that he was further willing and thereby offered to pay all costs hitherto incurred by the defendants, the Hon. Richard Denman and the Hon. George Denman, in the action at law; but that as to the composition required of him, in addition to the dues, the plaintiff desired to be informed of the amount of such claim and the grounds

thereof. The bill then, as originally framed, prayed a decree that the defendants might make a full and true discovery and disclosure of and concerning all and singular the transactions and matters in the bill mentioned, and that in the meantime the defendants (the plaintiffs in the action at law) might be restrained by injunction from proceeding in the action at law commenced by them against the plaintiff in this suit, and from commencing or prosecuting any other action or proceedings at law against the plaintiff in respect of or concerning the matters aforesaid or any of them, and that the defendants, or such one or two of them as had the custody or disposal of the bond and petition, or either of them, might, on payment by the plaintiff of the dues and costs and also of the composition, if properly chargeable upon him, to the person or persons entitled to receive the same, deliver up the bond and petition to the plaintiff. The bill (as amended during the hearing at the bar) then prayed for a declaration that the plaintiff was entitled to retire from the Society of Lincoln's Inn without giving any undertaking not to practise as a barrister, and without being subject to any condition against his practising as a barrister, and without being liable to the payment of any fine or composition on his retiring from the Society.

HALL, V.C.—Mr. Neate, I am a Member, although not a Benchman, of Lincoln's Inn. Have you any objection to my hearing this case?

Mr. Neate.—I have no objection whatever; and should have had none if your Honour had been a Benchman of the Inn.

Mr. Dickinson, for the defendants, then opened the demurrer.—The objects of this bill are these—first, to restrain a pending action on the bond; second, to restrain any other actions on it; third, to obtain the delivery up of the bond; fourth, a declaration as to the payment of certain money, if payable; and fifth (which is the grand object of the suit), a decision which shall in effect say that the plaintiff may retire from the Society without stipulating not to practise as a barrister.

It is to be observed, first, that the bill does not state, as it should have done, that

the Society called the plaintiff to the degree of utter barrister "of the Society." However, he is still a barrister; and by no law or custom of this country can he practise as such, without being a member of some one of the Inns of Court. It is not easy to appreciate the force of the plaintiff's objection to the addition of the words "India" and the "Colonies;" for he makes no complaint in that respect against the Masters of the Bench for arrogating to themselves a right which they do not possess. Then, again, as to the pending action: the plaintiff states a bond, which by his very bill he admits to be a legal one, and with regard to which he confesses that the action is brought for a sum that he acknowledges to be due. He says nothing to shew he is not bound to pay what is actually owing. As to the other actions, the bill contains nothing whatever to shew that so long as the plaintiff remains a member of the Society, and liable to pay his dues to it, there is any equity whatever for saying, if he does not pay them he must not be sued; nor is there a word to prove that the "composition," or "fine" as it was formerly called, is improperly payable.

Mr. Neate.—The bill states my meaning, which is this: that I have a right, as a barrister, to the control of my own acts.

Mr. Dickenson.—If the plaintiff had said, or could say, that he was at liberty to practise as a barrister, notwithstanding he was not a member of any Inn of Court, he might have asserted that right. What he seeks by this suit is the cancellation of the bond, and that he may be relieved from being a member of the society, without making the usual declaration.

Mr. Neate.—The bill, as originally framed, prayed that the bond might be delivered up, on payment, without any further condition. I wish the Court to say whether any composition is properly payable. The "dues" are for past "consideration," and I do not dispute them. I have occasionally used the library of the society and had other benefits from it. But what I insist upon is this; that I ought to be at full liberty to close my account

with it when I like, and without being subjected to any future liability.

Mr. Dickinson.—If the plaintiff wishes it we are quite ready to have the prayer of the bill so amended, now at the bar, as to raise the question whether he can be kept a member of the society against his will?

[HALL, V.C., then directed the prayer to be amended, and it was amended as above stated.]

Mr. Dickinson.—We object to any interference whatever by this Court with the Society of Lincoln's Inn. It is a purely voluntary society; of which the plaintiff, voluntarily, became a member; and of which he has been a member for upwards of thirty years; and

Second. The plaintiff alleges by his bill that various attempts to interfere with the internal affairs of the society already made, have failed.

But why should those results have ensued? Because, as stated by the plaintiff's own bill, the society is not a corporation, subject to the control of the ordinary Courts of this country. It is a private society, governed solely by its own laws, made by itself, and to the making of which the plaintiff, as a member of the society, must be taken to have himself contributed and assented. The society has the Judges of the Superior Courts of England and Wales as its "visitors;" not, indeed in their judicial character as Judges, but as the duly constituted visitatorial body of the society. This Court, therefore, cannot interfere with it as the plaintiff desires—

Cunningham v. Wegg, 2 Bro. C.C. 241.

That was a case with reference to Gray's Inn, and related to the leasing of some chambers in that Inn, and the payment of "Pensions." The bill there did not state, as the bill here does, that the society was a "private" or "voluntary" one, but the fact was "pleaded" to the bill, and the Court held that that society was not bound to account to this Court. The Lord Chancellor then said: "The plea was a good one. There was no instance of a suit, either relative to the discipline or the property of chambers, in an Inn of Court. The defendants said,

as far as they had acted, they were liable to the jurisdiction of the Judges. It was a claim among persons having privilege; therefore, this was not the proper jurisdiction."

Rackstraw v. Brewer, 2 P. Wms. 211, is not really an authority against us, because there the benchers of Gray's Inn themselves recommended the plaintiffs to come to the Court of Chancery (the Rolls) and left them at liberty to make their application there.

It seems plain, therefore, that this Court will not interfere with the property of the Society, which comprises the dues from its members; the ground of that non-intervention being that the Society is a private or voluntary one, and that if any injustice is done by it to any of its members, there is an appeal to the Judges as the visitors—

The King v. Gray's Inn, on the prosecution of W Hart, 1 Douglas, 353.

There Hart wished to be called to the bar, and the application was to a Court of law for a mandamus.

Booreman's Case, March's Rep. on "New Cases," 2nd ed. 1675, p. 177, case 235,

was referred to in that case, and also *Dugdale's Origines Juridicales*; and *Savage's Case*, 1 Douglas, 355.

In Hart's Case, Lord Mansfield said that the Court was of opinion that no rule should be made for a mandamus; but that if there was a ground for it, the party must take the ancient course of applying to the twelve Judges. In the case of

The King v. The Principal and Associates of Barnard's Inn, 5 Ad. & E. 17,

a rule for a mandamus to admit an attorney to the society was discharged by the Court of King's Bench, it not appearing that the Court had the requisite authority over the Inn.

Sir William Follett's arguments in that case were accepted and not contradicted by the Court. Lord Denman gave judgment, and the rule was discharged. Now the publication of a call to the bar is a publication by the benchers of the society of which the intended barrister is a member, making it

known to the public that the individual is a barrister. The benchers, as such, have no authority in Court, and they publish the fact of a member of their body being a barrister because he is a member of their body. The call is a call to the bar of the particular society, not to the bar of this or any other Court. That no doubt arose from the ancient practice or custom of requiring from persons going to be called "moots" or "exercises," to be conducted or performed at the bar of the society. If, therefore, a gentleman ceases to be a member of any Inn of Court he loses his right to practise as a barrister in the ordinary sense of the term. Of course, there may be other degrees conferred, such as that of a "serjeant-at-law."

[HALL, V.C.—What do you understand by the expression "admitted to the bar?"]

Mr. Dickinson.—That a barrister must be a member of some Inn of Court.

[HALL, V.C.—At present I am not clear that that is the meaning of those words.]

Mr. Dickinson.—To become a barrister you must be a member of some Inn of Court. But the plaintiff says, "I may cease to be a member of my society, and yet still be a member of the bar. Of that this Court may take judicial notice." I will venture to say that that is quite erroneous. To become a barrister you must have become, and you must be, a member of some one of the Inns of Court or societies. To be a barrister you must be, and continue to be, such a member.

The King v. The Benchers of Lincoln's Inn, 4 B. & C. 855,

was the case of an application for a mandamus by a Mr. Wooller. He never was a member of the Society, but he wished to become a member in order to be called to the bar. The usual preliminary papers were furnished to him, and he returned them. He was told by the steward that he could not be made a member of the Society. He then presented a petition to the Society, praying to be heard by it. That petition was not replied to. That obviously was a very different case from the present one. That was not a case between the Society and one of its own members, but between the Society and a stranger. He then applied

to a Court of law for a mandamus. It was held that the remedy was not by mandamus, but by an appeal to the Judges. Two points seem to have been relied on by the applicant in that case—first, that he had not the benefit of the visitatorial power; and second, that it was a question whether any society could say a particular person shall not be a barrister. The result, however, of the cases, so far as I have been able to investigate them, is this—that, as controlling the public position of an individual, these societies cannot be interfered with by this Court.

Here the rules of this particular Society are made by it; and therefore (as already remarked) by the plaintiff himself as a member of it.

On the whole case, therefore, I submit, that—

First, on the ground of contract, there is no pretence for the interference of this Court;

Second, On the ground of fraud—none whatever is even alleged by the bill;

Third, There is no case of trustee and *cestui que* trust so much as suggested;

Fourth, there is no prayer for an account; and

Fifth, there is nothing in the nature of "mistake."

Then on what possible ground can the bill be said to shew any equity? I say that the present is a case utterly devoid of anything whatever to support it, and that the demurrer must be allowed.

Mr. Pemberton with him.—There is absolutely no equitable foundation whatever for the bill in this suit; and if this Court were to make a decree upon it at the hearing, it would practically revolutionize this society, and alter the whole of its internal arrangements.

Mr. Neate, in person and in his robes, supported the bill.—If this had been simply a private case of my own I should not have appeared in person and in my robes.

[*HALL, V.C.*—You need offer no apology, *Mr. Neate*, on that or any other ground.]

Mr. Neate.—First, then, as to the form of the bill. I was not unaware of the importance of the words "of this Society," but I took the words I used from an order of the Society's own. I do not suppose a

man's "*right*" to be a barrister is any more to be attributed to his being a member of any society or Inn of Court, than his "*right*" to be a M.A. to his being a member of a college or the university. He may be a M.A. without having his name on the books of either. It is a question of a degree in both cases.

As to the words "Colonies" and "India," I had the form given to me by the Society—to whom and to whose solicitors, I wish to express my great sense of their courtesy. The word "India," I am told, was added simply because, although it is not a colony, it is still a part of the empire.

Then as to the more substantial arguments in support of the bill.

First. It is said that this society is a "private" or voluntary one.

Cunningham v. Wegg (ubi supra), is not a case at all in point. The view there suggested never could be taken, where, as here, the Inn begins the litigation. All the other authorities were cases at law, and not therefore, *ad rem*. The action here was commenced by the Society against me, in a Court of law, out of its own proper forum. That being so, surely the society cannot, because it is an Inn of Court, be exempt from such remedies against it, as other suitors who resort to a Court of law are subjected to? Does the Society, after having invoked the aid of a Court of law *against* a member of its own body, seriously mean to affirm that all questions between itself and others, are to be submitted to what I may call its "domestic forum?" Is there any case in which they have been allowed so to deal with complaints made to them? Would the Lord Chancellor and the Judges appoint a day to hear such disputes? I feel confident that as the Inn has sued me at law, this Court will relieve me, if I have an equitable right to relief.

I admit there is an apparent difficulty in my asking an injunction to restrain an action against me for that which I acknowledge I owe. But the condition for payment is not absolute, it is "conditional" only. I say I am only bound to pay, on having the bond delivered up to me. It does seem to me that whatever

may be my position in a Court of law, I am entitled in this Court, if not to an injunction, to have the bond delivered up to me. That is a good equity.

The line of argument which I propose to take on the case generally, is this—

It is no part of my case to deny that the Inns of Court have, practically, a monopoly. What I do deny, is their right to enforce that monopoly, by requiring me to subscribe a document which I say is contrary to public policy.

First then, I say the monopoly is a doubtful one, and that, as now enjoyed by the Inns of Court, it depends entirely on the allowance of it by the Judges ;

Second. That the Courts of law would so regard it: for it is in the power of the Judges to admit other persons to practise as barristers, *e.g.*, persons who have taken a degree in laws at either university ;

Third. The Judges possess that power only by delegation from the Crown ;

Fourth. That to call upon me to sign the declaration, is an effort on the part of the Inn to prop up that doubtful monopoly ; and an attempt to restrain me from using the liberty that may be given me by any alteration the Judges may think proper to make in the rules ;

Fifth. That the declaration, though framed as it is, is intended to be a binding agreement, so far as I am concerned, and is therefore clearly against public policy ;

Sixth. That it is contrary to the constitutions of the Inns of Court ; and of that of Lincoln's Inn in particular ; and I must therefore examine the history and nature of those constitutions ;

Seventh. The required declaration is in restraint of trade. It violates the rights of individuals, and is an unwarranted departure from the true principles of law.

[HALL, V.C.—If, Mr. Neate, the defendants are right in their view that this Court has no jurisdiction to entertain your bill, then—however much I may wish to hear you, and however much you might (as I am certain you would) illustrate your argument with great learning—I think it would be wrong, indeed it would be unnecessary and useless, for me to go into all those questions you propose to discuss. I must therefore ask you to

confine yourself to the question of the jurisdiction alone.]

Mr. Neate.—The jurisdiction may be assumed to this extent: the Judges have not in reality the authority which the defendants attribute to them; at all events they have never exercised it. But there must of necessity be some authority over even "private" societies; and if the Judges, who are said to have it, have it not, some "Court" must have it. But the Courts of law have it not; and therefore the Courts of equity must possess it. There seems indeed to be no case in which the Judges have ever interfered, as it is said they might—and ought to do—here.

Mr. Dickinson.—Because there never was such a case as this.

Mr. Neate.—That does not affect the argument.

The right of any person to enter the public service is now more widely recognized than it used to be. If a person applies to an Inn of Court for admission, and it is refused, and if there is nothing against his character, I apprehend the Courts of law would grant a mandamus. They would, in fact, treat these private societies as public ones, and regard their claims to what is called "a domestic forum," or "private jurisdiction," as nugatory. Each Inn of Court would really be treated as a "corporation de son tort," if I may use the expression, and would be made to answer publicly, for meddling with what are, in truth, public rights and public property. I say, however, that this Society has by its own conduct, in proceeding against me, in the first instance, in a Court of law, waived its right to set up its own "domestic forum" now, or to say that it is "only" a private body. In conclusion, I submit that they cannot successfully resist the prayer of my bill, and that their demurrer must be overruled.

HALL, V.C.—It appears to me that I have no jurisdiction to try the question raised in this case. Mr. Neate no doubt is well aware of the difficulties which may arise between a member of an Inn of Court and the Inn itself, with reference to the management of its property; because he has commented on the case of *Cunningham*

v. Wegg (ubi supra). He says that that decision cannot be maintained. But sitting here as a Judge of first instance, I could not do otherwise than follow it. However, I will express no opinion on that case; for my judgment in the present one does not depend on it. The jurisdiction of this Court, as well as that of a Court of law, may in certain cases, and indeed, must in some, be found to exist in respect of the management of property; even although in such instances, an Inn of Court may be parties to the litigation. However, a case of property, in the strict sense of the term, is one with which I am not dealing on the present occasion. If it were such a case I should be bound to follow *Cunningham v. Wegg (ubi supra)*. This is a case in which the question is between the plaintiff and the defendants, the latter of whom may for the purposes of this suit be considered as representing the Society of Lincoln's Inn. The question is simply and solely as to the position and rights of the plaintiff as a member of the Society. He voluntarily became a member of it, and gave it a bond to pay certain dues during the whole of the time that he should be, and until he ceased to continue, a member of it. The condition of the bond contains no stipulations as to the mode or circumstances by or under which he should cease to be a member of the Society. That was left to the internal regulations of the Society itself, of which he had become and still is a member. Therefore in that state of things, the right to retire from the Society which the plaintiff claims is entirely a question between him and the Society. He says he has a right to retire. He does not say that he has already retired, and is not now a member; because if he had said that, it would have been a defence to the action at law. He says he made a proposal to the Society to be allowed to retire from being a member of it; but that they refused to permit him to do so, except on terms, with which, he says, he is not bound to comply. That is a question entirely for the peculiar jurisdiction which has been referred to in the arguments; and which has always been recognized, namely, that of the Judges of the superior Courts of England. They have the power of deciding such cases as

the present. If the plaintiff had no remedy by an appeal to the Judges, he might and probably would have a right to apply to the Court of Queen's Bench for a mandamus. That, however, would be by reason of the fact that he had no other remedy. No case has been referred to in which the Courts of Equity have interfered between the Benchers of an Inn of Court and a member of the same society, to restrain an action at law under such circumstances as the present. I consider that the judgments in the cases of *The King v. The Benchers of Lincoln's Inn (ubi supra)* and *The King v. Gray's Inn (ubi supra)*, although judgments of Common Law Courts, are binding on me and prevent my entertaining any jurisdiction in this case. If there were no appeal to the Judges, there might be a right to a mandamus. I think I have no power to deal with this case; and that the bill is not well founded. It was said, however, that the claim to have the bond delivered up would of itself confer an equity on the plaintiff. With reference to that the rule of this Court is, as Mr. Neate knows, that the Court will not interfere if the invalidity of the instrument appears on the face of it. A document is, on the face of it, either legal or it is not. If it is illegal it is inoperative; and there is therefore a valid defence at law with respect to it. If, on the other hand, it is legal, but the circumstances are such that the party cannot avail himself of them at law, then if the case be, as this is, one between a society and a member of it, with a proper forum to which to appeal, viz., the Judges, this Court ought not to interfere; and this Court will not be induced to do so, merely because the bill seeks the delivery up of the document. I may observe that it is not in every case that this Court does interfere when it can. Its jurisdiction as to the delivery up and cancellation of documents is peculiar. It usually interferes in the instances of bills of exchange and promissory notes because they may be negotiable; but the considerations applicable to those cases do not affect that of a bond. I have recently had to consider that in a case of *Binns v. Fisher (1)*, in which I held that

(1) 43 Law J. Rep. (N.S.) Chanc. 188.

the plaintiffs had not sufficient equity to entitle them to have their bond delivered up to them. On the whole of this case I am of opinion that the plaintiff has failed in establishing his right to the relief which he seeks. I have not made any observation on Mr. Neate's offer to pay the 23l. 11s., and his admission that he might have had, as no doubt he has had, some benefit from being a member of this society; such as the use of its library, and so forth. He does not rest his case on that, and if he had done so, I think it would not have assisted him. Perhaps I should say that any relief he may seek with respect to future actions against him, he may embody in his appeal to the Judges. His case here really seems to me to be found in the amendment which was proposed to his bill, namely, the declaration that he is entitled to retire from the Society of Lincoln's Inn without giving any undertaking not to practise as a barrister; and without being subject to any condition against his practising as one; and without being liable to the payment of any fine or composition on his retiring from the Society. In conclusion, I must hold that this demurrer be allowed.

Solicitors—Messrs. Dobinson & Geare, for plaintiff; Mr. H. L. Pemberton, for defendants.

MALINS, V.C. } In re THE TUMACACORI
1874. } MINING AND LAND COMPANY.
Feb. 27. }

Registered Company—Winding-up—No Creditors or Contributories—Sale of Company's Property—Liability to Winding-up Order—Calling Meetings under Companies Act, 1862, s. 91—Going Concern.

A company had been in existence for four years without carrying on any business; all its shares were registered as fully paid-up, and there were no creditors. An agreement having been entered into for the sale of its property, a shareholder presented a petition for winding up the company with a view to the property being sold under the direction of the Court, other shareholders,

however, opposing the petition on the ground that the sale could be better effected without the intervention of the Court, and that there being no creditors or contributories a winding-up order would be useless. Winding-up order granted on two grounds—First, that the company being registered under the Companies Act, 1862, the liability to a winding-up order existed, independently of the question whether any advantage might result from such an order; Secondly, that as the property appeared to be of some value, and the shareholders were unable to agree as to the mode of sale, the sale could be more advantageously effected under the direction of the Court.

The Court will not direct meetings of creditors or contributories to be called under section 91 of the Companies Act, 1862, except where the company is a going concern.

This was a petition for winding up the above company.

The company was incorporated in April, 1870, with a capital of 2,000,000l., divided into 200,000 shares of 10l. each. Its principal objects were to purchase and hold all the lands in the territory of Arizona, in the United States of America, and to work the mines thereunder. The shareholders consisted of a small body of men in whose names all the shares, except seven, were registered as fully paid up, although no money was ever paid in respect of them. Two hundred fully paid-up shares were transferred gratuitously to Lord Claud Hamilton, Sir John Hay and five other gentlemen of position in this country, who were the seven directors of the company, and who had signed the memorandum of association for one share each, but none of these seven shares were ever paid up. It was stated that Lord C. Hamilton had instructed the solicitor to the company to pay the 10l. on his share, but there was no evidence of the payment having been made, the company having neither a cash-book nor a banker. The company had in reality never carried on any actual business, and they were unable to take possession of their land in consequence of the want of funds and a war between the Indian tribes inhabiting the district.

It being necessary under an Act of Congress of the United States that the company, in order to secure their title, should take possession before the 1st of May, 1874, they took steps in December last for raising the necessary funds by entering into an agreement with a new company called the Sonora Company, for the sale and transfer to them of the property of the Tumacacori Company, and a deposit was paid in respect of the purchase money.

By the 4th clause of the Articles of Association of the Tumacacori Company, it was declared that the directors of that company should have power to dispose of "all or any part of the company's business or property, and for all or any of the said purposes, if necessary, to establish any new company or companies, and to take, hold or sell shares in any such other company."

Shortly after the date of the agreement with the Sonora Company, this winding-up petition was presented by Mr. F. W. Eldredge, the holder of 10,000 paid-up shares in the Tumacacori Company.

On the 20th of January last a resolution was passed by the company for a voluntary winding-up, but without any result.

Mr. Glasse and Mr. Cracknall, for the petitioner.—The sale to the Sonora Company can be more advantageously effected by the Court under section 95 of the Companies Act, 1862. The other side will contend that the sale may be made in a voluntary winding-up, under section 161; but no shareholder in the Tumacacori Company can be compelled to take shares in the Sonora Company against his wish; the sale to the latter company is not binding upon dissenting shareholders in the former—

In re The Bank of Hindustan, China and Japan (Limited), *Higgs' Case*, 2 Hem. & M. 657;

Clinch v. Financial Corporation, 37 Law J. Rep. (N.S.) Chanc. 281; s. c. (on app.) 38 *ibid.* 1; s. c. Law Rep. 4 Chanc. App. 117;

The Imperial Bank of China, &c., v. The Bank of Hindustan, &c., Law Rep. 6 Eq. 91.

Besides, the voluntary winding-up has turned out a failure.

The company's property is valuable, and can be sold for money. We are entitled to a winding-up order and to have a liquidator appointed; the fact that the property is in a foreign country makes no difference. They also mentioned

In re Imperial Mercantile Credit Association, 41 Law J. Rep. (N.S.) Chanc. 116; s. c. Law Rep. 12 Eq. 504,

as to the inclination of the Court to regard the wishes of a majority of shareholders.

[*MALINS, V.C.*, mentioned

In re Irrigation Company of France, Fox's Case, 40 Law J. Rep. (N.S.) Chanc. 433; s. c. Law Rep. 6 Chanc. App. 176,

in which the Court declined to make a compulsory winding-up order on the application of a paid-up shareholder, where resolutions had been passed for a voluntary winding-up.]

Mr. Higgins and Mr. Chester, for a holder of 55,000 paid up shares, supported the petition.

Mr. Cotton and Mr. W. Barber, Mr. J. Pearson and Mr. Latham, for holders of 133,000 paid up shares, *contra*.—Nothing can be gained by a winding-up order, inasmuch as there are no contributories beyond the directors holding one share each, and no creditors, and the sale to the Sonora Company can just as well be effected without the intervention of the Court. At all events, let the Court first consult the wishes of the shareholders, under section 91 of the Companies Act, 1862, by directing a meeting to be called, as in

In re Brighton Hotel Company, 37 Law J. Rep. (N.S.) Chanc. 915; s. c. Law Rep. 6 Eq. 339;

and

In re The Joint Stock Coal Company, 38 Law J. Rep. (N.S.) Chanc. 429; s. c. Law Rep. 8 Eq. 146.

The majority of the shareholders are opposed to this application, which must fail because resolutions for a voluntary winding up have been duly passed—

In re Langley Mill Steel and Iron Works Company, 40 Law J. Rep.

(N.S.) Chanc. 313; s. c. Law Rep. 12 Eq. 26.

The Companies Act, 1862, has no reference to such a case as this. The 92nd and following sections, providing for the appointment of official liquidators, shew that the Act contemplates dealing with property of substantial value. A winding-up order would be nugatory here. If it were made, a liquidator would have to be appointed, and out of what fund would he be paid, there being no contributories? The sale to the Sonora Company can be made by the directors under the 4th clause of the Articles of Association.

[MALINS, V.C., mentioned

The Princess of Reuss v. Bos and The International Land Company (Limited), 39 Law J. Rep. (N.S.) Chanc. 737; s. c. Law Rep. 5 Chanc. App. 363; s. c. (H.L.) 40 Law J. Rep. (N.S.) Chanc. 655; s. c. Law Rep. 5 E. & Ir. App. 176.]

Mr. Glasse in reply.

MALINS, V.C.—This is a very peculiar case, and, as far as I know, it is a case without precedent. One of the peculiarities of this company, with its enormous capital of two millions, is that every share has been issued; but a still more extraordinary fact of the case is, that every share has been issued without the company receiving a single shilling from any one of the shareholders, and although the company has been in existence now close upon four years, it never has, as a company, received or paid a single shilling. It is also not only a singular, but I must say a discreditable circumstance that the directors of this company, although they are gentlemen of position in society, each subscribed the memorandum of association for one share only, rendering themselves liable for 10*l.*, and 10*l.* only, and at the same time received a gratuity of 200 shares fully paid up. Another singular circumstance is that everybody has received his shares gratuitously. Two hundred thousand shares have been issued, and not a penny paid, for it is admitted on both sides that this company has never had a cash book,

that it has not a banker's book and, as far as I have heard, it has not a debt properly worthy the name of debt. Therefore here I have a company in which, if I make an order to wind up there can be no list of contributories, for there is nobody liable to contribute a penny, and there can be no creditors, for it is admitted there are none. What am I to do in such a state of things? It is perfectly clear that the object of the Winding-up Acts is to settle the rights of contributories, creditors, and everybody interested in the company. In this case there is no money to take possession of. If I make the winding-up order, there must be an official liquidator, because winding up without the aid of an official liquidator is, in my opinion, entirely out of the question. Where am I to find money to pay him? There is not a shareholder, except these seven gentlemen who are liable to be put on the list of contributories for 10*l.* each. All I can get is 60*l.*, assuming that one of them, Lord Claud Hamilton, has paid his 10*l.*, though that payment, I must say, is a very equivocal one. So that here is a company which has been going on for four years, and up to the present time, looking at it in the most favourable way, it has received only 10*l.* I am much inclined to think that, under such circumstances, persons who get into such concerns as these ought to be left to get out of them as best they can; for it is hardly worthy the consideration of a Court to aid them, or to do anything for them whatever; and it has been the impression on my mind during a considerable part of the argument that that is the proper course to take. But I must take the Act as I find it. In the case of *The International Land Company (The Princess of Reuss v. Bos)* (*ubi supra*), which was a company with an enormous capital, and which was formed for the purpose of purchasing and selling land in Austria—in this country it had an office, and in that office it was proved there was a chair, a table, and, I believe, a small desk, but nothing else—I thought, as there was nothing to be got in this country, and whatever could be got could only be got by selling land in Austria,

that that was not a company within the meaning of the Act which was proper to be wound up in this country, because I felt satisfied that no good could come of it. I accordingly refused to make the order. From me the case went to Lord Justice Giffard, sitting alone, who made the order to wind up. From him it went to the House of Lords, who affirmed his decision. Therefore, according to that, I was wrong in my conclusion in not making an order to wind up that company. That was a company which I was satisfied could do nothing, and I believe the result has proved that my opinion was the correct one; for the company has been in my chambers for four years, and I believe nothing has been done except getting in some small assets, out of which I have been able to remunerate the official liquidators up to a certain time. However, as I understand, the decision of the House of Lords goes to this extent, that wherever there is a registered company under this Act, there is the right to a winding-up order.

Now if this had been a creditor petitioning (and I have already shewn there cannot be such a person here, for there is no creditor), considering that the case is one falling strictly and literally within the subdivision of section 79, which provides that the winding-up order may be made whenever the company does not commence its business within a year from its incorporation, or suspends its business, it is pretty clear there would be the right to make the order to wind up, but then the order to wind up may be made on the application of a contributory as well as a creditor. Then, what is to be done in this case? If I do not make an order to wind up, what is to become of this property, because both sides agree that there is property here of value? If one side had told me that there was nothing worth winding up, and the other side had told me that there was, I should have felt some difficulty in making up my mind. I have no difficulty of that kind here, because both parties tell me that there is property of value; that although they have not worked it somebody may be willing to work it, and it may be sold for money. If I refrain from making an

order, how is the question to be settled? It has been argued that, under the 4th clause of the Articles of Association, the directors of this company have the power of disposing of the company's business or property, and, if necessary, of establishing a new company, and taking shares in such new company. I am of opinion that that clause does not apply to the existing state of things at all, but merely has reference to amalgamation with other companies, or something of that sort, while the company is a going company, and not in the case of a winding-up.

The difficulty being that which I have stated, what are the views of the different parties? My making any order has been strenuously opposed, but the very parties who oppose now any order being made to wind up the company compulsorily, had, so recently as the 20th of January last, made up their minds to submit a resolution to a meeting of the company to wind it up voluntarily. What do they say by their affidavit? They do not say that it cannot be wound up voluntarily, and if it can be wound up voluntarily of course it can be wound up compulsorily. Their view, when they went to that meeting, was to wind up, and, if so, why have they now changed their views so much? They say it is not a desirable thing to wind up the company, and that I should call a meeting. I have the power to call a meeting; but suppose I do, I see very plainly that one side has the command of 133,000 shares, and that the other side, who are for the winding-up, has the command of 65,000 shares. What would be the utility of my calling a meeting when those having the 133,000 shares would be sure to carry everything their own way? It would be a mere delusion to call a meeting. It is very true that in the case of *The Brighton Hotel Company* (*ubi supra*), I did call a meeting, as I did in the case of another company which has been referred to; but those were companies which were actually carrying on business, and where I had a doubt as to whether it was an expedient thing to wind up. I therefore gave them an opportunity of seeing whether it was advantageous that they should be continued or not. But to call

a meeting here, which cannot by any possibility determine whether it is advantageous to carry on the business or not, is out of the question. The only question is how to dispose of the property. It is said the company have entered into an arrangement by which another company is to be formed, and by which they are to get certain benefits; a certain number of ordinary shares are to be created, and a certain number of preference shares. It is perfectly clear, whether they are ordinary shares or preference shares, the shareholders of this company cannot be obliged to go into the new concern; and, therefore, I am clearly of opinion that any efforts to be made to dispose of the property of this company without the aid of this Court must be futile, and must end in nothing. Now then, under all these circumstances, although I feel great difficulty as to what is to be done, and what course the company may take, and although I am strongly impressed with the propriety, if I were at liberty to do so, of leaving them to settle their own affairs and to sell their own property, for which they have not paid a penny, in the best way they can; yet seeing that the company is registered, and that there is property to be disposed of, I think, upon the whole, I cannot refrain from making an order to wind up this company compulsorily, though whether I shall be able to carry that order out, is another question. First of all, I make an order compulsorily to wind up. That order will be taken in, and the first thing after that will be to appoint a liquidator. Mr. Glasse seems confident that I shall find no difficulty in finding a liquidator who will be willing to take the office, and who will run the risk of getting paid as best he can. If I cannot find a liquidator, it may then be necessary to stay the order, and to take some other steps; but, in the meanwhile, as both parties agree that there is property of value, I hope some one will be found to undertake the office, and under the orders of this Court (I think it will be for the benefit of all parties, as well for the benefit of those who support as for those who oppose this petition) the property can be disposed of to some other company or in some other way; and I

am perfectly satisfied that, if sold at all, it can be sold to much greater advantage by the official liquidator under the orders of this Court than it can ever be by a body like this, where every proposal which is made by the one party is sure to be opposed by the other. Therefore, on all these grounds, not doubting for a moment that there are considerable difficulties in the way of the case as I have pointed out, I am of opinion that the proper course is to make an order to wind up compulsorily as asked.

Solicitors—Mr. W. T. Manning, for petitioner; Messrs. Gedge, Kirby & Millett, and Mr. F. Heritage, for shareholders.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} CLARK v. THE SCHOOL BOARD FOR LONDON.
JAMES, L.J.	
MELLISH, L.J.	
1874.	
Jan. 14, 15.	

Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 19, 20—Buildings by School Board—Lands injuriously affected—Purchase or Compensation—Injunction.

The sections of the Lands Clauses Consolidation Act, 1845, relating to the purchase of lands, are incorporated in the Elementary Education Act, 1870, for all purposes, and their application is not confined to cases where the relation of vendor and purchaser exists. Therefore the remedy of a person whose lands are injuriously affected by the works of the School Board, but no part of whose land is taken, is by proceeding for compensation under section 68 of the Lands Clauses Act, and not by bill for an injunction.

Macey v. The Metropolitan Board of Works (33 Law J. Rep. (n.s.) Chanc. 377) approved of and followed.

By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), it is enacted (sec. 18) that "the School Board shall

maintain and keep efficient every school provided by such Board, and shall, from time to time, provide such additional school accommodation as is in their opinion necessary, in order to supply a sufficient amount of public school accommodation for their district."

By sec. 19, "every School Board, for the purpose of providing sufficient public school accommodation for their district, whether in obedience to any requisition or not, may provide, by building or otherwise school houses, properly fitted up, and improve, enlarge and fit up any school house provided by them, and supply school apparatus and everything necessary for the efficiency of the schools provided by them, and purchase and take on lease any land, and any right over land, or may exercise any of such powers;" and (sec. 20) "with respect to the purchase of land by School Boards for the purposes of this Act, the following provisions shall have effect, that is to say, first, the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the Special Act; and in construing those Acts for the purposes of this section, the Special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the School Board, and land shall be construed to include any right over land."

Acting under the powers conferred upon them by this Act, the School Board for London had taken land to the north of Winchester Court, Pentonville, in which court were some houses of which the plaintiff was lessee for an unexpired term of twelve years, and in May, 1873, they commenced building on the land so taken a school house, part of the wall of which was within four feet of the plaintiff's houses. The plaintiff thereupon filed his bill to restrain the Board from building so as to interfere with his ancient lights.

Vice-Chancellor Malins granted an interlocutory injunction, and the defendants appealed. Upon the appeal it was arranged that the cause should be heard before the full Court upon motion for a decree. Before the hearing the School

Board purchased the plaintiff's interest under their compulsory powers, and the only question, therefore, now remaining was, as to the costs, which depended upon the question whether the plaintiff was originally right in filing the bill.

Mr. Glasse and Mr. F. A. Lewin, for the plaintiff.—The right to light and air is a right over land within the meaning of the first clause of the 18th section, and the defendants were bound to give us notice of their intention to purchase it, and to proceed under the clauses in the Lands Clauses Act relating to the purchase of land before they take it, and if they fail to do so, they must be restrained. The 68th section of the Lands Clauses Act providing for the mode in which compensation is to be settled in respect of lands injuriously affected does not apply, for the 20th section of the Elementary Education Act only incorporates that Act with respect to the purchase of land, and the School Board have purchased nothing from the plaintiff. The Act of Parliament does not exempt the Board from liability in respect of any interference with our lights which they may cause by building under their powers—

Wells v. Ody, 1 Mee. & W. 452; s. c.

5 Law J. Rep. (N.S.) Exch. 199;

Dawson v. Paver, 5 Hare, 415; s. c.

16 Law J. Rep. (N.S.) Chanc. 274.

Mr. Cotton and Mr. Speed, for the defendants, contended that the plaintiff's proper remedy was by compensation under the 68th section of the Lands Clauses Act. It was one of the clauses relating to the purchase of lands, and was therefore incorporated in the Elementary Education Act. It was not necessary that the relation of vendor and purchaser should exist, in order to make the section applicable.

The following cases were referred to in the course of the argument—

Macey v. The Metropolitan Board of Works (*ubi supra*);

The Queen v. The Vestry of St. Luke's, Chelsea, 40 Law J. Rep. (N.S.)

Q.B. 305, affirmed 41 ib. 81; s. c.

Law Rep. 7 Q.B. 148;

Galloway v. The Mayor, &c., of London, 2 De Gex, J. & S. 213;

Broadbent v. The Imperial Gas Company, 7 De Gex, M. & G. 436;

Hulton v. The London and South Western Railway Company, 7 Hare, 259; s. c. 18 Law J. Rep. (N.S.) Chanc. 345;

Lister v. Lobley, 7 Ad. & E. 124; s. c. 6 Law J. Rep. (N.S.) K.B. 200.

Mr. F. A. Lewin replied.

THE LORD CHANCELLOR.—The question which has been argued here is one of some importance, and therefore we think it right to express our opinion upon it.

It seems to me that the Legislature, in authorising the School Board for important public purposes to exercise these large powers, subject to the supervision and authority of the Department of the Privy Council for Education, meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them. The discharge of those duties required that the persons entrusted with them should provide what in their honest judgment was the proper suitable accommodation for the instruction of the children to be educated in the buildings to be erected upon the land acquired by them. And it appears to me reasonable to suppose that when compulsory powers to take land for these public purposes are given, the matter is not absolutely left to their discretion, because if they do not provide what a higher authority considers sufficient school accommodation, they can be required to provide more.

I cannot but think that it was intended that the School Board should have the full benefit of all the provisions connected with the compulsory clauses in the Lands Clauses Consolidation Act, to enable them, acting *bona fide*, according to their judgment and discretion, to erect such buildings, on such a space of ground, of such magnitude, and so situated on lands acquired by them, as they might think proper for the public purposes with which they have been charged. And, as it appears to me, that view is confirmed not only by the general provisions of the Act, and by the particular provisions of sec. 19, but also very much by the ex-

press words which are found in sec. 19, and are repeated in sec. 20. It is enacted by sec. 19 that, for the purposes of the building so to be erected by them, they should have power to purchase, not only the land, but any right over land. And in sec. 20 it is said that in construing the incorporated Acts, the word "land" shall be construed to include "any right over land."

These are very large powers, and accordingly they appear to me to shew that the intention of the Legislature was to give the land which is required to the School Board absolutely free of any *jus tertii*, which would control their dominion over it for the purpose of the duty which they have to discharge. The right as against a man's neighbour which he acquires by reason of the possession of ancient lights is, on the part of that neighbour, strictly within the nature of the "servitude" known to the Roman law and to the Civil law. That term expresses a positive liability, and the corresponding right cannot be acquired by prescription against a neighbour without twenty years' user. It is, therefore, strictly within the meaning of those words, "a right over land," and is just like a right to a water course, or a right of way over land—it is a right over the land whether exercised upon the surface or under the surface.

It seems to me that this is about the largest expression that could have been used, if the object, of the Legislature was that the land was to be absolutely acquired for the public service. If so, of course such a right, if interfered with, must be the subject of compensation under the Act, and the sole question is as to the mode under which that compensation is to be given, whether the introduction of these words, "any right over land," makes it necessary to purchase any right over land where there is an interference with any servitude of this description, or whether the compensation is to be obtained under those provisions of the Lands Clauses Act which deal with persons whose lands are not taken but are injuriously affected?

In my opinion the sound view is that the application, according to the nature

of the subject matter, of the different compensation clauses of the Lands Clauses Act, is not meant to be altered by the definition in the Special Act, that in the word "land" is included "any right over land," or by the express enactment that the compulsory powers are to extend to rights over land. The general Act contains a scheme of provisions applicable to working out the right to compensation, and that scheme of provisions varies according to the nature of the subject matter. In some clauses relating to the purchase of land it is provided that when land is to be taken notice is to be given, and if that notice is given then there is a right to enter upon the land, and no injunction may be granted; but if an attempt is made to enter without notice, and without taking the proper steps, then an injunction may be granted.

The interference with ancient lights is not a thing which is capable of being "entered upon." The word "entering" is inapplicable to it, and therefore such a clause as the 85th section of the Lands Clauses Act is inapplicable to the case. But there are other cases mentioned in the Act in which compensation is to be made, such as the case in which no agreement has been arrived at, though an injurious act is proposed to be done upon lands not taken. These provisions as to compensation seem to be applicable to a case of this kind, and the more so because in many of such cases until the thing is done it cannot be known whether the land will be injuriously affected so as to be the subject of compensation or not. I am very glad to find that in coming to this conclusion we are not without authority. The case of *Macey v. The Metropolitan Board of Works* (*ubi supra*) seems in that respect on all fours with the present case. There the Thames Embankment Act, by a definition clause similar to that which we have to construe here, says that the word "lands" is to be construed to include easements, interests, rights and privileges over land. In the execution of the works the Metropolitan Board of Works proceeded to fill up the river in front of the plaintiff's wharf, and it was found that he would lose a very valuable right which

he possessed over land in front of his wharf. He insisted that they should have given the notice of their intention by purchase, to acquire his easement. But it was held that he was wrong, and that their right to enter and execute the works was not in abeyance till they had done the act, and that the nature of his right was such that the proper compensation clauses applicable to it were those which related to persons whose lands were injuriously affected, and not those which related to persons whose lands were purchased under what we may call the purchase clauses. That is an authority which appears to be consistent with common sense, and from which, for my part, I do not differ.

That of course disposes of the right of the plaintiff (if this case had been brought to a hearing without the intervention of an Act of Parliament altering the position of the parties) to maintain the injunction he has obtained, and to obtain a decree. But it seems to us, looking at everything that has passed, and at the fact that this is an important general question, the decision of which to some extent will affect other cases, and looking at the fact that there is something special in the general form of this Act, and in the clauses which we have to construe, I think we shall not be doing wrong in dismissing the bill without costs.

MELLISH, L.J.—I am entirely of the same opinion. During the argument I for some time thought it doubtful whether, according to the true construction of the Act, the meaning was not that the School Board were to purchase all such land as would enable them to build their school without interfering with the rights of any third persons, and that it was therefore merely a question of the sum which they were to pay for the land. But I am satisfied that there is no ground for that. I think that they are only required, and indeed authorised, to purchase that quantity of land which they want for the purpose of building the school house, including, of course, the teacher's dwelling-house, playground, offices and premises required.

It would have been rather an extraordinary thing, considering that the site

and school are to be paid for by the rate-payers, if Parliament had made it necessary that a larger quantity of land should be purchased than was really necessary for the purpose for which it was required. I think, therefore, that they were not authorised, and had no compulsory power, properly speaking, to purchase any land except that land which might really be required for the purposes of their new building. That seems to be made clear by those words which were pressed so much upon us, namely, "any right over land;" because, what the 19th section says is, in effect, if the Board want to erect a school, they may purchase land; and then, in order that they may be perfectly unfettered in building the school, they may purchase any right which any third person has over that land. In other words, if the man who owns the land will not sell it, or the man who owns the right over it will not sell that right, then, in order to enable the Board to proceed, the next section gives compulsory power, and incorporates the various clauses of the Lands Clauses Consolidation Act, and says that the right shall include any right over land. I cannot help thinking that they can take under the compulsory powers, not only the land itself, but any right over land, that is, any easement which any third person has; and, if it is necessary, then they are to acquire that right for the purpose of building the school. There is merely a difference in the forms that are to be adopted for the purpose of getting compensation, and by the terms of the Lands Clauses Act, 1845, this is to be treated as land which has been injuriously affected.

JAMES, L.J., concurred.

Bill dismissed without costs.

Solicitors — Messrs. Lewin & Son, for plaintiff;
Messrs. Gedge, Kirby & Millett, for the School Board.

JESSEL, M.R. { *In re THE TAHITI COTTON
1874. AND COFFEE PLANTATION
Jan. 17, 26. COMPANY (LIMITED).*
Ex parte SARGENT.

Companies Act, 1862, s. 35—Jurisdiction—Equitable Right to be registered as Shareholder—Specific Performance—Blank Transfer—Pledge of Shares—Power of Pledgee.

The Court has no jurisdiction under the 35th section of the Companies Act of 1862, to grant specific performance of an agreement to transfer shares or to enforce against the company an equitable claim to be registered as a shareholder, but where an applicant has a legal title, the Court will compel the company to enter his name on the register, although his title is disputed by the person registered as holder. In such case the Court has no jurisdiction to make such person disputing the title pay the costs of the summons rendered necessary by his opposition.

The pledges of shares with transfers executed by the pledgor with the date and name of transferee in blank has, and also his transferee has, implied power to fill up the blanks. Such transfers, although executed as deeds by the original pledgor, will not operate as deeds, and if the regulations of the company require a deed will only confer an equitable interest and operate as contracts to transfer, but when the articles of association did not require a deed and the blanks had been filled up by the transferee of the pledgor:—Held, that they operated as valid transfers and conferred on him a right to be registered as a shareholder which the Court would enforce on summons under the 35th section.

This was an application by summons made by T. Sargent under the 35th section of the Companies Act of 1862, against the company and Joseph Fry, to have the register of shareholders of the Tahiti Cotton and Coffee Plantation Company (Limited), rectified by inserting his name in the place of Joseph Fry as holder of seventy-five shares.

The company was registered under the Companies Act, 1867.

The clauses of the articles relating to transfers were as follows—

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Clause 7. No person shall as against this company be deemed or be a shareholder in respect of any share, unless he or she shall have complied with all the requirements of these articles in that behalf, and shall have accepted such share and testified such acceptance by writing under his or her hand in such form as the company may from time to time direct, and shall have delivered such acceptance duly executed by him or her to the company, to be entered in its books and filed in the company's office.

8. Every shareholder shall be entitled to a certificate under the company's common seal specifying the share or shares held by him or her, and the amount paid up thereon.

28. The instrument of transfer shall be presented to the company accompanied with an acceptance in writing by the transferee of the share or shares transferred to him or her, and also with such other evidence and documents as the directors may require to prove the transferor's title, and thereupon, and upon payment to the company of the transfer fee of 2s. 6d. for each transfer, it shall register the transferee as a shareholder.

29. The company may refuse to register the transfer of any share made by a shareholder who is indebted to it either for calls or on any other account whatsoever, and the company shall have a lien upon all the shares of any such transferring shareholder for any sum of money in which he or she may be indebted to it as aforesaid.

The facts on which the Master of the Rolls grounded his judgment are fully stated in the judgment; they were shortly as follows—

In 1870 Fry deposited with R. C. Cannon, a broker, certificates of the shares in question (and shares in other companies) to secure a loan of 450*l*. He also deposited with Cannon transfers of the shares in the form of deeds signed and executed by Fry, but with the name of the transferee and date in blank. Cannon deposited the certificates of shares and the transfers, still in blank, with Sargent, to secure a loan of 500*l*. In December, 1872, Fry paid off his debt to Cannon, and obtained a return of some of

the securities, but not those which had been deposited with Sargent. Sargent subsequently filled up the transfers with his own name as transferee, and sent them to the company for registration in May, 1873. Fry subsequently gave notice to the company that he disputed the validity of the transfers, and the company refused to register them.

Mr. Fry and Mr. Stock, for Sargent.—We contend that these transfers operate either as agreements for transfer which this Court will specifically enforce or actual legal transfers to Mr. Sargent. As to the jurisdiction of the Court to enforce specific performance of an agreement under section 35, the authorities are conflicting. They are collected and commented on in *Buckleley on the Companies Acts*, page 59–64. He there cites—

Ward & Henry's Case, 35 Law J. Rep. (N.S.) Chanc. 652; s. c. Law Rep. 2 Eq. 226; (on app.) 36 Law J. Rep. (N.S.) Chanc. 462; s. c. Law Rep. 2 Chanc. 431;

Ex parte Kintrea, 39 Law J. Rep. (N.S.) Chanc. 193; s. c. Law Rep. 5 Chanc. 95–99;

Stewart's Case, 35 Law J. Rep. (N.S.) Chanc. 738; s. c. Law Rep. 1 Chanc. 574;

Head's Case, 36 Law J. Rep. (N.S.) Chanc. 121; s. c. Law Rep. 3 Eq. 84;

White's Case, 36 Law J. Rep. (N.S.) Chanc. 121; s. c. Law Rep. 3 Eq. 84;

Ward & Garfitt's Case, 36 Law J. Rep. (N.S.) Chanc. 416; s. c. Law Rep. 4 Eq. 189;

The Reese River Company v. Smith, 39 Law J. Rep. (N.S.) Chanc. 849; s. c. Law Rep. 4 E. & I. Ap. 64;

Ex parte Ward, 37 Law J. Rep. (N.S.) Exch. 83; s. c. Law Rep. 3 Exch. 172;

Ex parte Los, 34 Law J. Rep. (N.S.) Chanc. 609;

Musgrave and Hart's Case, 37 Law J. Rep. (N.S.) Chanc. 161; s. c. Law Rep. 5 Eq. 193;

Ex parte Parker, Law Rep. 2 Chanc. 685;

Simpson's Case, 39 Law J. Rep. (N.S.) Chanc. 41; s. c. Law Rep. 9 Eq. 91

We submit that the balance of authority is in favour of the proposition that the Court has jurisdiction. And this is in accordance with the words of the section, "any question relating to the title."

[THE MASTER OF THE ROLLS.—The former words as to costs seem to me to restrict the generality of these words. The section only gives power to order costs to be paid by the company or the applicant. If I am to decide a question between two claimants, I have no jurisdiction to make the person who is wrong pay costs. This implies that the legislature did not intend such question to be decided under this section.]

We submit that the authorities shew that there is jurisdiction, but that the Court will refuse to exercise it in complicated cases.

[THE MASTER OF THE ROLLS.—I prefer the view taken by Lord Cairns in

Ward & Henry's Case (ubi supra).

I consider that I have no jurisdiction under the 35th section to decree specific performance of an agreement to transfer shares.]

Then we contend that we have a legal title, and that the transfers are valid as actual transfers and not as agreements. We do not contend that they are deeds, but the articles of association do not require a deed, all that they require is an instrument of transfer and an acceptance in writing by the transferee. It is clear that by the pledge of transfers executed in blank an implied authority was given to the pledgee or his transferee to fill up the blank, and in this case the evidence shews that Mr. Fry knew of the blank being filled up and never objected; in fact by his letter of the 10th of January, 1873, he admitted the right of the transferee to be registered.

Mr. Southgate and *Mr. Cracknall*, for the company.—First. Even if the transfers were legal transfers, the company were not bound to act on them when they had notice from Mr. Fry that he disputed the claim. The company have merely a ministerial duty to perform, and are not bound to decide between rival claimants, the Court should direct the applicant to file a bill in order that the question between the two claimants should be de-

cided—*Ex parte Parker (ubi supra)*. Second. We contend that the transfers are not legal transfers.

It is said that Sargent had authority to fill up the blank, but a legal power to execute a deed must be conferred by deed. And it has been decided that a transfer executed in blank is void as a deed—

Hibblewhite v. M'Morine, 9 Mee. & W. 200; s. c. 9 Law J. Rep. (N.S.) Exch. 217;

Swan v. The North British Australasian Company, 7 Hurl. & N. 603; s. c. 31 Law J. Rep. (N.S.) Exch. 425.

[THE MASTER OF THE ROLLS.—If the articles require a deed, a deed is necessary, but not otherwise.]

Yes, but here there is a deed.

[THE MASTER OF THE ROLLS.—Mr. Sargent says, all that is required by the articles is the document which he produces.]

The articles do not say that there should not be a deed; and the custom is to have a deed; when that is the case a deed is necessary—

Marino's Case, 36 Law J. Rep. (N.S.) Chanc. 468; s. c. Law Rep. 2 Chanc. 596.

[*Mr. Fry*.—In *Marino's Case (ubi supra)* the articles of association contained no provision as to the mode in which transfers were to be executed, and in order to ascertain what the regulations of the company were, it was necessary to look at the custom of the company. Here there is an express regulation in the articles as to the mode of transfer, and no custom of the company can interfere with the right of a person taking under such a transfer.]

[THE MASTER OF THE ROLLS.—I think that the cases are sufficiently distinct for me to decide this without reference to *Marino's Case (ubi supra)*.]

Sir E. Baggallay and *Mr. Shebbeare*, for Mr. Joseph Fry.—We ask that the summons may be dismissed with costs. The Court has no jurisdiction to decide between rival claimants—

Stewart's Case (ubi supra);

Ward's Case (ubi supra),

decides that before the Court can be called on to order a transfer, the right should be established, and if it has jurisdiction should order a bill to be filed—

Ward & Henry's Case (ubi supra);
The Reese River Silver Mining Com-
pany v. Smith (ubi supra);
Simpson's Case (ubi supra).

THE MASTER OF THE ROLLS.—I am of opinion that I must make the order asked for. The case is an unfortunate one, undoubtedly, for Mr. Joseph Fry, but the facts really are very plain indeed. Mr. Fry borrows what I will call for shortness sake 450*l.* of a Mr. Cannon, a sharebroker. He deposits with him as a security the transfers of certain shares not quite filled up; that is, there was no date to them, and there was no name of the transferee; they were what is commonly called blank transfers. The deposits were made on two different occasions as a security. He hands to him also certificates of shares. I have no doubt that without express words Mr. Cannon was authorised and was intended to be authorised by Mr. Fry, if necessary, to fill up the blanks and get the shares registered. The object and meaning of the whole transaction was that if the money was not paid Mr. Cannon should do this. Mr. Cannon, like every other mortgagee, had a right to re-borrow and to transfer his security. He did re-borrow of a Mr. Sargent and transferred the security to him.

It seems that with the shares there were other shares of greater value pledged. In December, 1872 (I pass over the intervening transactions), Mr. Fry was minded to redeem his shares from Mr. Cannon. He goes to Mr. Cannon, settles the account and say to him, "Now I will pay you off, give me back my shares. The effect will be, 500*l.* is due to you, I will pay you the 500*l.*" Mr. Cannon told Mr. Fry that he had pledged the shares, that he was unable to get them back for the 500*l.*, and thereupon Mr. Fry remonstrated with him for having pledged the shares, and put them in a position in which he could not disturb them. He not only paid him the 500*l.*, but 50*l.* more to help him to get them back. He got back from him certain other shares, being the Vancouver shares, which were of greater value than the 500*l.*, and knowing that Mr. Cannon had pledged these other shares, he desired he said, out of kindness to an old acquaint-

tance or because he could not help himself, to get back the other shares if Mr. Cannon could arrange it. Mr. Cannon could not arrange it, and Mr. Sargent, who had never been paid by Mr. Cannon, thereupon did what I consider Mr. Fry might know the holder of the transfers would do if he were not paid, filled up the transfers with the name of the transferee and the date, got them stamped and took them to the company to be registered. So far everything is very plain. When they came to the company for registration it turned out that Mr. Fry was chairman of the board of directors, and in that position had a commanding influence with the company. Though he knew the facts I have stated, he chose to intervene and call upon the company not to register. He saw Mr. Sargent and wrote a letter to him saying, that he must register them if Mr. Sargent insisted upon it. I am not quoting the words of the letter, but that was the substance of it. That was on the 10th of June. Notwithstanding all this, without offering to pay Mr. Sargent whom he must have known he was liable to pay to redeem the shares, he insisted upon the company not registering them. All I can say is, if I could make Mr. Fry pay the costs I would, because I think that he, knowing all this as a man of business, ought to have gone to Mr. Sargent and paid him and redeemed the shares. But, however, he took the other course, and thereupon the company, acting without full knowledge of the facts no doubt, but acting on Mr. Fry's representation that he had not given authority to have these transfers filled up refused to register the transfers.

The transfers were not valid as deeds, but no deed is required by the articles of the company, and I hold there was authority to fill up the blanks over the signature of Mr. Fry, therefore they were validly signed, and I think ought to have been registered. Now I come to the difficult subject of costs; not that I should have any difficulty at all if my hands were not tied by the section of the Act of Parliament. As I said before I should have no hesitation in making Mr. Fry pay the costs, as it was Mr. Fry's own fault in not redeeming the shares. It was not Mr.

Sargent's fault. Mr. Fry chose to trust Mr. Cannon, or, as he said very fairly, was compelled to trust him, in order to get back his Vancouver shares. That being so, Mr. Sargent does not move against Mr. Fry, but he moves against the company and gives notice to Mr. Fry. The Court may either refuse the application with or without costs to be paid by the applicant, or it may, if satisfied with the justice of the case, make an order for rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. Upon that I adopt entirely what was said by Mr. Baron Channell in *Ward's Case* (*ubi supra*). He said, speaking of the decision of the Lords Justices in *Ward & Henry's Case* (*ubi supra*)—"The true effect of the words used by them is that if the applicant shews a clear right to have his name put on or taken off the register, then, as the result of determining this question, the Court will ministerially exercise the power of rectifying the register, but the right must first be established." That means that it must be established to the Court's satisfaction, *i.e.*, the Court to which the application is made; and, as I said before, it is not only established to my satisfaction, but I think it has been most fairly and honestly and candidly put by the counsel for Mr. Fry, who say that they cannot contest the equitable right of Mr. Sargent, and I hold his legal right also to have the shares transferred to him. Now that being so, what am I to do with the costs? I cannot make the right person pay them, for that would be Mr. Joseph Fry, whose interference has caused the application. I consider under the words of that section that I have no power to do so. I cannot make the applicant pay them, he has been right throughout. The only question I have to consider is whether I can make the company pay them. Now of course the company has a right to say that having had this notice from Mr. Fry, they were as prudent people entitled to hold their hands until the question should be judicially determined, and if that had been the answer or if they had applied to Mr. Fry to indemnify them or done any-

thing of that sort, I do not think there could have been any pretence for asking them to pay costs. But what they did was this, they took Mr. Fry's representation, and without more, absolutely refused to register. Now the question which I really have to decide is whether or not the person's name was omitted from the register without sufficient cause: is it sufficient cause, that somebody whose name is on the register gives notice to the company that the transfer is not valid, the transfer being valid in form. I cannot hold that to be sufficient cause, because it would come to this that everybody giving notice would stop a transfer. Then is it sufficient cause if the person who gives the notice turns out to be wrong? The company took no step to ascertain the facts, but simply refused and stood on that refusal, in fact it sided with Mr. Fry its chairman. Can I say that a company which chooses to refuse a transfer because the chairman says it is wrong when it is right, is not to bear the costs resulting from that refusal, getting an indemnity for those costs over and against Mr. Fry? I think that is the best course. I should have been better pleased if I had had jurisdiction to make Mr. Fry pay the costs, but I think the company has not been neutral in this transaction. I think that it has sided with Mr. Fry, that it has taken a part, and that if Mr. Fry had not been chairman the same action that the company has taken would not have been taken. Therefore, on the whole, I think that the applicant succeeding in his application ought to have his costs and ought to have them against the company.

The order will be an order to place Mr. Sargent's name on the register for seventy-five and thirty-seven shares in place of Mr. Fry's name, the costs of the applicant to be paid by the company.

Solicitors—Mr. W. Foster, for the Company;
Messrs. Hancock, Sharp & Hales, for Mr.
Sargent; Mr. G. D. Byfield, for Mr. J. Fry.

HALL, V.C.
1874.
Jan. 20, 21.
Feb. 11, 17.

TURNER v. THE LONDON AND
SOUTH WESTERN RAILWAY
COMPANY, AND THE RING-
WOOD, CHRISTCHURCH AND
BOURNEMOUTH RAILWAY
COMPANY.

*Railway—The 22nd & 23rd Vict. c. xcv.
(The Ringwood, Christchurch and Bournem-
mouth Railway Act, 1859), sect. 27—
“Ordinary Train”.—Death of sole Plaintiff
after argument and before Delivery of
Judgment—Practice.*

*Trains having a special object, not being
trains for the ordinary traffic and purposes of
the above named branch line of railway;
being also substantially faster than the other
trains; stopping only at one of the two
stations on the branch line; put on it to be
in connection with fast trains on the main
line of the London and South Western
Railway, and so materially shortening the
through journeys, are not “ordinary”
trains within the 27th section of the above
mentioned Act.*

*The death of a sole plaintiff, after argu-
ment and before judgment, does not prevent
the delivery thereof; and it will be entered
“nunc pro tunc,” as of the date when the
arguments were concluded.*

The plaintiff in this suit was Mr. John
Turner Turner, of Avon Cottage, in the
parish of Ringwood, in the county of
Hants.

By the Ringwood, Christchurch and
Bournemouth Railway Act, 1859, that
company was authorised to make a rail-
way commencing in the parish of Ring-
wood, in the county of Southampton, by
a junction with the line of the London
and South Western Railway, at or near
the Ashley Level; crossing over that rail-
way near to and west of the 106th mile-
post from London, on the same railway,
and terminating in the parish of Christ-
church in the same county, on certain
land called Portfield, on the east of the
road leading from Christchurch to Hearn.
By the 27th section of the Act, it was
enacted as follows—“That the company
shall erect and for ever maintain a lodge
at the point where the railway shall cross
the occupation road numbered 29, on the
plans deposited for the purposes of this

Act, in the parish of Ringwood, being the
northern entrance to Avon Cottage, and
the owner or occupier for the time being
of Avon Cottage, shall at all times have
the right of exhibiting at that lodge a
road signal, being a red flag by day and
a red lamp at night, for the purpose of
stopping any ‘ordinary train,’ to let
down or take up passengers; and whenever
such signal shall be visible in reasonable
time for the purpose, the company shall
cause any ‘such ordinary train’ to stop
at such point, and shall take up and set
down passengers accordingly.” By the
40th section of the same Act, it was en-
acted—“That the maximum rates of
charge to be made by the company for
the conveyance of passengers upon the
railway, including the tolls for the use of
the railway and of carriages, and for loco-
motive power and every other expense
incidental to such conveyance should not
exceed the following sums—for every
passenger conveyed in a first class car-
riage, the sum of two pence half penny
per mile; for every passenger conveyed
in a second class carriage, the sum of one
penny three farthings per mile; and for
every passenger conveyed in a third class
carriage, the sum of one penny per mile.”
By the 42nd section it was enacted—
“That the restriction as to the charges
to be made should not extend to any
special train that might be required to be
run upon the railway; but should apply
only to the *ordinary and express trains*, ap-
pointed from time to time by the company
for the conveyance of passengers and
goods upon the railway.” By the 45th
section it was enacted “that the two
companies might from time to time
make all such contracts and arrangements
as they thought fit with respect to the user
and working of the railway, or any part
thereof, by the London and South Western
Railway Company, and such working
contracts and arrangements respectively
might be upon such terms and conditions
whatsoever with respect to the providing
by that company of engines and carriages,
plant, stock and servants for such working
of the railway, or any part thereof, and
with respect to the conduct and regulation
of the traffic on the railway or any part
thereof respectively, and with respect to the

fixing, collection, division, apportionment and application of the tolls, rates and charges to be demanded and taken for such traffic or any part thereof, and with respect to the compensation to be made by either of those companies to the other of them for such purposes or any of them, and with respect to any other matters in connexion with such working as those two companies should mutually agree on." And by the 49th section, it was enacted "that during the continuance of any such contracts or agreements, the railways of the two companies, should for the purpose of calculating the tolls to be taken by the London and South Western Railway Company in respect of animals, articles and persons conveyed over any part of their railways and any part of the railway by that Act authorised, for distances not amounting in the aggregate to six miles, be deemed one continuous line of railway."

The railway and works authorised by that Act were duly constructed; and the railway was opened in March, 1870, and managed and worked by the London and South Western Railway Company, according to certain specified agreements between the two companies.

The plaintiff, as the owner and occupier of Avon Cottage, was entitled to the benefit of the 27th section of the Act; and the question raised and to be determined in this suit was, whether certain additional trains, which commenced running on the branch line in March, 1872, were or were not "*ordinary*" trains within the meaning of that section? The branch line was about twelve miles in length and had two stations between Ringwood and Bournemouth, namely Hearn and Christchurch. From the time of the opening of the line, in March, 1870, until March, 1872, there were six trains a day from Ringwood to Bournemouth, and five trains a day from Bournemouth to Ringwood. In the time tables of the London and South Western Railway Company for February, 1872 (at page 10), two of those trains were mentioned as being Southampton, Stokes Bay, Bishopstoke and Weymouth fast trains. All those trains had been treated as ordinary trains, coming within the 27th section, and the

plaintiff had accordingly had the benefit of that section as to them.

In March, 1872, the London and South Western Railway Company added an additional train each way on the branch line. One of those trains was a down train leaving Ringwood Junction at 6.16 p.m. reaching Bournemouth at 6.44 p.m. The times for starting and arrival of that train were subsequently altered to 5 p.m. for starting, and 5.30 p.m. for arrival. The other of those trains was an up train leaving Bournemouth at 10.10 a.m., and arriving at Ringwood at or shortly before 10.38 a.m. The times of starting and arrival of that train were subsequently altered to 10.15 a.m., and then to 11.5 a.m. and 11.33 a.m. Those two trains were the trains as to which the controversy had arisen. Those trains did not run from Ringwood to Bournemouth and from Bournemouth to Ringwood, without stopping. They did stop at Christchurch; but they did not stop at Hearn. They went quicker than the other trains above mentioned; there being a saving of about five minutes one way, and four minutes the other way. That was a not-inconsiderable shortening of the time taken by the other trains; which times did not much exceed half an hour.

The defendants had not considered and did not consider those trains as being "*ordinary trains*." Mr. Scott, the traffic manager of the London and South-Western Railway, proved that they were added in compliance with memorials addressed to the board of directors of the London and South-Western Railway Company, requesting them to supply a special and express service between Ringwood and Bournemouth, and Bournemouth and Ringwood, running in connection with the fast and express trains of the main line service of the London and South-Western Railway Company between Bishopstoke and London; and that there was a considerable saving in time by reason of the addition of the trains in question, not merely in the journey between Bournemouth and Ringwood, and *vice versa*, but in the journey from and to London, and to and from Bournemouth. The plaintiff alleged that the London and South-Western Railway

Company had prohibited their servants who occupied the lodge from stopping or allowing the plaintiff to stop the additional trains by signal as provided by the 27th section of the above-mentioned Act, and absolutely refused to allow him to exercise his rights under the 27th section, as owner and occupier of Avon Cottage. In that state of things a large amount of correspondence took place between the parties and their respective solicitors; and ultimately, in July, 1872, the plaintiff filed the bill in this suit, praying a declaration that he was entitled to stop by signal in the mode prescribed by the 27th section of the "Ringwood, Christchurch and Bournemouth Railway Act, 1859," the additional trains so timed as aforesaid to leave Ringwood Junction at 6.16 p.m., subsequently altered to 5 p.m.; and Bournemouth at 10.15 a.m., subsequently altered to 11.5 a.m.:—And also that the defendants, the London and South-Western Railway Company, might be restrained by the order and injunction of this Court from refusing to allow the plaintiff to stop by signal in the mode aforesaid the additional trains or any other trains, being ordinary trains within the meaning of the 27th section, and from otherwise depriving the plaintiff of his rights, under the 27th section, as owner and occupier of Avon Cottage. And that the defendants might be ordered to pay the plaintiff his costs of the suit.

The London and South-Western Railway Company by their answer (paragraph 19) stated as follows—That the plaintiff had the full benefit of the same number of ordinary trains on the Bournemouth and Ringwood railway, running in direct connection with the ordinary main line trains at Ringwood Junction, as he had always had previously to the running of the said special, fast or express trains. There had been (and still were) six ordinary trains a day, which ran between Bournemouth and Ringwood in connection with the main line trains as aforesaid. The additional special, fast or express trains were different from the ordinary trains in this respect; that horses and carriages were not allowed to be conveyed by such additional trains as they were by all the ordinary trains, and

also in that they ran *through* between Bournemouth and Bishopstoke with the same engines and carriages as extra fast trains throughout the whole distance, which they did not do in the case of the ordinary trains. Those trains ran with the same engine and carriages only between and from Ringwood and Bournemouth, and the passengers in ordinary trains coming to or going from Bournemouth by the main line had to change carriages at Ringwood Junction. They further insisted that there was a well understood distinction between the ordinary trains and the special, fast or express trains of the said company; and all these were quite distinct from mere special trains which were trains specially hired or run for a special object, and as to which under section 42 of the said Act there was no restriction as to charges.

The main and simple question which the Court had to decide was that already mentioned, namely, Whether, under the above circumstances, the trains referred to in the prayer of the plaintiff's bill were "ordinary trains" within the meaning of the 27th section of the second defendant company's Act? The further details of the case and the nature and effect of the evidence and the arguments will sufficiently appear from the judgment, *infra*.

Mr. Dickinson and *Mr. F. O. Haynes* were for the plaintiff.

Mr. Greene and *Mr. Everitt* were for the first defendant company.

Mr. Cecil Russell was for the second defendant company.

Mr. Dickinson replied.

The cause was (on Feb. 11) in the paper for judgment, when it was stated that the plaintiff had died on the previous Sunday. A discussion thereupon ensued as to the jurisdiction of the Court to deliver judgment in the existing and defective state of the record. After some time the cause was ordered to stand over, that, in the meantime, the authorities on the subject might be investigated and considered.

HALL, V.C. (on Feb. 17).—Before proceeding to deliver judgment in this case I desire to state that it appears to me upon consideration, and after some examination

of the authorities (so far as I have been able to find any)—and by the valuable aid (1) which I have received from Mr.

(1) Note of the cases furnished by Mr. Rogers, C.B. (the registrar), and relating to abatement between hearing and judgment:—

Cumber v. Wane (1 Str. 426). Judgment entered *nunc pro tunc*, when defendant died pending a *curia advisari vult*.

Davies v. Davies (9 Ves. jun. 461). There Lord Eldon held, on the 21st of March, 1804, that the death of one of the defendants did not necessarily prevent judgment. On referring to the entry of the order in *Reg. Lib.* 1803, A. 668, it appears that the cause was heard on the 26th of July, 1802, and judgment given on the 12th of May, 1804, on which day the decree is dated.

Belsham v. Percival (8 Hare 157). In that case the hearing was completed on the 24th of June, 1847, and judgment given on the 4th of November, 1847. It was held by Knight Bruce, V.C., that the death of a defendant in the interval between the hearing of the cause and the judgment did not render a bill of revivor necessary prior to drawing up the decree. Under the peculiar circumstances of that case, a separate decree dismissing the bill against one defendant was directed to be drawn up; and on referring to the entry in the *Reg. Lib.* 1846, A. 2355, it appears that the decree is dated the 4th of November, 1847, and expressed to be made by Wigram, V.C., and entitled *Belsham v. Harrison*, and was entered *nunc pro tunc*, by order, dated the 28th of February, 1851.

N.B.—Knight Bruce, V.C., took Wigram, V.C.'s causes in the interval before the appointment of his successor, Turner, V.C.

Collinson v. Lister (20 Beav. 355). In that case Romilly, M.R., held that an abatement after hearing did not prevent judgment being delivered or the decree being drawn up; and his Honour expressed his opinion that the point was settled by the case of *Cumber v. Wane* (*ubi supra*). On referring to the entry in the registrar's minute-book of Mr. Registrar Wood, of the 19th of April, 1855, p. 17, when the case was mentioned, it appears that the abatement was caused by the death of one of the three plaintiffs, and the decree was directed to bear date the day on which the case was heard; and *Cumber v. Wane* (1 Smith's Leading Cases, 147) is cited, and on referring to the entry of the order in *Reg. Lib.* 1854, A. p. 791, it appears that the decree, which directed accounts to be taken and payment by the defendant to the plaintiffs of their costs of suit up to decree, is dated the 15th of February, 1855.

Preston v. Meux. M.R., 20th of November, 1839, B. 341. That case is cited in Seton, p. 1139. It is stated that the suit abated between the hearing and the judgment, and on referring to the entry of the order it appears that the decree is dated the 20th of November, 1839, being the day of judgment being given. The cause is stated to

Rogers (the registrar) who has enquired into the matter, and also from the searches made by Mr. Cecil Russell—that I am now in a situation to deliver judgment, and to direct that the judgment shall be entered as of the date when the arguments upon the case were concluded. As the point is one of some general importance I may observe that the cases which have led me to this conclusion are those of *Collinson v. Lister* (2) and *Troup v. Troup* (3).

In the first of those cases, namely, in *Collinson v. Lister* (2), we find that the suit became abated between the hearing and the delivery by the Court of its judgment. "Mr. Pryor suggested that the decree could not, under such circumstances, be drawn up, it having been made pending the abatement." The Master of the Rolls said, "I am satisfied that that presents no difficulty; the point is settled by the case of *Cumber v. Wane*, and the reporter refers to other cases in the note to that." *Cumber v. Wane* is reported in 1 Str. 426; and as reported there, all we find in it, bearing upon the point, is this:—It is said, "There it was alleged that since the time which the Court took to advise, the defendant in error was dead, and therefore they prayed that they might enter the judgment *nunc pro tunc*, as was done in the case of *Blair v. De la Hay*, which is referred to, and it was ordered accordingly."

Now in *Chitty's Archbold's Practice*, Queen's Bench—I refer to the 10th edition by Mr. Prentice in 1858, at page 1,502, the rule at law is stated thus—"The Court will in general permit a judgment to be entered *nunc pro tunc* where the signing of it has been delayed by the act of the Court. Therefore, if a party die after special verdict or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argu-

have been heard on the 27th and 28th of February and 1st, 2nd, 4th and 5th of March, 1839.

(2) 7 De Gex, M. & G. 634; s. c. 20 Beav. 356; s. c. 25 Law J. Rep. (n.s.) Chanc. 38; s. c. 24 Law J. Rep. (n.s.) Chanc. 762.

(3) 16 W. R. 573; s. c. 37 Law J. Rep. (n.s.) Chanc. 390.

ment, and pending the time taken for argument, or whilst the Court are considering their judgment, the Court will allow judgment to be entered up after the party's death *nunc pro tunc*, in order that he may not be prejudiced by a delay arising from the act of the Court." Then it goes on to explain that the Court will not do it where the act arises from the neglect of the party himself in completing the judgment. I need not refer to that. In support of the general statement of the law, several cases are referred to, some of them of comparatively modern date. That is the rule at law; that judgment may be entered *nunc pro tunc*, whatever that may mean.

In *Troup v. Troup* (3) this is what is stated—"The suit of *Troup v. Ricardo* was heard on appeal from the Master of the Rolls before the Lord Chancellor (Chelmsford) in April, 1867; at the conclusion of the argument his Lordship reserved judgment. James Troup, the plaintiff in that suit, died on the 2nd of May. Shortly after his death the suit of *Troup v. Troup* was instituted before Malins, V.C., by a creditor, and a common decree for the administration of the deceased's estate was made before the long vacation. On the 2nd of November, 1867, the Lord Chancellor pronounced his judgment in *Troup v. Ricardo*, dismissing the bill as against Messrs. Moreing & Holgate, with costs, the amount of such costs to be taxed by the taxing master in the usual way, and paid by the plaintiff. The Lord Chancellor's decree, when drawn up, was dated, *nunc pro tunc*, as an order of the 30th of April, 1867, that being the day on which the hearing of the appeal concluded." That is what is there meant by *nunc pro tunc*.

There are some other cases which I have found in which the judgments have been entered *nunc pro tunc* in this Court, but so far as I can make them out they are not very satisfactory authorities upon the point. I do not gather from them that the judgments were actually antedated, and therefore *nunc pro tunc* in this Court does not seem always to have been considered as equivalent to or the same thing as "antedated." That is what I felt some difficulty about. It

seems to me to have been occasioned by this, that there has been a practice in this Court, which dates from a very early period indeed, of requiring that all judgments, decrees and orders should be entered within a certain time—within thirteen months. There is a very old order to that effect (4) which, however, is not in the General Orders, but which has nevertheless (as I understand) been acted upon since those orders. The practice has been to obtain, in those cases where the decree or order has not been entered up within the twelve months, an order of course (I believe from the Rolls) authorising the entering up, as they call it, *nunc pro tunc*. That process apparently is this:—The books in which these decrees and orders are entered every twelve months are sent away from the ordinary office where they would be entered, into other custody, and getting into that other custody you have to go to somebody else to get the book to do it. Under that order you are entitled to get the book back again, and then make the enquiry. There you enter it *nunc pro tunc*, but so entering it, it is not antedated, so far as I collect. Therefore the entry *nunc pro tunc* in this Court is an ambiguous expression. We find that in the cases to which I have referred the judgments were actually antedated. There is no doubt about that. As to *Collinson v. Lister* (*ubi supra*) I have been furnished with an extract from the registrar's book of the day, namely, Thursday, the 19th of April, 1855. Mr. Colville (who was the registrar) was a very experienced one indeed. He seems to have made an express note in his book, that the decree

(4) Dec. 4, 1691.—Beam. p. 290, Reg. Lib. A. 1691, fo. 165. "All orders, rules and process of Michaelmas and Hilary Terms or vacations to be entered before the following Michaelmas Term, and those of Easter and Trinity Terms and vacations before the following Easter Term, and not to be entered afterwards without a special order of the Court."

N.B.—The order to enter *nunc pro tunc* is obtained from the secretary's office at the Rolls. The order directed to be entered is placed in the old book under date thus—An order dated in 1869 would be entered in Lib. 1869, with a note in the margin, "Entered pr. order dated the day of ."

was to be dated "the 15th of February, 1855." That is in the margin, followed then by this, "See Mr. Bedwell's book of that day, when cause finally heard." Then, again, in the body of the extract there is this, "*Nota Bene*—The decree to be dated that day, although judgment given on this; a party having died in the intermediate time." Therefore the matter was there manifestly considered by the Court, and deliberately determined. In the other cases the orders may have been made *nunc pro tunc* without defining exactly what that meant. But there are those two authorities on the subject, and, so far as I can ascertain it, the practice appears to accord with the rules at common law—I have not got the records to see that they were antedated in those cases—still, as I do not apprehend or have any reason to know, that the registrars have any such rule as I have referred to in the Court of Chancery, namely, that of interfering, *nunc pro tunc*, in certain cases—and seeing that a reason is given in books of practice for the rule—it seems to me that it must be the practice at law in some way or other to effect the object by making such orders. Whether they are actually antedated, or whether they are considered when entered as *nunc pro tunc* in some particular form, as equivalent to that, is, I think, unimportant. Suffice it to say that the object is to put the party on the one side or the other, the plaintiff or defendant, in exactly the same position as if the judgment had not been delayed by the Court. Therefore I shall order this judgment to be entered as of the day when the arguments terminated, and that will avoid all difficulty.

I may add that upon consideration I cannot think that any injustice could accrue to anybody else in doing that, either as between different judgment creditors, or persons having the benefit of judgments, in the present state of the law. Perhaps, previously there might have been. But I do not apprehend that, there can now be any difference, because, although the judgment will be antedated, of course you cannot have the benefit of a registered judgment until it is actually registered. Therefore, so far as I can see,

there is no benefit or loss to accrue to anybody by that course being taken. I will now proceed to give my judgment upon the case itself.

By the Ringwood, Christchurch and Bournemouth Railway Act, 1869, that company was empowered to construct a branch railway from Ringwood to Bournemouth—the railway to join the London and South-Western Railway at Ringwood. [HALL, V.C., then referred to the sections of the Act, and after stating the facts of the case to the above effect, continued thus:] In that state of facts the question is, are those two trains ordinary trains? the answer, if given by a person not a lawyer, would, I cannot doubt, be that they are not. The answer, if expanded, would, I think, be something to this effect—"The trains in question are trains having a special object and purpose, not being trains for the ordinary traffic and purposes of the branch line, and are not what are commonly or properly understood to be ordinary trains; particularly considering that they are substantially faster than the other trains; that they only stop at one of the two stations; that they have been put on to meet and be in connection with fast trains on the main line; and that they materially shorten the through journeys." The same must, I think, be my answer if the case be considered in reference to the application to it of the 27th section of the Act; unless indeed there be anything in other parts of the Act, or any other reason which can properly be had regard to, whereby the words "ordinary trains" in that section should receive another interpretation. In aid of that construction, namely, that the trains are ordinary trains, the plaintiff's counsel referred to and minutely examined the company's time tables, pointing out that trains described in the headings or in other parts of the tables as "fast trains" were "ordinary trains;" that the heading of the tables mentions "express train" and "fast train," and they particularly relied on this, that in the time table for March 1872 the additional trains are introduced in one of the two columns, in which the words, "Southampton, Stokes Bay and Bishopstoke and Weymouth fast

trains" occurred in the February time table as above-mentioned. Those words being in the March time table without variation, the plaintiff's counsel also contended that the non-insertion in that table of a new description of the additional trains shews that they were considered to be and are, the same description of trains as those to the benefit of which the plaintiff has been treated as entitled. I do not think that the March time table can be regarded as containing, either by description or omission of description, an admission on the defendants' part that the additional trains were and are ordinary trains. There would be difficulty in framing the tables so as to contain accurate descriptions of the character of the trains, and particularly so in making the descriptions throughout the whole journey of each train accurate. I may observe that the words, "Southampton, Stoke's Bay, Bournemouth and Weymouth fast trains," were not inaccurate as applied to the new trains, although those trains were faster than the trains to which the descriptions were previously and indeed still remained applicable; referring to and comprising, as they did, as well original trains as the additional trains. The heading "Express trains" had reference, and I think reference only, to a particular train running in competition, with an express train to the West of England, on the Great Western Railway. Reference was also made by the plaintiff's counsel to the table of fares which only mentioned "express" and "ordinary;" but when it is considered that the company could and do charge the maximum, authorised by their Act, for passengers by all trains except trains running in competition with the Great Western Railway express trains, I do not think this table affects the construction of the 27th section.

I have now to consider the 40th and 42nd sections of the Act. It has been contended for the plaintiff that those sections only mention "special trains," "ordinary trains" and "express trains;" that they must have been meant to provide for and embrace every description of train; that the two additional trains are neither special nor express trains; and,

therefore, that they must be "ordinary" trains. It appears to me unnecessary to determine whether the two trains do or do not come under the description of "express" trains as mentioned in the 42nd section; for, assuming that they do not, I do not think that they are necessarily ordinary trains as there mentioned, or that, if they are, they must therefore be ordinary trains within the meaning of the 27th section. The 40th section prescribes the maximum charge for passengers, which the 42nd sections says is to apply only to ordinary and express trains, and not to special trains. If there be read into the 40th section of the Act, after the word "passengers," the words, "By ordinary and express trains, not including passengers by special trains," it might be open to contend that section 40 left some passengers unprovided for. I do not offer an opinion as to that, or even say that such reading of the 40th section as I have mentioned is the correct one; but I have said what I have said, as shewing or tending to shew that it is, as I think, unsafe to rely upon the argument addressed to me founded on the 40th and 42nd sections. Independently of this, I think it might well be held that a particular train was an ordinary train for the purposes of the 42nd section (that section being meant to comprise all trains), but not an ordinary train for the purposes of the 27th section, that section conferring a special and private right, creating a burden upon a public highway, and restraining the ordinary rights of the directors and managers of such highway to regulate the trains and traffic so as best to accommodate the public. I think the 27th section should not be construed to embrace any trains not coming clearly within its terms; and that such section should be interpreted according to what I consider to be the proper and natural meaning of the words used, there not being as clear words rendering another construction necessary.

I have not observed upon the mode in which the defendants have described the trains in question since the dispute has arisen. The defendants could not by giving the trains names, excluding them in terms from being ordinary trains,

make them not ordinary trains, if they were so in fact. Nevertheless, it was not incorrect for the defendants to give them names so excluding them if such names were in fact accurate descriptions.

I decide this case, as I think it should be decided, upon the construction of the Act as applied to the actual facts and circumstances of the case, without taking into account what has been done since the dispute arose.

On the whole my opinion is that the plaintiff has failed to establish his case, and that his bill must be dismissed with costs.

Solicitors—Messrs. Leman, Groves & Leman, for plaintiff; Mr. L. Crombie, for both the defendant companies.

JESSEL, M.R. } PAGET v. MARQUIS OF AN-
1874. } GLESEA.
Jan. 17. } WATKINS' CLAIM.

Apportionment—4 & 5 Will. 4. c. 22. s. 2
—*Mortgagee*—*Grantee of Rent Charge*
—*Entry*.

The second section of the Apportionment Act, 4 & 5 Will. 4. c. 22. s. 2, is not intended to apply as between a mortgagee (of tenant for life) who has not entered and remaindermen so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived.

A. (tenant for life) by deed, to secure a debt, granted to W. a rent-charge with usual powers of distress and entry, and by the same deed granted a term of years to a trustee to secure the same. A. died in the middle of a quarter. Two quarters of the rent-charge were in arrear.

W. had never entered. A.'s estate was insolvent. The rents had been paid to a separate account:—Held, that W. was not entitled to a charge on these rents, either for the apportioned rent-charge for the current quarter, or for the arrears.

This was a petition in the suit by Watkins, grantee of an annuity. By an indenture dated the 7th day of January, 1864, and

made between Henry Marquis of Anglesey, of the first part, W. Watkins, the petitioner, of the second part, and Charles Baker of the third part, reciting that the said Henry Marquis of Anglesey was indebted to the petitioner in the sum of 6,302l. 11s. 10d. upon the securities set forth in the second schedule thereunderwritten, and that he had that day paid the said petitioner on account of the aforesaid debt 302l. 11s. 10d., leaving a balance of 6,000l. then still due to him, and that the said marquis had agreed to sell to the said petitioner in consideration of the said sum of 6,000l. and of his delivering up the said securities an annuity or yearly sum of 960l. to be secured and paid as thereafter mentioned, and reciting that in pursuance of the said agreement in that behalf the petitioner had delivered up to the said marquis the said securities. It was witnessed that the said Henry Marquis of Anglesey granted, bargained and sold unto the petitioner a yearly rent charge of 960l. to be charged upon, and issuing and payable out of hereditaments, of which the marquis was tenant for life, and also upon and out of the reversions and remainders, yearly and other rents and profits of the said hereditaments and premises thereby charged and made chargeable with the payment of the said yearly sum of 960l., subject to the incumbrances thereinbefore mentioned or referred to, to receive and take the said annuity unto the petitioner for the term of 100 years thenceforth next ensuing, if the said marquis should so long live, the said annuity of 960l., to be payable and paid by four equal quarterly payments on the 7th day of April, the 7th day of July, the 7th day of October and the 7th day of January in every year without deduction or abatement, and the first quarterly payment to be made on the 7th day of April, 1864, if the said marquis should then be living, together with a proportionate part of the said annuity for the time which should have elapsed between the day of the date of the now stating indenture or the then last quarterly day of payment thereof as the case might be, and the day of the decease of the said Marquis of Anglesey, in case he should depart this life on any

other day than one of the said quarterly days of payment, and power was given to the petitioner on the said annuity being in arrear for twenty-one days, into and upon the said hereditaments and premises thereby charged or made chargeable with the said annuity, or into and upon any part or parts thereof to enter and distrain for the same annuity and all arrears thereof as if the same was a rent reserved on a lease for years, to the intent that the petitioner should and might thereby and therewith or otherwise be fully paid and satisfied the said annuity and all the arrears thereof, and the said marquis thereby also granted unto the petitioner that so often as the said annuity or any part thereof should be in arrear and unpaid by the space of forty days after any one of the said days whereon the same was thereinbefore appointed to be paid as aforesaid, then and so often as it should happen, and either on or at any time after the expiration of the said forty days it should be lawful for the petitioner, his executors, administrators and assigns, although no legal or formal demand should have been made of the said annuity, but subject as aforesaid into and upon the said hereditaments and premises, or any part thereof to enter, and the same to have, hold and enjoy, and the yearly rents and profits thereof, and of every part thereof, to receive and take until he should thereby or therewith or otherwise be fully satisfied and paid the said annuity of 960*l.*, and all arrears thereof, and also all such costs, charges, damages and expenses as should be occasioned by the non-payment of the said annuity or any part thereof at the days or times aforesaid. And it was further witnessed that for further securing the said annuity, and for the considerations aforesaid, the said marquis at the request of the said petitioner granted and demised unto the said Charles Baker all and singular the manors or lordships, parks, rectories, advowsons, capital and other messuages, farms, lands, tenements, tithes, rent-charge in lieu of tithes, rents, charges and other rents and other freehold and leasehold hereditaments thereinbefore charged or made chargeable with the said annuity of 960*l.* thereby granted

with their appurtenances, to hold the same (subject nevertheless to the charges and incumbrances then already affecting the same) unto the said Charles Baker for the term of 200 years from thence next ensuing if the said marquis should so long live, and without impeachment of waste nevertheless upon, and for the trust purposes thereafter declared, and it was thereby declared that the said term of 200 years was granted upon trust for the better securing the due and regular payment of the said annuity, and that in case, and when and as often as the money or any quarterly payment or any part thereof should be in arrear and unpaid in the whole or in part for the space of sixty days next after any one of the days or times thereinbefore appointed for payment thereof, the said Charles Baker should by and out of the yearly rents and profits of the said hereditaments and premises thereby demised (but subject as aforesaid) or by any mortgage thereof, or of a competent part thereof for all or any part of the said term of 200 years, or by bringing actions against or making distresses upon all and every, or any one or more of the tenants of the said hereditaments and premises for recovery of the rents then in arrear, or by making entries on the same hereditaments and premises or any of them, and also by granting leases for any term or number of years not exceeding twenty-one years, determinable nevertheless with the said term of 200 years thereby granted, of any farms which should be untenanted as often as the said marquis should not provide tenants for the same at a fair and reasonable rent, or by all and every or any one or more of the ways and means aforesaid, levy and raise such arrears of the said annuity, as from time to time should become due, together with all such damages, costs, charges and expenses as the said Charles Baker should incur, sustain or be put into by reason of the non-payment of the said annuity or any part thereof, and together with the costs, charges and expenses attending the execution of the trusts of the said term of 200 years. And upon this further trust that the said Charles Baker should in the first place retain and reimburse to and

for himself, his costs, charges and expenses, and in the next place to pay and satisfy to the said petitioner all the arrears of the said annuity of 960*l.*, and all costs, charges, damages and expenses which he should have incurred by reason or on account of the non-payment thereof or of any part thereof, or in or about recovering and enforcing the payment of the same. And upon this further trust that in the meantime and until some quarterly payment thereof should be in arrear and unpaid in the whole or in part by the space of sixty days next after some one of the days or times thereby appointed for payment of the same, and also from time to time when, where and so often as all arrears of the same annuity, and the said costs, charges, damages and expenses should be raised or fully satisfied and paid, the said Charles Baker should permit and suffer the said marquis or his assigns to receive and take the yearly rents and profits of the said hereditaments and premises. And upon this further trust that the said Charles Baker, his executors, administrators or assigns should from time to time after payment of the said annuity, and after deducting, paying and retaining such costs, charges, damages and expenses as aforesaid pay to the said marquis, his executors, administrators or assigns, the money (if any) which from time to time should remain in the hands of the said Charles Baker, his executors, administrators or assigns unapplied to any of the purposes aforesaid. And in the said indenture are contained covenants on the part of the said marquis to surrender to the said Charles Baker the copyhold and customary hereditaments comprised therein, and also for payment to the said petitioner, William Watkins, of the said annuity, thereby granted as and when the same should become payable as aforesaid.

The marquis died on Feb. 7, 1869.

This suit had been instituted for the administration of the estate of the late marquis and the usual creditors' decree had been made.

The apportioned rents for the quarter current at the marquis's death, amounting to 800*l.*, had been paid into Court, and carried to a separate account intituled suspense account.

There were specialty creditors unpaid, and the estate was insolvent.

At the time of the marquis's death two quarters of the rent charge, amounting to 480*l.*, were in arrear.

The apportioned part of the quarter current at the death of the marquis was 80*l.*

The petition now presented by Watkins asked for payment to him of the 480*l.* and 80*l.* out of the rents standing to the suspense account.

Mr. Fry and *Mr. Cracknall*, for the petitioner.—The petitioner is at least entitled under the Apportionment Act, 4 & 5 Will. 4. c. 22. s. 2, to the apportioned part for the current quarter.

If the marquis had lived, the petitioner might have received the whole, therefore he has the same right now.

[THE MASTER OF THE ROLLS.—You are not an assign at law. You are asking me to give you under the Act what you could not have got if the tenant for life had lived.]

The petitioner had title.

[THE MASTER OF THE ROLLS.—No title until entry only an *interesse termini*; without an actual entry you cannot recover rents on a demise.]

There are two things, a rent charge and term, a rent charge with power of distress and a right to rent wholly independent of the term.

[THE MASTER OF THE ROLLS.—The rent-charge only gives you right after notice to the tenant, otherwise you could not distrain at law, and the rent charge stopped with the death.]

The petitioner's estate stopped, but the Act continued his right to take the rents if he chose.

Sir R. Baggallay, *Mr. Southgate*, *Mr. Graham Hastings* and *Mr. O. T. Simpson*, for the respondent, were not called on.

THE MASTER OF THE ROLLS.—I cannot allow that the Apportionment Act gives any right to which a mortgagee would not have been entitled if there had been no death. If the mortgagee were in possession the case would be different, he could then have got all that the tenant for life was entitled to.

But I cannot follow the argument that

the Act gives him a right to an apportioned part although he would have had no right to the whole of the rent if the day for payment had arrived. I am of opinion that he is not an assign of the rents within the meaning of the Act; that means one who would have been entitled to the whole quarter's rent if the day for payment had arrived.

It appears to me the Act was not intended to apply as between mortgagor and mortgagee not in possession, and that a mortgagee who is not in possession is not an assign within the meaning of the Act. The petition must be dismissed.

Solicitors—Messrs. Watkins, Baker & Baylis, for petitioner; Messrs. Waller & Handson and Messrs. Horn & Murray, for respondent.

HALL, V.C. }
1874. }
Jan. 16. }

HARRIS v. RICH.
DE ROZAS v. RICH.

Costs—Old Creditor's Suit—Fund in Court—Second Administration Suit—Abatement—Application, in both Suits—Crown.

Where a party claims his costs out of a fund paid into Court in an old suit, and a second suit is instituted with respect to the fund, which latter suit afterwards abates, the proper course for the claimant to adopt is to present a petition, entitled in both suits, stating the special facts of the case, and praying relief accordingly.

Petition.

On the 2nd of August, 1873, an application was made in the second of the above named suits, to dismiss the bill in it for want of prosecution. The facts of the case were these—

Thomas Winde died in Jamaica in 1819, possessed of personal estate both in England and Jamaica. In 1823 a suit was instituted by Mr. Harris, who claimed to be a judgment creditor of Thomas Winde, against Anthony Rich, who was the legal personal representative of

Thomas Winde in England, for the administration of his estate. Anthony Rich by his answer in the suit of *Harris v. Rich* (the first above named suit) admitted the possession of 999l. stock belonging to Thomas Winde's estate, and in pursuance of an order made in that suit, the sum of stock was transferred into Court in 1824. Mr. Harris died not very long afterwards. Nothing further was done in that suit. In 1869, there was standing to the credit of that cause the sum of 999l. stock so transferred into Court, and a further sum of 1,368l. cash, being the accumulations of the dividend thereof. In that year, François de Rozas filed the bill in *De Rozas v. Rich* (the second above named suit), alleging that by virtue of a power of attorney given to him by the surviving executor of Mr. MacDowell (who was another judgment creditor of Thomas Winde) letters of administration of MacDowell's estate had been granted to him; and praying that the stock and cash standing to the credit of the cause of *Harris v. Rich* might be transferred to the credit of *De Rozas v. Rich*; and that it might be ascertained who were the persons entitled to the money. The suit of *De Rozas v. Rich* was brought on for hearing on the 26th of July, 1869, before Vice-Chancellor Stuart, when his Honour declined to make any order according to the prayer of the bill; on the ground that the judgment by virtue of which the plaintiff claimed, was obtained so far back as 1817, and had never been revived. His Honour then, at the request of the plaintiff *De Rozas*, ordered the cause to stand over so that he might be able, if possible, to amend his title. When the cause came on at a subsequent period, it was again ordered to stand over for the same purpose. In April, 1870, the plaintiff's solicitor wrote to say that the surviving executor of MacDowell, from whom the plaintiff held the power of attorney, had died; and that the suit had consequently become defective. Under those circumstances the motion was made to dismiss the bill for want of prosecution, which, after standing over from time to time, was renewed as already stated on the 2nd of August, 1873. In support of the motion it was

then submitted that nothing had been in fact done in the suit of *De Rozas v. Rich*, for four years; and it was therefore asked either that the bill in that suit should be dismissed with costs, or that the plaintiff in it might be put under such terms as would ensure the due prosecution of the suit. In answer to that it was urged that the suit of *De Rozas v. Rich* had become abated; and that the Court had no jurisdiction to make any order in it. Vice-Chancellor Wickens was of opinion that that was so; and suggested the possibility of taking some proceedings in the suit of *Harris v. Rich*, which would enable the defendant to obtain possession of the money.

A petition was accordingly presented by Anthony Rich, the defendant in *De Rozas v. Rich* and entitled in both suits. The petition stated the above facts, and also that from the best information which the petitioner was able to obtain, he believed the Crown would ultimately be entitled to the whole, or some part of the fund; and prayed, that the costs which he had been obliged to pay as the legal personal representative of Thomas Winde and his father, might be paid out of the fund in Court.

That petition came on to be heard on the 19th of December, 1873, when the Court suggested that the Attorney-General should be served with it; and directed the petition to stand over for that purpose. The service was duly effected: and on the 16th of January, 1874, the petition came on to be finally heard, and disposed of.

Mr. W. Worsley Knox was for the petitioner.

Mr. G. W. Hemming, for the Crown, did not oppose.

Mr. Dickinson was for the plaintiff in *De Rozas v. Rich*.

HALL, V.C., made an order according to the prayer of the petition.

Solicitor—*Mr. Hand*, for the petitioner; Messrs. *Rawes & Bradley*, for the Crown.

LORE JUSTICES.

1874.

March 16.

In re SOUTH.

Judgment Debt—Execution—Legal Remainder—Delivery in Execution—1 & 2 Vict. c. 110. ss. 11, 13; 27 & 28 Vict. c. 112.

An estate in remainder cannot be delivered in execution by the sheriff.

This was an appeal from an order made on a petition by V.C. Malins. In December, 1872, a judgment recovered by the petitioner C. Houghton against the present appellant T. D. South was entered up for a sum of 300*l.* and costs.

The appellant was then a minor. He was entitled to the following estates—First, to a legal remainder in a house in Kent, under a testamentary gift as follows—

“My wife shall possess my house at Bridge during her life, but not to leave and let, and at her decease I bequeath it, the said house, to my grandson, T. D. South, and in the event of his death, to the next grandson or grand-daughter as the case may be.”

The tenant for life of this property was still living.

The second property was at Staines, in Middlesex, and was devised by will, dated in 1865, to the testator's wife for life, and then, subject to an existing life estate of the testator's mother and the said life estate of his wife, to the testator's grandson, the said T. D. South, in fee.

The petitioner, C. Houghton, issued execution on his judgment, and the Sheriff of Middlesex made return to a writ of *elegit* that the debtor was “seized in his demesne of the reversion in fee simple” of the property at Staines, “being of the clear yearly value of 124*l.*,” which said premises he had caused to be delivered to the said C. Houghton, by a reasonable price and extent, to hold to him according to the nature and tenure thereof, according to the form of the statute in such case made and provided, until the sum of 366*l.* 18*s.* 6*d.*, named in the writ, should be levied.

The return made no mention of the Sheriff's fees.

3 I.

A similar return was made by the Sheriff of Kent, stating that the debtor was "seised in his demesne of the reversion in fee simple" of the property at Bridge, being of the clear yearly value of 20*l*.

The judgment had been registered in the Court of Common Pleas, and the writs of *elegit* to the Sheriffs of Middlesex and Kent were also so registered on the 26th of August and 1st of November, 1873, respectively.

Enquiry had been made at the offices of the Under-Sheriff of Middlesex and of the Sheriff's agent of Kent, on behalf of the debtor, as to what was actually done under the *elegits*, but no information was obtained, except that it was not the practice actually to deliver the land under an *elegit*.

On the 3rd of November, 1873, C. Houghton presented a petition in the matter of the 27 & 28 Vict. c. 112, and of the debtor, praying a sale of his interest in the lands.

On the 22d of January, 1874, the sum of 382*l*. 16*s*. 9*d*., the amount due for principal, interest and costs under the judgment, not including anything for the costs of the *elegits* and Sheriffs' fees, was paid on behalf of the debtor, and received by the petitioner's solicitor without prejudice.

On the 15th of February, 1874, the debtor came of age.

On the 25th the petition came on for hearing, and the Vice-Chancellor held that the execution was properly executed, and ordered payment of the costs of the *elegit* and Sheriffs' fees, and of the application.

The debtor appealed.

Mr. E. O. Willis and *Mr. Clare* for the appellant.—We say that a remainder cannot be seized in execution.

The enactments affecting the question are 1 & 2 Vict. c. 110. ss. 11. & 13; and 27 & 28 Vict. c. 112 (2). If they are

(1) 1 & 2 Vict. c. 110. s. 11, provides that "It shall be lawful for the Sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed . . . to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure as the person against whom execution is so

proceeding under the latter Act they must shew actual delivery. If not, their form of proceeding is wrong. Under the old law a remainder was not extendable—

sued, or any person in trust for him shall have been seized or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the Sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out."

Section 13 provides that a judgment shall operate as a charge upon all lands, &c., "of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seized, possessed or entitled, for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit . . . and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon;" with provisos against the judgment being enforced for a year, and to protect purchasers for value without notice.

The Act 27 & 28 Vict. c. 112, provides, section 1, that—"No judgment statute or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority in pursuance of such judgment statute or recognizance."

Section 2—"In the construction of this Act . . . the term land shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein."

Section 4—"Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment statute or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery upon petition, in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only, and thereupon the Court shall direct all such en-

Vin. Abr. Statute Merchant, Letter P. 15.

A remainder cannot be delivered. It lies in grant and not in livery, and a feoffment cannot be made of it.

The judgment could not, in fact, be executed by the Sheriff under section 11 of the 1 Vict. c. 110—

In re Duke of Newcastle 39 Law J. Rep. (N.S.) Chanc. 68; s. c. Law Rep. 8 Eq. 700.

The words of section 13 are wider, but the charge thereby created is merely inchoate, and can only be enforced by bill—

Hatton v. Haywood, ante 372; s. c. Law Rep. 9 Chanc. 229; s. c. 22 W.R. 356.

There are two other points raised. First, it was said on behalf of the petitioner that we are estopped by the Sheriff's return, but the return is made on an *ex parte* enquiry, and we cannot be bound by it.

We say, moreover, that the Court had no jurisdiction to order payment of the costs by the *elegit* and the Sheriff's poundage. It cannot, in any case, do more than give effect to the levy, which does not mention these items. Supposing the levy good, we have discharged it by the payment we have made of the amount it names.

Mr. Everitt, for the respondent on the appeal (the petitioner).—He referred to the judgment in

quires to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper"

Section 11 enacts—"That it shall be lawful for the Sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including land and hereditaments of copyhold or customary tenure as the person against whom execution is so sued, or any person in trust for him, shall have been seized or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, having any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the Sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out."

In re Howarth, 42 Law J. Rep. (N.S.) Chanc. 316; s. c. Law Rep. 8 Chanc. 415.

LORD JUSTICE JAMES.—We do not require any reply, Mr. Willis, except as to the costs of the application.

Mr. Willis.—They should have waited till the debtor came of age. Till then he had no means of raising the money.

LORD JUSTICE JAMES.—I think that is enough.

In this case I am of opinion that the order of the Vice-Chancellor cannot be sustained. In principle the case is decided by *Hatton v. Haywood* (*ubi supra*); but independently of that, by the words of the old Act (1 & 2 Vict. c. 110) the Sheriff is to seize the lands of which the debtor is "seised or possessed." In this case the debtor was not at the time of the seizure seised or possessed, because he was only entitled in remainder. And the Sheriff, or some person having the conduct of the proceedings, seems to have been well aware of the difficulty, for we have a return that the debtor was seised of a reversion yielding a 'present rent—which was seizable, the fact being, that instead of a reversion having an annual value, he was entitled to a remainder or a contingent interest. That was not the interest which was purported to be seized. The petitioner comes for the sale of a remainder, and not of a reversion of which he was seized for an immediate estate. Under a return of Black Acre, the creditors cannot sell White Acre. The return is of one thing and the petition for the sale of another. The petition is certainly wrong on that simple ground, there being a mistake, in fact, as to the creditor's interest.

The order, therefore, cannot stand, and for the reasons mentioned by Mr. Willis, I think the petition should be dismissed with costs in the Court below; but of course, without any costs of the appeal.

LORD JUSTICE MELLISH.—I am of the same opinion.

Solicitors—Mr. Woodward, for the petitioner;
Messrs. Le Riché & Son, for the appellant.

JESSEL, M.R. }
1874.
March 74. }

Re ELLIS'S TRUSTS.

Anticipation, Restraint on—Absolute Bequest of Sum of Consols—Married Woman.

A restraint on anticipation may apply as well to a personal fund producing income, to which fund a married woman is absolutely entitled, as to real estate producing rent, and will in either case prevent alienation during coverture.

Testatrix by will gave 500*l.* consols to A. B., a married woman, absolutely. By codicil she declared that all gifts, whether absolute or limited, made by her will to any female, should be for her separate use without power of anticipation. The fund was paid into Court:—Held, on petition for payment out by A. B., that the restraint on anticipation applied to the consols, and that A. B. was only entitled to receive the income during coverture.

By will, dated in 1860, E. Ellis gave to A. M. Allen, a married woman, the sum of 500*l.* 3*l.* per cent. Consolidated Bank Annuities absolutely.

The testatrix likewise gave various other legacies to females, some of stock and some of cash. Of these gifts some were absolute in possession, others for life in possession, and others were in remainder after previous interest, some of those in remainder being for life only, and the others being absolute.

By a subsequent codicil the testatrix declared that all gifts and provisions thereby or by her will made to any female should be for her separate use and (whilst she should be under coverture) without any power of anticipation. The said legacy of 500*l.* consols had been transferred into Court under the Trustee Relief Act.

A petition was presented by A. M. Allen, for transfer out of the fund.

Mr. North, for the petitioner.—First. Having regard to the nature of the gift and the other gifts in the will, I contend that the restraint on anticipation was not intended by the testatrix to apply at all to an absolute gift of consols in possession which is an interest incapable of being anticipated, but only to such gifts as

were capable of being dealt with by anticipation, if anticipation had not been forbidden by the codicil.

Second. If intended by the testatrix to apply to these consols, Mrs. Allen is now absolutely entitled to the fund in possession—to receive that fund is not to alienate her interest, and even if it were, it is not to alienate it by anticipation, and this is all that the clause restrains. The distinction is taken in

Re Sykes' Trusts, 2 Jo. & H. 415; in that case "a married woman became by the will of a testatrix, who died in 1851, entitled to property for her separate use with a restraint on anticipation, subject to the life interest of her father who died in 1830." Vice-Chancellor Wood considered that the restraint on anticipation applied while the interest of the married woman was reversionary, but that when it became an interest in possession she was, though still under coverture, entitled to receive the fund, and it was paid out of Court to her twice on this view, having been paid into Court first by the trustee of the will, and subsequently by other trustees on account of a claim in respect of an alleged settlement by Mrs. Sykes.

[THE MASTER OF THE ROLLS referred to—

Baggett v. Meux, 1 Coll. 138; s. c. 1 Ph. 627; 15 Law J. Rep. (N.S.) Chanc. 262.]

That was a case of real estate.

In re Sarel, 10 Jur. N.S. 876;

Re Gaskell's Trusts, 11 Jur. N.S. 780,

the married woman was restrained from alienation in any way. Here she is only restrained from alienation by anticipation. All the cases are reconcilable if this distinction is kept in mind.

[THE MASTER OF THE ROLLS.—The words in

Re Gaskell's Trusts (*ubi supra*) are in effect the same as those in

Re Sykes' Trusts (*ubi supra*), which was cited, and as

Re Gaskell's Trusts (*ubi supra*) is the later decision of the same Judge, I shall follow it in preference to

Re Sykes' Trusts (*ubi supra*).

He also referred to—

Spring v. Pride, 10 Jur. N.S. 646 ;
and

Armitage v. Coates, 35 Beav. 1.]

Mr. Henderson, for the trustee, who had paid the fund into Court.

THE MASTER OF THE ROLLS.—I cannot accede to the ingenious arguments of Mr. North, but it is very surprising to find that there is no distinct authority on the question that I have to decide.

The testatrix, by her will, gives to Augusta Maria Allen (who is a married woman) a sum of bank annuities. The subject matter of the gift is, therefore, not a sum of money, and I do not now decide anything as to such a gift. What the testatrix has done is to give a perpetual annuity to a married woman absolutely. It is not, strictly speaking, a gift of a capital sum, but of a perpetual annuity, subject to redemption by the State.

Having done that, the testatrix, by her codicil, directs that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female shall be for her separate use and (whilst she shall be under coverture) without any power of anticipation.

The first question is whether these terms apply to this gift of bank annuities? I cannot accede to the argument that they do not. The language of the codicil appears to me to be plain and distinct. The direction extends to all gifts, whether absolute or limited ; and it appears to me to apply, and to have been intended by the testatrix to apply to this gift.

The next question is, assuming that the direction does apply, what is its effect on the gift? It is said that a gift to a married woman of bank annuities, followed by a restraint on anticipation, enables her to take the whole fund at once. It seems to me that a restraint on anticipation as applied to an annuity, prevents the annuitant from getting the annuity all at once ; if she took it all at once, it would be as plain an anticipation as one could have. That is rather a narrow ground to take. Still I think that, considering the nature of the gift and the language of the will, there is suffi-

cient to enable me to decide this question on this ground alone.

But I also think that, after the two decisions in *Baggett v. Meus* (*ubi supra*), it must be considered as settled that where there is an absolute gift to a married woman of a fund producing income, followed by a restraint on anticipation, the restraint on anticipation prevents her from alienating the fund during coverture, and I prefer to decide the case on that broader ground.

It is admitted that the position of a married woman as to property which she is restrained from alienating is anomalous. It is apparently assumed by Vice-Chancellor Knight Bruce in *Baggett v. Meus* (*ubi supra*) that a married woman may be restrained during coverture from alienating a fund producing income. He says this—" It being clear, and admitted on all hands, that with respect to a life interest given to a married woman for her separate use she may be effectually restrained from doing, during her coverture, any act of alienation, total or partial (without any clause of forfeiture, and without any limitation over taking effect upon such an act), it being clear, as I apprehend, that a clause prohibiting alienation or anticipation by a married woman of her separate estate (when there is no such provision of forfeiture or limitation over), however the prohibition may be expressed, whether in terms confining it to a period of coverture, or in terms general and undefined, or in terms distinctly expressing a period beyond as well as during coverture, has by law validity allowed to it as to a life interest at least, but that this validity is by the same law (whatever the expressions) not permitted to extend to a period beyond coverture (that is, the law of its own force preventing the restriction from operation or effect as to any act done when coverture does not exist). I am at a loss to discover any sufficient reason why that which holds good as to a life interest should not equally hold good as to an absolute estate. Why should there be any difference? "

It is true that the actual decision in that case applied to real estate, but the passage I have read appears to me a

clear expression of opinion by Vice-Chancellor Knight Bruce that, so far as restraint on anticipation is concerned, there is no distinction between capital and income.

Then on appeal, the Lord Chancellor says—"After the case of *Tullett v. Armstrong* (1) there can be no doubt about the doctrine of the Court respecting the property given to the separate use of a married woman, and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband, but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The meaning evidently applies to a fee as much as to a life estate, to real property as much as to personal." That shews that the Lord Chancellor thought that there was no distinction between real and personal estate, between corpus and income.

Though I find no direct decision on the point, I think there is sufficient authority to enable me to say that there is no distinction between personal estate producing income and real estate producing rent. I repeat that I decide nothing as to the effect of a clause restraining anticipation where no income is produced. Here I think the petitioner can only have the income paid to her during coverture.

Solicitors—Messrs. Norris, Allen & Carter, for the petitioner; Messrs. Tanqueray-Willame & Hanbury, for the respondent.

BACON, V.C. }
1874.
Feb. 19.

MILLER v. HALES.

Practice—Plaintiff out of the Jurisdiction—Security for Costs—Officer in the Army.

The bond of an officer in Her Majesty's service, whose regiment is stationed out of the jurisdiction of the Court, is a sufficient

security for the costs of a plaintiff in a Chancery suit, resident out of the jurisdiction.

The plaintiff in this suit was resident in Italy, and the defendant made the usual application that security might be given for costs. A bond was then entered into on behalf of the plaintiff, and deposited with the Clerk of Records and Writs, and the obligor was described in the bond as "Horatio Gordon Robley, a captain in Her Majesty's 91st regiment (Highlands)," but without any further address.

The defendant's solicitors applied for the address of the surety and a reference to his bankers, but were only informed in reply that the plaintiff's regiment was stationed at Stirling in Scotland. A summons was then taken out by the defendant asking that the plaintiff might be ordered to procure some sufficient person to give security; this summons was adjourned into Court by the chief clerk.

It appeared by affidavit that Captain Robley when he signed the bond was staying in Italy on a visit to the plaintiff.

Mr. E. Macnaghten, for the summons, contended that Captain Robley's security was insufficient, on the ground that his bond was worthless, because if he remained abroad it could not be enforced.

Mr. Kay and *Mr. Tremlett*, for the plaintiff, were not called upon.

BACON, V.C., said—I could not make the order asked for by the summons without deciding that no officer in Her Majesty's service was competent to give security for costs. If any other reason were alleged why this gentleman would not be likely to prove a sufficient security I would attend to it, but as this is not so, the summons must be dismissed with costs.

Solicitors—Messrs. Bevan & Witting, for plaintiff; Messrs. Parker, Watney & Clarke, for defendant.

(1) 1 Beav. 1; s. c. 4 Myl. & Cr. 377; s. c. 5 Law J. Rep. (N.S.) Chanc. 303; 8 *ibid.* 19; 9 *ibid.* 41.

JESSEL, M.R. } *Re* THE POOLE FIRE BRICK
1873. } AND BLUE CLAY COM-
Dec. 18. } PANY.

*Liquidation—Voluntary Winding-up—
Creditor—Claim—Action—Staying Execu-
tion—Costs—Companies Act, 1862, sec-
tion 138.*

A creditor made a claim in a voluntary winding-up, but the liquidator refused to take out a summons to consider it. The creditor then brought an action, and, the company not appearing, he recovered judgment for the full amount. On motion by the company,—Held, that the Court would restrain execution on the terms of the creditor being allowed to prove for his judgment, costs at law, and costs of the motion.

This company being in liquidation, Messrs. Ingram & Co. sent in a claim for 193l. 15s., for work and labour done and materials supplied. The liquidator disputed the amount of the claim, and refused to take out a summons to consider it. It was admitted that such a summons could only be taken out by the liquidator. Messrs. Ingram & Co. thereupon commenced an action on November 11th, 1873, and on December 8th, the action being in the cause list for the sittings commencing on December 10th, the liquidators gave notice of motion, under section 138 of the Companies Act, 1862, to restrain the action and consider the claim in chambers. The motion was made on December 11th, but the respondents urged that the claim could best be tried in the action, and the motion was ordered to stand over to await the result of it.

The company did not appear at the trial of the action, though they had pleaded never indebted, and Messrs. Ingram recovered judgment for the full amount of their claim with costs.

Mr. Hadley now renewed the motion, and asked for a stay of execution on the terms of the creditor being admitted to prove in the liquidation for his judgment and costs, and costs of the motion. He cited—

In re The Keynsham Company, 33 Beav. 123;

In re The Life Association of England, 34 Law J. Rep. (N.S.) Chanc. 64;

In re The Peninsular, &c., Banking Company, 35 Beav. 280.

Mr. Jason Smith, for the creditors, contended that the costs had been caused by the improper conduct of the liquidators, and that the creditors ought to be allowed to recover them from the company, and leave the company to settle with the liquidators. He cited—

Ex parte Levick, Law Rep. 5 Eq. 69.

THE MASTER OF THE ROLLS.—This case has been extremely well argued, and if it were of the first impression, I should have heard Mr. Hadley in reply and taken time to consider what rule ought to be adopted. But I am saved that course by three decisions of Lord Romilly's, which are all in point in principle, and one clearly so even in the facts. Besides which I am informed by Mr. Fry, as *amicus curiae*, that the present Lord Chancellor has expressed an opinion in conformity with these decisions. Against that there is a decision of Vice-Chancellor Stuart on an action, brought under different circumstances, which I cannot consider to be contrary to those three cases.

The first in order of date is by Lord Romilly, on the 16th of July, 1863, namely—*In re The Keynsham Company* (*ubi supra*). There a creditor of the company had apparently begun an action before the winding-up, and the liquidator came to the Court to stay the action. The Master of the Rolls at first thought that a special case must be made, but eventually he granted the injunction, saying the practice was analogous to the staying of actions after a decree for administration, and that the creditor should have his costs down to the time of his receiving notice of the winding-up—in the present case that would exclude all the costs—such costs to be added to the debt. So that even when the creditor had no notice of the winding-up his costs were added to his debt.

The next case was that of *The Life Association of England* (*ubi supra*), decided on the 25th of July, 1864, by the same Judge. There the creditor had brought the action before the winding-up, and the Master of the Rolls decided that on the application of the liquidator he.

ought to stay the action, without reference to any special circumstances, saying, "There is clearly an analogy between this and a suit for administration. If the executor does not admit assets, the costs of the creditor can only be added to his debt; but if assets are admitted and the debt not disputed, the creditor's costs would at once be paid. In this case I can only grant the application on condition, first, that Mr. Whitty, the creditor, be allowed to see the proceedings on the winding-up, and, secondly, to prove for his debt." And he granted the injunction on the terms that Mr. Whitty was to be allowed to prove for his debt, including costs. He also says, "If the action had been brought after the winding-up, I should have disallowed costs." That is an authority against giving this creditor any costs at all. But the attention of the Judge was not called to the distinction between a compulsory and a voluntary winding-up, in the latter of which a creditor cannot initiate proceedings in any manner except by bringing an action. I therefore do not attend to that last observation.

Then came the third case of *The Peninsular, &c., Banking Company (ubi supra)*, in January, 1866. That was very like this case. There the action was commenced after the winding-up on twelve bills of exchange. The liquidator let the creditor commence the action, and the day before trial he moved to restrain it. There was no defence and no remedy, and the Master of the Rolls restrained execution, and let the creditor go in under the winding-up, adding his costs to his debt. I suppose his attention was called to the distinction between a voluntary winding-up and a compulsory one; and it was not, I imagine, disputed that the creditor had notice of the winding-up.

With these three decisions one way, I have only to deal with one decision of Vice-Chancellor Stuart produced in opposition to them, namely, *Ex parte Levick (ubi supra)*. That was an action by a liquidator to recover some moneys against Levick and five other persons, which action failed. I presume that the action was in the name of the company. There was an attempt made by the liquidator to

arrest the judgment, so as to compel the defendants in the action to go in and prove for their costs. They were not creditors of the company in any other sense. And the Vice-Chancellor said that the creditors referred to as ranking *pari passu* in the Act of Parliament must mean creditors of the company at the time of the order for winding-up. The case, therefore, is completely distinct from the other three cases. If the respondents in that case had been creditors at the time of the winding-up, I presume the Judge would have followed the other cases. That case, therefore, does not affect those others.

That being so I should feel bound to adhere to the established practice; but I must say I don't see how any other practice could be established, when there is a *bona fide* dispute, and the company allow an action to be brought in a proper case before a jury and a common law Judge. This was a claim for labour, work and materials. They might well consider that the Chief Clerk's office was not the best place to try such a claim. The Act has not made it imperative on the liquidator to apply to try every claim, and the creditor has no other remedy except to bring an action. And the same Act has said that the creditors, at the time of the winding-up, must be paid *pari passu*. Then it has been argued that though I must arrest execution for the debt, I must allow it for the costs. But the costs are a mere appendage to the debt, being the cost of ascertaining it. The rule in Chancery is that, however large costs may be, they must be added to the debt. I therefore cannot see how any other rule could be established in a winding-up. I think the creditor ought to have been allowed by the legislature to take out a summons himself; but that not being so, I must follow the established practice, and this creditor must be allowed to prove for the debt, interest and costs, to which he is entitled under the judgment, and for his costs of this motion.

Solicitors—Messrs. Randall & Angier, for the company; Mr. W. A. Plunket, for the creditors.

JESSEL, M.R. }
 1874. } BARCLAY v. MESSENGER.
 March 25. }

Specific Performance—Time of Essence of Contract—Extension of Time—Waiver.

If it be of the essence of the contract that an act should be completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time.

M. and W., entitled to a lease under a building agreement, defeasible by notice in case they did not complete buildings by the 1st of January, 1874, in July, 1873, entered into an agreement to sell their interest to the plaintiffs for 2,000*l.*, 200*l.* of which was paid on signing the agreement, 800*l.* and 1,000*l.* to be paid at the times specified in the 5th clause, which was as follows: "If the purchaser shall fail to pay either the 800*l.* on the 14th of July, 1873, or the 1,000*l.* on the 31st of July, 1873, or as to the 1,000*l.* upon such deferred date as the parties might agree upon, all money paid previous to such default being made shall be absolutely forfeited and this contract become null and void."

The 800*l.* was duly paid. The time for payment of the 1,000*l.* was extended to the 26th of August, 1873. The purchaser made default in payment at that date. The vendors gave notice to determine the agreement, and a suit for specific performance was instituted by the purchasers:—

Held, that by the 5th clause time was made of the essence of the contract. That the extension of the time to the 26th of August did not operate as an absolute waiver of that condition, but merely substituted the 26th of August for the original date. *Opinion of LORD ROMILLY in Parker v. Thorold*, 16 Beav. 76, that after an extension of time, time cannot be taken to be of the essence of the contract disapproved of. Bill dismissed with costs, without prejudice to any action at law to recover the 1,000*l.*

By an agreement dated the 1st of January, 1873, and made between the Clothworkers' Company of the one part and J. Messenger and J. Wilcox of the other part, the Clothworkers' Company agreed to lease certain property in the city to

Messrs. Messenger and Wilcox for the term of 80 years from the 25th of December, 1872, on the completion of the buildings stipulated. The lessees covenanted to complete, within one year from the 25th of December, 1872, or from the day on which possession should be delivered, certain specified buildings to the satisfaction of the surveyor of the company, and according to plans to be approved by him; and it was provided that in case the buildings should not be completed by the time specified the lessors might determine the agreement. The lessors gave up possession to the lessees on the 1st of January, 1873.

By an agreement dated the 15th of July, 1873, but signed before that date, the lessees agreed to sell their interest to Messrs. J. Barclay and H. J. Vallance. Such agreement was as follows—

1. The vendors shall sell and the purchasers shall purchase the vendors' interest in the premises comprised in the said agreement of the 1st of January, 1873, such agreement and premises being free from all incumbrances except the rent to be reserved by the lease in the said agreement mentioned, and the covenants and conditions to be therein contained, and on the lessees' part to be observed and performed at the price of 2,000*l.*, to be paid as follows, that is to say, the sum of 200*l.* part thereof immediately upon the signing of the said agreement, and the sum of 800*l.* further part thereof on the 14th day of July, 1873, and 1,000*l.*, the residue thereof on the 31st day of July, 1873, or as to the said 1,000*l.*, at such deferred date as the parties may agree upon, at the office of Messrs. Harcourt and MacArthur (the vendors' solicitors), and the purchasers shall then have possession of the said premises.

2. The vendors having already delivered to the purchasers a copy of the said agreement, and the purchasers being fully aware of the contents thereof, they shall not call for the production of the lessees title, or investigate or make any objection in respect of the same, or require any evidence of the covenants and conditions contained in the lease, having been duly performed up to the completion of the purchase.

3. No assignment of the said agreement of the 1st of January, 1873, shall be asked for or required, but the purchasers are to take upon themselves every liability of every description, present or future, which the vendors are or may hereafter be under, whether in relation to the buildings, any question of ancient lights, or otherwise.

4. The vendors undertake, after the completion of the buildings to be erected, and after the performance of every agreement and condition contained in the said agreement, so as to entitle the vendors to obtain the same, to obtain the grant of a lease of the said premises to the purchasers, for the term, at the rent, and generally upon the terms of the said agreement.

5. If the purchasers shall fail to pay either the 800*l.* on the said 14th day of July, 1873, or the 1,000*l.* on the 31st day of July, 1873 (or as to the 1,000*l.* upon such deferred date as the parties may agree upon), all money paid previous to such default being made shall be absolutely forfeited and this contract shall become null and void, except that in case of any loss arising to the vendors upon the non-performance of this contract on the part of the purchasers, the purchasers shall pay to the vendors the amount of such loss, whether arising from a re-sale of the property or otherwise.

The 200*l.* and 800*l.* mentioned in the agreement were duly paid.

The 1,000*l.* was not paid on the 31st of July, 1873, nor was any deferred time fixed.

The plaintiffs in August were let into possession.

On the 16th of August, 1873, J. Messenger, on behalf of the vendors, sent to H. J. Vallance the following letter—

“Telegraph Street.

“My dear Sir,—I simply send this to remind you that you have promised to commence operations on the ground on Monday next. I am sure you will not neglect this, and you must take this as a formal notice that unless the works are commenced as promised the 1,000*l.* must be paid within one week from Tuesday next.

“Yours faithfully,

“J. Messenger.

“H. J. Vallance, Esq.”

The purchasers did not commence the buildings or pay the 1,000*l.* at the time specified in the letter of the 16th of August. Nothing was done on either side until the 2nd of October, 1873, when the vendors gave notice to the purchasers that they considered the agreement at an end, that they should re-sell the property, and hold the purchasers liable for any loss incurred. The purchasers replied, insisting on the vendors performing the agreement. On the 16th of October the Clothworkers' Company wrote to Messrs. Messenger and Wilcox, requiring them to proceed with the buildings.

On the 20th of October, 1873, the vendors re-sold the property to a Mr. E. Browning and another, who, on the 26th of December, entered into possession and commenced the buildings.

On the 8th of January, 1874, Messrs. Barclay and Vallance filed a bill against Messrs. Messenger, Wilcox and E. Browning, praying for specific performance of the agreement of the 15th of July, 1873, and for an injunction to restrain the defendants from interfering with the plaintiffs' completion of the buildings. The material facts and the effect of the correspondence which was voluminous, and the nature of the arguments for the plaintiffs sufficiently appear from the judgment.

Mr. Southgate, Mr. W. H. G. Bagshawe, and Mr. F. Bagshawe, for the plaintiffs, cited—

Macbryde v. Weeks, 22 Beav. 533;

In re Dagenham Docks Company, 43

Law J. Rep. (n.s.) Chanc. 261;

s. c. Law Rep. 8 Chanc. 1022;

[THE MASTER OF THE ROLLS referred to

Rede v. Oakes, 2 De Gex, J. & S.

518; 32 Beav. 555; s. c. 34 Law

J. Rep. (n.s.) Chanc. 145;

Parkin v. Thorold, 16 Beav. 59; s. c.

22 Law J. Rep. (n.s.) Chanc.

170.]

Hudson v. Bartram, 3 Madd. 440;

Taylor v. Brown, 2 Beav. 180; s. c. 9

Law J. Rep. (n.s.) Chanc. 14;

Vernon v. Stephens, 2 P. Wms. 66;

Moss v. Matthews, 3 Ves. 279;

Spurrier v. Hancock, 4 Ves. 667;

Harrington v. Wheeler, 4 Ves. 686

Coslake v. Till, 1 Russ. 376;

Davis v. Thomas, 1 Russ. & My. 506;
s. c. 9 Law J. Rep. (o.s.) Chanc.
232;

Eads v. Williams, 4 De Gex, M. &
G. 674; s. c. 24 Law J. Rep. (N.S.)
Chanc. 531;

Price v. Dyer, 17 Ves. 356.

Mr. Roxburgh and *Mr. Stiffe Everitt*, for
Messenger and Wilcox, and *Mr. Fry* and
Mr. B. B. Rogers, for E. Browning, were
not called on.

THE MASTER OF THE ROLLS.—This is a bill filed by two gentlemen of the names of Barclay and Vallance against the defendants Messenger and Wilcox, and two purchasers under them—one only is named in the bill, but there were two—of what is commonly called a building agreement, or an agreement for a building lease. It is necessary to consider what the subject of the purchase was, because I think the decision that I have come to on the question depends to some extent upon the nature of the thing bargained for. Now it was an agreement dated the 1st of January, 1873, by which Messenger and Wilcox became liable to build in Telegraph Street a house of the value of 8,000*l.*, within a year from January, 1873. There was a covenant to that effect in the agreement. They did not become entitled to the lease until the house was built, and there was a power reserved to the Clothworkers' Company, who were the ground landlords, in case of default for two calendar months to re-enter. So that at the time when the arrangement, which is the foundation of this suit, was made, which was the 15th of July, 1873, the interest of Messenger and Wilcox was to some extent precarious. They had not begun building; they had done nothing whatever except pull down some old houses which were on the ground; they were in the possession of a vacant piece of ground; they had something like seven months—that is to say, they had literally five months and two months for the default—to build a house worth 8,000*l.* on the ground; and there was a personal liability on them to be sued on their covenant to build. It might therefore prove a very onerous contract. I do not know what Mr. Messen-

ger is. I do not think I have been told; but Mr. Wilcox is a tailor. Mr. Messenger does not appear to have been a builder. What is he, Mr. Roxburgh?

[*Mr. Messenger*.—I was an architect, but I have retired from practice.]

THE MASTER OF THE ROLLS.—Neither Messenger nor Wilcox were themselves minded to build, and they were anxious to get rid of this, which I have no doubt they considered a beneficial arrangement or bargain with the Clothworkers' Company. Now they met a gentleman of the name of Vallance, who seems to be a solicitor out of business, and who had a friend, a Captain Barclay, who is a paymaster in the Rifle Brigade, and a man of some means. Mr. Henry Fletcher Vallance, who is one of the plaintiffs, was not a man of any pecuniary means at all; he has told us so most frankly. He relied entirely on being able to raise the money which might be wanted to perform any agreement he might enter into. By an agreement dated the 15th July, 1873, Messrs. Messenger and Wilcox, who were then entitled to the benefit of this building agreement with the Clothworkers' Company, agreed to sell it for 2,000*l.* to the plaintiffs, Messrs. Barclay and Vallance. It is no part of my duty on this occasion to ascertain how far Captain Barclay understood what he was about, or whether he had any notion of the amount of liability he was taking upon himself in entering upon this agreement. That is a matter between him and Mr. Vallance, with which I at present have nothing to do. But it is to be observed that both Mr. Vallance and Captain Barclay say most positively, on cross-examination, that it was neither intended, agreed, nor expected, that Captain Barclay was to furnish more than a sum of 1,000*l.* That being so, the agreement is for 2,000*l.* to be paid, nominally, 200*l.* at a prior date and 800*l.* on the 14th of July. Of course if the day had arrived before the signature of the agreement 1,000*l.* had become due, and in substance 1,000*l.* was then paid; and it was provided that a further 1,000*l.* should be paid on the 31st of July, 1873, or at such deferred date as the parties might agree upon, at the offices of Messrs. Harcourt

and Mac Arthur, the vendors' solicitors, and the purchasers should then have possession of the premises, that is, on payment of the second 1,000*l*. The second clause was that the purchasers should accept the title of the vendors; and this is very important, because in ordinary cases, of course, the vendors have to make out their title, and many of the cases have turned on their neglect or delay in making out their title. In this case they had no title to make out. The third clause was that they were not to make any conveyance of it; there was no question about delay in the conveyance, they were to have no assignment at all; but the purchasers were to take upon themselves every liability of every description, present or future, which the vendors might be under. Then the fourth clause was this, that after the completion of the buildings the vendors undertook that the Clothworkers' Company would grant a lease to the purchasers. So that this is a case in which the vendors had nothing to do before completion of the purchase, neither to make out a title nor to execute a conveyance. The fifth clause, passing over the previous sum which was paid, was this: If the 1,000*l*. should not be paid on the 31st of July, 1873 (or upon such deferred date as the parties might agree upon), "all money paid previous to such default being made should be absolutely forfeited and the now stating contract should be null and void, except that in case of any loss arising to the vendors from the non-performance of the said contract on the part of the purchasers, the purchasers should pay to the vendors the amount of such loss, whether arising from a re-sale of the property or otherwise." Now that differs from the ordinary clause (generally the last condition in the conditions of sale) only in this, that the forfeiture arises on a single and defined event. As I said before, the agreement between the purchasers, as between themselves, was that Captain Barclay should find the 1,000*l*. He was then to have a third of the profit which might arise from the transaction, and to have his 1,000*l*. handed back to him, but he was not to advance any more money.

That being the arrangement between

the purchasers the question arises, how was the money to be found? Mr. Vallance had no money; Captain Barclay was not to advance any more; there was therefore 1,000*l*. to be found from somewhere, to say nothing of the 8,000*l*. required for the building. Mr. Vallance, in the most candid manner, tells us that not having any money and not expecting to obtain any from Captain Barclay, he had made an arrangement, or rather proposed an arrangement, with a gentleman whose name is Houghton on behalf of some land company to lend him the money. This proposal never ripened into agreement, and the proposal was certainly finally and conclusively put an end to on the 20th of October, 1873. I mention that now not to interrupt the narrative in other respects. He also told us that the vendors, Messenger and Wilcox, were perfectly well aware that he, Mr. Vallance, had no money; he never pretended to have any, and he said everybody knew it. They were also aware that he could only get the money by borrowing it somewhere.

Now that being the position of matters the next step was (though when it was taken I cannot tell) to put the plaintiffs into possession of the property. The plaintiffs have not told me when it took place, but I cannot help guessing (though I have no evidence before me) that it took place some time in July. I only say this, because I cannot help seeing that it was not by any means on the 31st of July but at a subsequent date. It is alleged in the bill that possession was given on the 18th of September. That is admitted to be wrong, and it is conclusively proved by the evidence that the plaintiffs were in possession before the 15th of August, although how long before does not appear. On the 16th of August Mr. Messenger writes a letter to this effect to Mr. Vallance—"I simply send this to remind you that you have promised to commence operations on the ground on Monday next. I am sure you will not neglect this, and you must take this as a formal notice that unless the works are commenced as promised the 1,000*l*. must be paid within one week from Tuesday next," which would be the 26th of August. The plain-

tiffs allege in the bill that they were not in a position to promise, and certainly were not in a position to perform the first alternative of that letter. As regards one of the plaintiffs he was not in a position to perform the other alternative; but as regards Captain Barclay, it appears that he could have paid the 1,000*l.* but he was not applied to to pay it, and had no intention to pay it. He never was applied to or had any intention of paying it until the filing of the bill or a day or two before. That letter having been received, a very extraordinary correspondence takes place. The answer to that letter was a letter, or rather two letters, from Mr. Vallance, one directed to Mr. Messenger, the writer of the letter, and the other to Mr. Wilcox, the other vendor; the one to Mr. Wilcox, under date the 16th of August, the other of the 18th of August. The first is to Mr. Wilcox, and Mr. Vallance asks him—"Are you a party to the letter copied on the other side? If so I am very much surprised, and take leave to inform you that I do not, and will not, recognise any right of yours to give a peremptory notice for payment of the 1,000*l.* alluded to. The works would have been commenced long ago if everything had turned out exactly as you and Mr. Messenger represented to me." Then he writes on the 18th to Mr. Messenger—"I am in receipt of your peculiar note of the 16th instant, and in reply beg to inform you that I decline to accept any notice from you to the effect therein contained, namely, that the 1,000*l.* should be paid within a week from to-morrow. I shall abide by my contract with you and Mr. Wilcox, and shall know how to protect the interests of Mr. J. Barclay and myself should you endeavour to depart from that contract. A great part of the delay in commencing work has been occasioned by yourself, and I must say I should have hesitated before giving you such favourable terms had I known that many of the representations made to me on your part would not be borne out by the facts. Perhaps it would be better for the future if you and Mr. Wilcox would communicate with me on this business through your solicitor."

Mr. Wilcox wrote an answer to that

letter on the 21st of August, which is in these terms, addressed to Mr. Vallance—"You will really very much oblige me by informing me when you intend to begin or expect to begin the execution of the building in Telegraph Street. It is, I assure you, of the greatest importance to you and us that not a moment's delay should take place in the commencement of the works." [This was in August, and the works ought to have been completed by the end of December.] "I trust you will not consider any communication of this kind either inquisitive or presuming upon your rights, but do let me have a satisfactory answer." Therefore that letter admitted that he was a party to the notice, and it also requested Mr. Vallance in a very civil way to let him know whether he was going to commence or not. It does not appear that any answer was given to that letter by Mr. Vallance; but the next step which is taken is one which he himself recommended. The vendors then do apply to their solicitors, and the solicitors taking a view of the contract that it was at an end by reason of the default in the payment of the 1,000*l.* on the 2nd of October, 1873, they wrote to the plaintiffs a formal notice on behalf of the defendants Messenger and Wilcox—"We hereby give you notice that you having made default in payment of the 1,000*l.*, being the balance of the purchase money payable to us under and by virtue of an agreement, dated the 15th day of July, 1873, such agreement has become null and void, and that we no longer consider ourselves bound thereby, and that we shall proceed to deal with the said property as if the said agreement had never been entered into. And we hereby give you further notice that we shall hold you liable for any loss or damage we may sustain or incur by reason of your failure to carry out the agreement."

The answer to that of the same 2nd of October is a counter-notice; and the counter-notice is to the effect that they are not to deal, or attempt to deal, with the property as owners, and that they are required to abide by and perform the agreement in every respect, and that they will be held liable for loss; so that it is a dis-

tinct refusal, so far as can be implied, to pay the 1,000*l.* Then nothing more is done until the 17th of October, when the Clothworkers' Company by their clerk send a notice to Messrs. Messenger and Wilcox, reminding them of their obligation to complete the building by the end of December; reminding them of some previous notice to a similar effect, which does not appear in evidence; stating also that seven weeks of the time are now only available; and intimating and putting in plain terms, that unless some very considerable progress is made with the building before the end of the year, the company will not consider that they are disentitled from enforcing the strict terms of the agreement. Naturally under pressure of that threat, Messrs. Messenger and Wilcox were very anxious to dispose of their interest; they say so, and I have no reason for doubting it. They look out for some other purchaser who will build, because they were under a covenant to build, and they find the other defendants, who agree to buy the same agreement of them for 1,200*l.*, and on the 20th of October an agreement for sale very similar in terms to the agreement made with the plaintiffs is executed by Messrs. Messenger and Wilcox to Mr. Browning and the other gentleman as the purchasers. That is an apparent profit of 200*l.*, because if they are entitled to keep the 1,000*l.* as to which I give no opinion—I am not asked to give any opinion, and I do not intend to prejudice anything that may be decided at law either one way or the other, but even supposing they were entitled to keep the 1,000*l.* professed to be paid to them—there would be an apparent profit of 1,200*l.* They would get 200*l.* profit from the purchasers and apparently keep 1,000*l.*, which they had admitted they have been paid; but in fact the 1,000*l.* was not paid to them. There was an agreement that 5*l.* per cent. should be paid to Mr. Vallance, and the 5*l.* per cent. on the first 1,000*l.* had been really paid; so that if the agreement had been carried out they would not have got 2,000*l.*, but would have got only 1,900*l.* If the agreement is now carried out in the same way they will get something like 100*l.* over, but then there is no doubt that they

will be liable to some expense or other, the amount of which I cannot ascertain, but if I were to hazard a conjecture I should say there would be no profit as far as they are concerned, even if they are entitled to retain the deposit. Therefore it appears to me that it is plain they were *bona fide* frightened by the notice from the Clothworkers' Company.

That being the position of matters on the 20th of October, the same day Messrs. Argles & Rawlins, solicitors to Messrs. Messenger and Wilcox give a formal notice to Messrs. Carter & Sons, who were the builders about to be employed by the plaintiffs, to remove their tools. They did remove some of them; they were a rather long time about it; and on or about the 26th of December some builders in the employment of the new purchasers, forced the lock and took possession, and the new purchasers have been in possession ever since, and appear, although after the filing of the bill, to have commenced building operations. That was resisted by the plaintiffs, who gave formal notice on the 31st of December, and filed the present bill on the 8th of January, 1874, then, and not until then, offering to pay the second 1,000*l.* There is only one other fact I need mention, which I think is immaterial, and that is that the plaintiff Vallance certainly knew within a few days after the 20th of October, although again I cannot say the exact day, that the property had been resold to the present purchasers, but he took no step in consequence of the information.

Now the first question I have to decide is what the legal rights of the parties are on the contract; and there is a second question, having regard to the nature and subject-matter of the contract, the known impecuniosity of the purchasers—for Captain Barclay himself could not have found 8,000*l.* to complete the contract—and their utter refusal to pay the money, whether either on the ground of time being of the essence of the contract, and there being no sufficient waiver by the defendants, or whether on the ground of circumstances and conduct, the plaintiffs are now precluded from obtaining the assistance of a Court of Equity for specific performance of this contract. It must

not be forgotten that we are in the month of March, 1874, and that there is nothing like an assurance that the Clothworkers' Company would give further time to the plaintiffs or either of them.

Now the first point to be considered is, was time originally of the essence of this contract? I am clearly of opinion that it was. I do not know how it could have been more strongly expressed than this: An agreement to pay on a given day or at a deferred date if agreed upon (there was no deferred date agreed upon), and if not the contract to be void. It seems to me, there being nothing whatever to be done under the contract by the defendants, every obligation being on the plaintiffs, that it is impossible to put any other interpretation on this contract than that both parties intended that the date of payment of the 1,000*l.* was to be of the essence of the contract. As I said before I should have had no doubt whatever on the agreement itself; but in one of the cases referred to, the case of *Hudson v. Bartram* (*ubi supra*), on a precisely similar contract in this respect, it being recited for the purpose of shewing that the stipulation was waived, it was considered, in the opinion of Sir John Leech, that time was of the essence of the contract under a contract in this particular form. That is an express decision on that point, although he did under the circumstances of that case hold that there had been a waiver of the stipulation.

Now, having arrived at the conclusion that time was originally of the essence of the contract, a proposition which I did not understand the counsel for the plaintiffs seriously to contest, the next question is, has it been waived? Now I cannot find any evidence of waiver. The first step giving possession was certainly not one demanded of the vendors until payment. Of course they might by giving possession before the day arrived (it does not appear when possession was given) if they pleased give such an advantage to the purchaser without thereby releasing him from the obligation of paying the money on the day mentioned. The letter of the 16th of August is relied upon as a waiver. I think it was but a qualified waiver; that is, a waiver if the

terms were complied with. Now the terms were either commencing the works, which the plaintiffs did not do, or paying the 1,000*l.* I think on this point a passage may well be cited from Lord St. Leonards' book on *Vendors and Purchasers*, 14th edit., p. 270, commenting on a well-known case, that of *Parkin v. Thorold* (*ubi supra*), in which Lord Cranworth, then Vice-Chancellor, and Lord Romilly, my predecessor as Master of the Rolls, differed as to whether time was or was not of the essence of the contract. The next question on which they also differed was whether the purchaser had waived it by extending the time to the 5th of November. Now upon that point there was no ultimate decision, for although Lord Romilly's decision was affirmed on appeal, it was affirmed on the first ground, that time was not of the essence. There was no actual decision as to the effect of the so-called waiver upon the original contract. But the Vice-Chancellor had expressed an opinion that the mere giving of time, where time was of the essence of the contract, would have no effect except by extending the time; and the Master of the Rolls thought that having once extended the time, you had destroyed the essentiality of the condition altogether. It was upon that that Lord St. Leonards makes this observation, he is speaking of Lord Romilly—"Assuming that time was not of the essence of the contract, he held that the notice for the 5th of November was far too short a period, and did not bind the seller to complete by that day, and that the seller had not acquiesced in the notice, nor been guilty of laches, and a specific performance was decreed with costs. This in substance appears to be the true view of the case, but the opinion of the Vice-Chancellor on the voluntary extension of the time seems to be right." Of the two competing opinions Lord St. Leonards prefers that of Lord Cranworth, "it can hardly be contended that, if time be of the essence of the contract, an extension of it by one party for the convenience of the other can be considered operative beyond the further day named."

Now, I must say of the two opinions, even if I had not the great authority of Lord St. Leonards, preferring that of

Lord Cranworth, I should have preferred it on the reasoning of the thing. If a man says a contract is to depend upon a payment of money by a certain day and the party entitled to receive the money says, "I will extend your time, I will give you a week or a month," why that should put the party in a better position than if it had been originally put in the contract I cannot conceive. It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time. If that is so, on the 26th of August the vendors were entitled to say that the contract was at an end. I cannot find that between the 26th of August and the 2nd of October anybody did anything. The plaintiffs remained in possession, but nothing was done; the defendants remained out of possession, but nothing was done by them. On the 2nd of October they gave formal notice to terminate, stating that the contract was at an end. The plaintiffs refused to accept the notice, but did not offer to pay the 1,000*l.*; on the contrary, as I understand the correspondence, they asserted that they had a right to refuse to pay, for that is the meaning of it. Then under the threat from the Clothworkers' Company, the first two defendants sell for a less price to the new purchasers, who finally take possession.

In my opinion, on the first ground, that is, that time was of the essence of the contract, there has been no effectual waiver beyond the 26th of August, and the plaintiffs cannot succeed in this case. But I am further of opinion that looking to the nature of the subject-matter, that on the 2nd of August about eight weeks only remained to complete the buildings according to the contract; that the plaintiffs had not put themselves into a position, and were not in a position, to complete them in any way; that as the plaintiff, Mr. Vallance, told us himself on the 20th of October he had not anything like even a reasonable expectation of finding the money to complete, he hoped he would find some friends to advance the money, but he had neither negotiations nor con-

tract, and he was utterly unable really to fulfil the contract; that the defendants were in this position that unless the contract was fulfilled they would lose everything—that is, they would lose the whole of the 1,000*l.* besides probably being liable to an action by the Clothworkers' Company; that both parties were perfectly well aware that the plaintiffs had no intention of paying the 1,000*l.*, and, according to my view of it, had refused to pay. I say, looking at the nature of the subject-matter and the conduct of the parties, quite independent of the question as to whether this was a case in which time was of the essence of the contract, the plaintiffs have not used that diligence which it was incumbent upon them to use to obtain the aid of a Court of Equity. As Lord Cranworth said in *Eads v. Williams* (*ubi supra*), and as was said by Lord Hardwicke in a much earlier case of *Millward v. Lord Thanet* (1), they were bound to use such diligence as the nature of the case demanded, having regard to all the circumstances of the case, before they were entitled to ask for the assistance of this Court. I think that—probably, for want of means—but it does not matter what the reason was—they have not put themselves in a position in any way to perform the contract. They refused to perform it in the only essential particular, namely, the payment of 1,000*l.*; and that for a considerable period before the filing of the bill, when time was, as they knew, and as the defendants knew, of the greatest possible importance, and I do not think the offer after the filing of the bill, then first made, can get over the previous defect. On that ground also, if I were compelled to resort to it, I should refuse them any relief. I shall, therefore, dismiss the bill and with costs, but, as I have already intimated, without prejudice to the right of the plaintiffs to bring such action, if any, as they may be advised to recover the 1,000*l.*

Solicitors—Mr. Blagden, for plaintiffs; Messrs. Argles & Rawlins, for Messenger & Wilcox; Messrs. Glyne, Son & Church, for E. Browning.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.
JAMES, L.J.
MELLISH, L.J. } THE CITY OF LONDON
1873. } BREWERY COMPANY v.
Nov. 24. } TENNANT.
Dec. 3, 4. }

Easement—Light and Air—Prescription Act (2 & 3 Will. 4. c. 71)—Mandatory Injunction—Damages—Lord Cairns's Act, 21 & 22 Vict. c. 27.

The right of an owner of ancient lights is to prevent his neighbour from obstructing the access of sufficient light and air to such an extent as to render his house substantially less comfortable and enjoyable, and the Prescription Act (2 & 3 Will. 4. c. 71) has not altered the nature of the right or the principle on which it is to be determined whether it has been infringed, but has merely substituted a statutory title for an assumed grant.

Semble, where a building obstructing the access of light has been completed before bill filed, the Court has jurisdiction under Lord Cairns's Act (21 & 22 Vict. c. 27) to award damages, notwithstanding the plaintiff may not have made out such a case as would entitle him to a mandatory injunction; and Durell v. Pritchard (35 Law J. Rep. (N.S.) Chanc. 223; s. c. Law Rep. 1 Chanc. 244) is not an authority for the contrary proposition.

This was a light and air case, in which the plaintiffs, who were the owners of a public-house in Swan Lane, Upper Thames Street, in the city of London, sought by their bill to restrain the defendants from so proceeding with the erection of certain buildings as to obstruct the free access of light and air to the plaintiffs' house and darken or injure its ancient lights. Vice-Chancellor Wickens dismissed the bill with costs, being of opinion that no sufficient injury to call for an injunction was proved, and the plaintiffs appealed.

Mr. Greene and Mr. C. Walker appeared for the appellants.

Mr. Dickinson and Mr. W. Pearson for the respondents.

The cases cited were—

Yates v. Jack, 35 Law J. Rep. (N.S.)
NEW SERIES, 43.—CHANC.

Chanc. 539; s. c. Law Rep. 1 Chanc. 295;
Staigh v. Burn, 39 Law J. Rep. (N.S.) Chanc. 289; s. c. Law Rep. 5 Chanc. 163;
Heath v. Bucknall, 38 Law J. Rep. (N.S.) Chanc. 372; s. c. Law Rep. 8 Eq. 1;
Durell v. Pritchard, 35 Law J. Rep. (N.S.) Chanc. 223; s. c. Law Rep. 1 Chanc. 244;
Back v. Stacey, 2 Car. & P. 465;
Clarke v. Clark, 35 Law J. Rep. (N.S.) Chanc. 151; s. c. Law Rep. 1 Chanc. 16;
Beadell v. Perry, Law Rep. 3 Eq. 465;
Kelk v. Pearson, Law Rep. 6 Chanc. 809;
Robson v. Wittingham, 35 Law J. Rep. (N.S.) Chanc. 227; s. c. Law Rep. 1 Chanc. 442;
Dent v. The Auction Mart Company, 35 Law J. Rep. (N.S.) Chanc. 555; s. c. Law Rep. 2 Eq. 238.

In the course of the argument the LORD CHANCELLOR said—

“In an unreported case of *Holmes v. Upton*, which I argued before Lord Cottenham, the trustees of a road made under their parliamentary powers a viaduct across the plaintiff's land. The viaduct gave way, and the trustees supported it with buttresses erected on the plaintiff's land without parliamentary authority. Plaintiff brought three actions of trespass, in each of which she recovered damage, and then filed a bill to have the buttresses pulled down. The Lord Chancellor made the decree.”

JAMES, L.J.—This appeal from the Vice-Chancellor is an appeal upon a mere question of fact, in which the burden of proof lies upon the plaintiff. In all these cases involving light and air, the Court of Equity is not administering any equitable relief strictly so-called, but is giving an equitable remedy for the violation of a legal right; and the question before the Court of Equity in all these cases is substantially the same as that which would have to be determined by a jury being properly directed by a Judge as to the principles of law applicable to the case.

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In the case of *Kell v. Pearson* (*ubi supra*) the Lord Justice and myself endeavoured to express what we thought to be the rule applicable to these cases. I believe the Lord Chancellor entirely agrees with the mode in which it is there expressed. It is really only repeating in different words what is to be found in many cases before, especially in that before Chief Justice Best, *Back v. Stacey* (*ubi supra*), and before Vice-Chancellor Wood following it, *Dent v. The Auction Mart Company* (*ubi supra*), that whatever be the extent of the easement, that easement gives a right to prevent your neighbour from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable; that is to say, that he is "entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop or other place of business." [His Lordship then referred to the evidence, and expressed his opinion that it would have been impossible for the Vice-Chancellor to have come to any other conclusion than that to which he had come, viz., that the plaintiffs had failed to make out any substantial damage, and proceeded.]

With regard to one point which was raised by Mr. Pearson in his able argument based upon *Durell v. Pritchard* (*ubi supra*), but upon which the Vice-Chancellor does not appear to have proceeded at all, viz., that unless there was a clear case for a mandatory injunction as to the whole of the building, there was no case for the interference of that Court, I think it is not safe to rely upon any such deduction. On the whole, I think the Court would not be slow to give relief in damages where there was a substantial case made, in order to prevent a multiplicity of actions. In this instance the plaintiff has entirely failed to make out any case of substantial damage, and, therefore, the appeal must be dismissed with costs.

THE LORD CHANCELLOR. — I entirely agree with the judgment which Lord

Justice James has just delivered, and I do not propose on the particular evidence to add anything to what he has said. It may, however, be right that I should refer to one or two things as regards other matters which rather touch upon principle. First of all, I wish to express my complete adherence to the view of the law laid down in *Kell v. Pearson* (*ubi supra*), which was a case correcting some impressions which might have arisen on the language used in former cases by some learned Judges, that the Act of Parliament that now governs the twenty years' title to light, has not altered the nature of the right or the principle on which the remedy is to be determined; but it merely substitutes a statutory title for the fiction of a presumed grant. With that doctrine I entirely agree. In regard to *Durell v. Pritchard* (*ubi supra*), it is always to be observed that the language of Judges should be understood in connection with the circumstances of the case before them, and the duty they have to discharge in those cases, and I am not at all disposed to adhere to the opinion, if such an opinion exists, that in every case in which a building has been completed, even entirely completed before the filing of a bill, this Court would be powerless either to grant an injunction or to grant damages in the place of an injunction. It appears to me the Court has power, if it thinks fit, to grant the injunction, even to the extent of what is called a mandatory injunction, that is, removing the building, though of course we know that the Court is not in the habit of doing that, except under special circumstances; but those circumstances might exist, and if the proposition is sound (as doubtless it is) that the power of granting the injunction in a case in which that power might be exercised ought to be the foundation for a decree for damages, I am not prepared to lay it down as a broad or general proposition that because the building has been completed before the bill has been filed, damages cannot be recovered. The clear reason for that is, that it would prevent multiplicity of actions, it would give damages once for all, and it is in accordance with sound principles and an authority which I mentioned

in the course of the argument before Lord Cottenham (1). Otherwise the effect of several actions, and damages being recovered without the abatement of the nuisance, would be multiplicity of actions, and on that ground alone the Court would order the nuisance to be abated.

The only other points which I think it worth while to discuss at all are these; they no doubt go more to evidence than law, but still they have a bearing on principle. The whole nuisance suggested here is from the oblique effect of buildings to the west, the southern and eastern lights being admitted not to be interfered with. I quite agree with Lord Cranworth in the case of *Clarke v. Clark* (*ubi supra*), that a greater amount of evidence is needed to support a material injury by lateral or oblique buildings than that which is necessary in a case of direct obstruction, and that more especially where the buildings to the side are not erected upon ground which was previously an open space, but a space already to a very great extent obstructed by buildings of less height indeed, and with a passage through part of them, but that passage not affording light directly to the building in question. Further, with regard to the forty-five degrees, there is no law upon that subject, it is merely an element in the question of fact; but undoubtedly there is ground for saying this, that if the legislature, by general regulations as to building, has considered that where new buildings are erected the lights sufficient for the comfortable occupation of them may be obtained by an angle of forty-five degrees, it is certainly evidence of a strong kind, *prima facie* at least, to shew that if the light comes to that extent under ordinary circumstances there is not likely to be material injury, and of course that evidence applies more strongly where a lateral light is only partially affected and all the lights are not obstructed. I make that observation, not imagining that either at law or in this Court any Judge has ever meant to lay down as a general proposition that there can be no material injury to light if there is forty-five degrees, but, *prima facie*, it is such a

degree of light as requires special evidence of injury, and certainly where that existed it would not induce the Court, upon the mere exhibition of models, or any such evidence as exists in this case, to think there was anything amounting to a nuisance. Then the only other point which occurs to me to notice is about air. I have observed in all these cases a formula has crept into the pleadings, and, as the Lord Justice has said, from the pleadings has passed into evidence, as to air as well as to light; but the nature of the case which would have to be made for an injunction by reason of the obstruction of air is *toto cælo* different from a case of light. Cases are very rare indeed, and must be very special, such as to involve danger to health, or something very nearly approaching to that, to justify the interference of the Court, on the ground of the diminution of air. Therefore when witnesses say there is a material diminution of light and air, and say no more, they are in truth reducing the value of their evidence as to light to the standard which must be applied to their evidence as to air, as to which it is of no value whatever.

LORD JUSTICE MELLISH concurred.

Solicitors—Messrs. Western & Sons, for plaintiffs;
Mr. Mark Shephard, for defendants.

JESSEL, M.R. }
1874. } RICHARDS v. DELBRIDGE.
April 16.

Voluntary Assignment—Imperfect Conveyance—Declaration of Trust—Words of Present Gift.

A person entitled to a leasehold mill, with plant, machinery and stock-in-trade, endorsed on the lease a memorandum: "This deed and all thereto belonging I give to A. from this time forth, with all the stock-in-trade," and he signed the memorandum and handed the deed to A.'s mother. After his death A. claimed the mill and appurtenances on the ground that the memorandum

(1) *Holmes v. Upton*.

amounted to a valid declaration of trust,—Held, that A.'s claim was bad, on the ground that words importing a present intention to give cannot be held to amount to an intention to retain as trustee.

Milroy v. Lord (4 De Gex, F. & J. 264; s. c. 31 Law J. Rep. (N.S.) Chanc. 798) *followed and approved of.*

Morgan v. Malleson (39 Law J. Rep. (N.S.) Chanc. 680; s. c. Law Rep. 10 Eq. 475); *and*

Richardson v. Richardson (36 Law J. Rep. (N.S.) Chanc. 653; s. c. Law Rep. 3 Eq. 686) *disapproved of.*

This was a demurrer to a bill, of which the material allegations were in the following words—

"John Delbridge, late of Gwinear, in the county of Cornwall, farmer, deceased, was possessed of a certain mill with the appurtenances, situate in the parish of Crowan, in the said county of Cornwall, with the plant, machinery and stock-in-trade thereto belonging, in which he carried on the business of bone manure merchant, and which was held under a lease dated the 24th day of June, 1863, for ninety-nine years from that date, if the three several persons therein named, or the survivor of them, should so long live, and which lease is still subsisting."

"On the 7th day of March, 1873, the said John Delbridge endorsed upon the said lease and signed a memorandum in the words and figures following, that is to say—

'7th March, 1873.

'This deed and all thereto belonging I give to Edward Bennetts Richards, from this time forth, with all the stock-in-trade.

'John Delbridge.'

"The plaintiff Edward Bennetts Richards is the person named in the said memorandum, and is the grandson of the said John Delbridge, and for some time before the date of the said memorandum had assisted him in the said business, and the plaintiff's name was printed with the name of the said John Delbridge upon the invoices used therein.

"The said John Delbridge, shortly after signing the said memorandum, delivered the said lease to the defendant Elizabeth Ann Richards, who is the plaintiff's

mother, on his behalf, and she is still in possession thereof."

The bill proceeded to state the will of John Delbridge, which contained specific gifts of certain other property of his and a residuary clause; and its proof by the defendants. The bill charged that the memorandum on the lease constituted a valid declaration of trust in favour of the plaintiffs, and prayed that the defendants might be compelled to execute it.

Mr. Fry and Mr. Phear, for the demurrer, cited—

Milroy v. Lord, 4 De Gex, F. & J. 264; s. c. 31 Law J. Rep. (N.S.) Chanc. 798 (L.J. 1862);

and

Warriner v. Rogers, 42 Law J. Rep. (N.S.) Chanc. 581; s. c. Law Rep. 16 Eq. 340 (V.C. B. 1873).

Mr. W. R. Fisher, for the bill, referred to

Wheatly v. Purrr, 1 Keen, 551; s. c. 6 Law J. Rep. (N.S.) Chanc. 195;

and relied on

Morgan v. Malleson, 39 Law J. Rep. (N.S.) Chanc. 680; s. c. Law Rep. 10 Eq. 475 (Lord Romilly, M.R. 1870),

where a memorandum in the words, "I hereby give and make over to Dr. Morris an India Bond, No. D. 506, value 1,000*l.*, assome token for all his very kind attention to me during illness," signed by the owner, was held after the owner's death to be a good declaration of trust, though the bond was not handed over, and also on

Richardson v. Richardson, 36 Law J. Rep. (N.S.) Chanc. 653; s. c. Law Rep. 3 Eq. 686 (V.C. Wood, 1867),

where a voluntary deed expressing to grant, convey and assign all the personal estate and effects whatsoever and where-soever of the party executing it was held to be a good declaration of trust, as to some promissory notes requiring indorsement and not indorsed.

THE MASTER OF THE ROLLS.—There must be more difficulty in these cases than I see, for the bill is warranted by the decisions in *Morgan v. Malleson* (*ubi supra*); and *Richardson v. Richardson* (*ubi supra*); and on the other hand we have the case

of *Milroy v. Lord* (*ubi supra*), before the Appeal Court, and the more recent case of *Warriner v. Rogers* (*ubi supra*), before Vice-Chancellor Bacon, where his Honour says that the rule of law is clear, and that with the exception of the two cases which have been referred to, the decisions are all perfectly consistent with that rule. In other words, the two first cases are wholly opposed to the two latter. That being so, I am not at liberty to decide the case otherwise than in accordance with his decision, which is that of the Court of Appeal. It is true that other Judges appear to have taken different views of the construction of certain expressions; but I am not bound by another Judge's view of the construction of special words; and there is not an instance of a single case stating a principle different from that laid down by the Court of Appeal, and if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is very simple. A man may transfer his property without value in two ways. He may either do such acts as amount at law to a conveyance or assignment of the property; and thus, having completely divested himself of the legal ownership, the person who takes the benefit of those acts acquires the property beneficially or on trust, as the case may be. The second mode of passing the property takes effect in equity only. The legal owner of the property does, in one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title he so deals with the property as to deprive himself of the beneficial ownership; he declares he will hold it from that time forward on trust for the other person. It is true it is not necessary he shall use the words "I declare myself a trustee," but he must do something equivalent, he must use expressions which have that meaning; and however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than within their fair meaning. Now the cases in which this question is raised are nearly all cases in which a man by documents insufficient to pass a legal in-

terest has said, "I give or grant certain property to A. B." In *Morgan v. Malleson* (*ubi supra*), the words were, "I hereby give and make over to Dr. Morris an India Bond," and in *Richardson v. Richardson* (*ubi supra*) the words were "grant, convey and assign." In these cases the learned Judges held that the words, "give and make over," and "grant, convey and assign," were effectual declarations of trust. In the former case Lord Romilly considered the words were the same as "I undertake to hold this bond for you," which would undoubtedly have amounted to a declaration of trust. Now, had there been no decision of the Court of Appeal, though I should have felt that the word "not" ought to have been inserted to make that proposition correct, I should nevertheless have followed it. But the true distinction appears to me to be plain and beyond dispute. The making a man a trustee involves an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not to retain it in the speaker's own hands for any purpose, fiduciary or otherwise. We have a case containing a few words by Lord Justice Turner stating this doctrine, and urging an argument wholly unanswered. In giving judgment in *Milroy v. Lord* (*ubi supra*) he says—"The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of these modes. If it is intended to take effect by transfer the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and Vice-Chancellor Wood were right there never could be a case where the expression of a present gift would not amount to an effectual declaration of trust. That would be to carry the doctrine of declaration of trust beyond its proper meaning. It is clearly confusion, as it appears to me, to treat these cases of voluntary gifts

as having any relation to another class of cases in which there is a valuable consideration, in which cases words of present transfer for value are held to be evidence of a contract which this Court will enforce. But applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature, which this Court therefore will not enforce. So that following out the principle even of these cases you will come to the same conclusion. I must therefore allow the demurrer; and though I feel some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.

Solicitors—Mr. T. D. Bolton, agent for Messrs. Grylls, Hill and Hill, Helston, Cornwall, for the plaintiffs; Messrs. Gregory, Rowcliffes and Co., agents for Messrs. Carlyon and Paull, Truro, for the defendants.

MALINS, V.C. }

1873. }

Nov. 22. }

Dec. 4, 20. }

DORIN v. DORIN.

Will—Construction—Gift to “our Children”—Illegitimate Children—Subsequent Marriage with Mother.

A testator having two illegitimate children by M., married her, and by his will, executed the day after his marriage, gave all his property “to my wife M.” for life, with liberty to direct the disposal of the property amongst “our children by will,” in default to be divided “equally between my children by her.” The testator in his lifetime acknowledged the two illegitimate children to be, and treated them as, his children, and died without having had any other children by M., leaving her and the two illegitimate children surviving:—Held, in a suit instituted by M. to administer the estate of the testator, that the two illegitimate children were the objects of the power of appointment given to M., and would take in default as the children of the testator by her. Further that they were not precluded from taking by the

fact that the testator might have had future legitimate children by M., for such children would have taken as a class with the existing illegitimate children.

Wilkinson v. Adam (1 Ves. & B. 422), Beachcroft v. Beachcroft (1 Madd. 430), and other authorities considered.

Joseph Alexander Dorin married his second wife Margaret Christiana on the 29th of April, 1864, and on the following day he made his will in these terms: “I bequeath all I possess, real and personal property, to my wife Margaret Christiana Dorin, in trust that she shall apply the same to her own personal use during the term of her natural life, and I leave her at liberty to direct the disposal of the property amongst our children by will at her death in such manner as she shall think fit; and should she make no will, I desire that the property existing at her death shall be divided, so far as it may be practicable to do so, equally between my children by her. And I nominate my said wife Margaret Christiana Dorin to be the sole executrix of this my will.”

At the date of his will the testator had two children only living, who were his illegitimate children by his second wife Margaret Christiana, born before his marriage with her. After his marriage he had no issue by his second wife, and he died in December, 1872, leaving her and his two illegitimate children surviving. A suit for the administration of his estate was then instituted by his widow against his heir-at-law and sole next-of-kin (who was the son of a deceased child of his first marriage) and his two illegitimate children; and the question now argued was, whether the two illegitimate children were the objects of the power given to his wife by his will, and could take under the words “our children” and “my children by her.”

The remaining material facts will appear sufficiently from the judgment of the Vice-Chancellor.

Mr. Cotton and Mr. Kekewich, for the plaintiff, stated the case.

Mr. John Pearson and Mr. F. C. J. Mil-
lar, for the defendant, A. F. L. Dorin,
the heir-at-law and sole next-of-kin.
—The word “children” is a technical

word and means only legitimate children, unless a contrary intention appears upon the face of the instrument. It may be that the testator had an intention to benefit these illegitimate children, but that intention must clearly appear upon the face of the will itself. Here they are not sufficiently described in the will, and where that is the case, the Court cannot from anything *dehors* the will, enlarge the word "children" so as to admit illegitimate children—

Wilkinson v. Adam (*ubi supra*) ;

Godfrey v. Davis, 6 Ves. 43 ;

Warner v. Warner, 15 Jurist, 141 ;
s. c. 20 Law J. Rep. (N.S.) Chanc. 273.

In this case, moreover, the testator had before the date of his will married the mother of his illegitimate children, and as he thereby put himself in the position of possibly having legitimate children, his will must be construed as if he had such legitimate children only in his contemplation—

Gabb v. Prendergast, 1 Kay & J. 439 ;
s. c. 24 Law J. Rep. (N.S.) Chanc. 431.

As was said by Lord Westbury in

Barlow v. Orde, Law Rep. 3 P.C. 164,

"It is a technical rule of construction that under a testamentary gift to children as a class, illegitimate children, although recognised by the testator, cannot be permitted to share jointly with natural lawful children."

They also referred to—

Crook v. Hill, 38 Law J. Rep. (N.S.) Chanc. 579 ; s. c. 40 Law J. Rep. (N.S.) Chanc. 216 ; s. c. Law Rep. 6 Chanc. 311 ; s. c. (H.L.) 42 Law J. Rep. (N.S.) Chanc. 702 ; s. c. Law Rep. 6 E. & Ir. App. 265 ;

Re Brown's Trusts, 43 Law J. Rep. (N.S.) Chanc. 84 ; s. c. Law Rep. 16 Eq. 239 ;

and

2 *Jarman on Wills* (3rd ed.), 208.

Mr. Glasse and Mr. Vaughan Hawkins, for the illegitimate children.—

Wilkinson v. Adam (*ubi supra*)

determined that a devise by a married man, who had no legitimate children, "to the children which I may have by

Ann Lewis," was a good devise to illegitimate children living at the date of the will ; and that case is an authority entirely in our favour. There can be no doubt that the testator intended the illegitimate children who were in existence at the date of his will to take under it. There is no rule which prevents their taking as a class under a general description, and it is settled that they may so take when the intention that they should do can be ascertained. It is admitted that these illegitimate children were recognised by the testator as his own ; they had therefore acquired by name and reputation the character of his children, and that being so, they are sufficiently described in the will—

Wilkinson v. Adam, 1 Ves. & B. 447, 450, 463 ;

Beachcroft v. Beachcroft (*ubi supra*) ;
Kenebel v. Scrafton, 2 East, 530.

The possibility that the testator might have had future legitimate children does not prevent the existing illegitimate children from taking, as they might have taken together as a class—

Lepine v. Bean, 39 Law J. Rep. (N.S.) Chanc. 847 ; s. c. Law Rep. 10 Eq. 160 ;

Owen v. Bryant, 2 De Gex, M. & G. 697 ; s. c. 21 Law J. Rep. (N.S.) Chanc. 860.

Mr. John Pearson in reply.—The decision in

Lepine v. Bean (*ubi supra*)

was founded upon the peculiar words of the will in that case ; there the testator, William Bean, described Margaret Bishop, who was not his wife, as "my wife Margaret Bean," and the Master of the Rolls held that by the words, "my children," the testator must have meant his children by her. In the case of

In re Overhill's Trusts, 1 Sm. & G. 362 ; s. c. 22 Law J. Rep. (N.S.) Chanc. 485,

the Vice-Chancellor, Sir J. Stuart, said that the decision of Sir Thomas Plumer in

Beachcroft v. Beachcroft (*ubi supra*)

was not reconcilable with the principles to be collected from the decisions in other cases. That case must therefore be considered as overruled. The true principle

is, that unless the words of the will itself either necessarily apply to and include illegitimate children, or clearly exclude any but such children, legitimate children only can take.

He also referred to

Barnett v. Tugwell, 31 Beav. 232; s. c.

31 Law J. Rep. (N.S.) Chanc. 629.

The Vice-Chancellor reserved judgment.

MALINS, V.C. (on December 20), after reading the will, said—The testator at the date of his will had two children only living, namely, the defendants, Charles Alexander Dorin and William James Alexander Dorin; and the question is, whether they can take under the description in the will of children by his wife, they having been born before he had married her. The general rule that a bequest to children of the testator or of any other person must *prima facie* be taken to mean legitimate children is not and cannot be disputed; whether illegitimate children can take under that description must depend upon the language of the will itself, or upon the language as interpreted by surrounding circumstances, for in order to ascertain what the testator meant by particular words it is proper for the Court, so far as possible, to put itself in the position of the testator, and from that position and the surrounding circumstances to ascertain his intention, and to interpret the language of his will.

It is necessary, therefore, in order to ascertain what the testator meant by "our children" and "my children by her" to look at the situation of the testator when he made his will. He had been a civil servant in India, and had, no doubt, gone to that country at an early age. He had married a Miss Patton in 1823. By her he had two children, both of whom had died before the date of his will, one without issue and the other leaving an only son, the defendant, Arthur Frederick Lock Dorin, who was born in 1846, and who was consequently the heir-at-law and sole next-of-kin of the testator. The first wife of the testator having been with him in India, appears to have returned to England, leaving the testator there, in or shortly before 1850; and soon after that the testator began a cohabita-

tion with the plaintiff, and he continued that cohabitation in India till his final return to England in 1858; and the result of that connection was the birth of the defendant, Charles Alexander Dorin, in 1855. The plaintiff, with her child by the testator, came to England in the early part of 1858, and was soon afterwards followed by the testator, who then finally took up his abode in this country. Upon his return he lived with his first wife at Chepstow for some months, and he continued subsequently to live with her up to the time of her death in 1863, although during the latter part of her life he spent the greater part of his time with the plaintiff, with whom he always continued his connection from the time of his return to England, successfully concealing it from his wife up to a very late period. A second child of this illicit connection, the defendant William James Alexander Dorin, was born in 1861; and the testator's first wife having died in April, 1863, he married the plaintiff on the 29th of April, 1864, and his will, which I have now to construe, was made the day after that marriage, namely, upon the 30th of April, 1864. It is clearly proved in the cause, and was fairly admitted by Mr. Pearson in his able argument for the defendant, the heir-at-law, that the testator always acknowledged the two defendants, who are his illegitimate children by the plaintiff, as his children. He had them, in fact, baptized as such.

Under these circumstances, what did the testator mean by the expressions in his will, "our children" and "my children?" It cannot for a moment be doubted, and indeed it was fairly admitted by Mr. Pearson, that he must have intended the two illegitimate children he already had by the plaintiff. The intention then being clear, it is the duty of the Court to carry that intention, which, as Sir Thomas Plumer said, is the polar star of construction, into effect, if it can do so without infringing any principles or settled rule of law. It was argued that since the testator had by marrying the mother of these children put himself in the position of possibly having legitimate children by her, his will must necessarily be construed as if

he had such children only in his contemplation; but such a construction would, in my opinion, be a violation of his language, which, to my mind, plainly points to existing and not to future children, though such children might well be included in the gift, and, considering the number of years the connection with the plaintiff had continued, and that no child had been born for nearly four years, it is most improbable that he had future children in contemplation, and all but impossible that he had such children exclusively in view.

The law is now clearly settled that existing illegitimate children may take under the description of "children" whenever it can be ascertained that it is intended they should do so. The great leading authority upon this subject is the case of *Wilkinson v. Adam* (*ubi supra*), which is the one principally referred to in the argument on both sides. That case is so familiar that it is only necessary for me simply to state that the testator therein being a man of very large property, having a wife alive, but living principally with a woman named Ann Lewis, gave his property after the death of his wife, and after the expiration of a term of years limited by his will, "to the children which I may have by the aforesaid Ann Lewis and living at my decease." That expression is afterwards repeated—"To the use and behoof of the child or children which I may have by the said Ann Lewis." Now "the children which I may have by Ann Lewis" sounds in futurity. Not "the children I have," but "the children I may have." And there is no doubt, I apprehend, that the law as it stood before *Wilkinson v. Adam* (*ubi supra*), very strictly applied, would have excluded these children, because they were already born; and the question was whether they could take.

That the decision in that case caused a great change in the law is, I think, conclusively shewn by the fact that Mr. Bell, one of the greatest lawyers of that or of any other day, having argued that the illegitimate children could not take, is stated to have said that if the case was decided in their favour he should burn all his books. I

NEW SERIES, 43.—CHANC.

mention that as shewing it was considered by the lawyers of that day that the case would be an extension of the principle, which, strictly read, meant legitimate children, unless the will shewed the contrary.

Now this case underwent great consideration, three distinguished Judges of the common law bar being called in by Lord Eldon to hear it, and those Judges delivered a most elaborate judgment, which was confirmed by Lord Eldon, holding that these children could take. I shall only refer to one or two passages in the judgments which lay down the general principles.

It was argued, that inasmuch as the children were not pointed out, none but the children by this woman, in the event of the testator and her surviving his wife, and of the testator's marrying her and having children by that marriage, could take, and Lord Eldon in the course of his observations upon the case says, at page 447, "Some points of this case admit of no doubt. It is impossible to make out the two points contended for the heir; first, that the will means illegitimate children, who, though incapable themselves of taking, would prevent the plaintiff from taking, and so give title to the heir. That cannot be maintained; as, if illegitimate children are meant, there is no rule of policy which prevents the Court from saying that they are intended; in other words, if they are sufficiently described, there is no rule that prevents their taking; but if they are not sufficiently described, but legitimate children are the persons to take, then, as there are no legitimate children, there is no prior taker described before the plaintiff. There is no doubt, therefore, that the existence of those children, if they cannot take, does not form a bar to the plaintiff's taking." Then, at page 450, the learned Judges in their written opinion delivered to Lord Eldon, say, "But with respect to the three children, who were born before the making of the will, the depositions prove most abundantly" (that which is proved in this case) "that they had then acquired the reputation of being the children of the testator by Ann Lewis; and thinking,

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for the reasons above given, that they were the intended objects of the testator's bounty, we think that they are intended to take the real estate under the will itself without the aid or explanation of any other papers." Then Lord Eldon in his celebrated judgment expresses himself at pages 462 and 463 thus—"In all the cases I have seen having relation to this question the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will itself, but by the effect of evidence *dehors*, read or attempted to be read with a view to establish, not out of the contents of the will, but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case is supposed to rest upon any evidence out of the will, except that which establishes the fact that there were individuals who had gained by reputation the name and character of his children, that conclusion is drawn without sufficient attention to the grounds on which the judgment is formed, my opinion being that, taking the fact as established, that there were children who had gained the reputation of being his children, it does necessarily appear on the will itself that he intended those children. If that principle is just, and this case falls within its reach, all the cases cited are inapplicable to this."

Then as to *Beachcroft v. Beachcroft* (*ubi supra*), it is said that case is no longer authority. My opinion, however, is that *Beachcroft v. Beachcroft* is a good and binding authority, founded on the soundest principles. In that case the testator, who had resided in India, and had illegitimate children by a native woman, gave his property in these words—"Out of the residue I give and bequeath as follows: to my children"—that of course *prima facie* would mean legitimate children—"the sum of pounds sterling, 5,000 each; to the mother of my children the sum of sicca rupees 6,000, which I request my executors will secure to her in the most advantageous way." There, the question was, whether the illegitimate children could take. The evidence shewed that the testator had treated them as his children, had sent three of them to this country to be educated, and that they

were the principal objects, as in this case, of the testator's affection. Sir Thomas Plumer says—"Where there is a latent ambiguity in the will, parol evidence is admissible to prove the identity of the thing devised, or the identity of the person intended to take; and whether an individual or a class of children are the objects of the testator's bounty, it is equally a case for parol evidence. In construing a will the intention is the Polar star, and to discover that, the words and context of the will must be considered; but if there is a latent ambiguity, evidence is admissible to shew who the testator was in the habit of considering in the character described in his will." Now comes a passage I think peculiarly applicable to the present case—"I know of no rule which prevents illegitimate children claiming under a class or description as well as any other stranger. Such children are not prohibited from taking, as by the civil law; and I see no reason to prevent them taking under a general description. It is immoral to become the father of such children, but having them, it is a duty to provide for them; it would be an aggravation of the father's fault not to do so, and, indeed, by several statutes a putative father is compellable to provide for them." Then he makes some further observations with regard to the possibility of future children taking.

In *Lepine v. Bean* (*ubi supra*) the Master of the Rolls, I think, has carried it further than any other case. The testator had a wife alive, but he was living with another woman who was not his wife, and by his will he thought fit to call the woman not his wife his wife. The real wife survived him, but she was past child bearing, and was seventy years of age when the testator died; still he gave the property to his "dear wife" Margaret Bishop, who was only his mistress, and his children by his dear wife; and the question was, whether they would take. The sole argument there was, that children must mean legitimate children, and therefore the illegitimate children could not take. The Master of the Rolls, however, said—"Those children who had died he called his children. And the words of the will

are so strong, that it is obvious that by 'my wife,' he meant Margaret Bishop, and that by 'my children,' he meant the children he had had by her. I think that is plain upon the will. I think the designation of the wife is quite clear and distinct. He calls her his wife, and the children his children. I think, thereupon, those who were alive were entitled to take."

In the recent case of *Crook v. Hill* (*ubi supra*) the testator's daughter had married the husband of her deceased sister, and therefore all the children of that so-called marriage would necessarily be illegitimate. The testator, knowing that fact, made his will, calling the gentleman who had so married his daughter, his son-in-law, which no doubt was the fact, because he had legally married one daughter, and had illegally attempted to marry another; therefore, the circumstance of calling him the son-in-law was not much relied on. He gave the property to the children by the said second wife as he called her, and the question was, whether they could take upon the strength of the rule that none but legitimate children could take. Sir John Stuart decided they could not take, and that was reversed by the Lord Justices and also by the House of Lords.

I may also refer to a recent decision of my own in *Re Brown's Trusts* (*ubi supra*), where there was a bequest to the children of the testator's daughter "by her putative husband A. B.," the testator knowing that she was not married to that man, although it was believed at the time of the marriage that it was a valid marriage, because the first wife was supposed to be dead when the second marriage took place. It turned out that she was not, and that that state of things was known to the testator. She having an only child, which was illegitimate, the testator gave the sum in question to the children of his daughter by her putative husband or any other husband; and I decided in that case that the illegitimate child took under the description of the children of his daughter.

These authorities, therefore, clearly establish that illegitimate children may take under the description of the children of a particular person when they

have acquired the reputation and character of being so, and the Court is satisfied of the intention of the testator that they should take. Both these requisites are, in my opinion, completely fulfilled in the present case, and I am therefore of opinion that the two defendants, who are the illegitimate children of the testator by the plaintiff, answer the description of "our children" and "my children by her," that is, the plaintiff, his wife.

But it was contended on behalf of the heir-at-law that the effect of giving the property to the two children would be to exclude the legitimate children of the testator's marriage with the plaintiff. That would not be so, for there is no rule which prevents illegitimate and legitimate children taking together as a class where it is intended that they should do so. In this case the words of the will are sufficient to include the future children, and they might therefore have taken if there had been any. In *Wilkinson v. Adam* (*ubi supra*) I find this passage in the opinion of the learned Judges—"It was possible that the testator might outlive his wife and marry Ann Lewis, and have legitimate children by her. The words of the devise are large enough to include such children, and there appears no express intention to exclude them, though probably the testator had them not in contemplation. We incline to think, therefore, that such children would take under the devise; but the conclusion drawn from thence, that under the circumstances of this case the illegitimate children cannot take with them is not, as we think, well founded." And at page 457 again they say, "From the language of the judgment, however, it certainly seems"—that is, referring to the judgment in the Court of Queen's Bench in *Kennebel v. Scrifton* (*ubi supra*)—"that the Court thought that the testator meant to provide for children of a different character and denomination from legitimate; and yet they determine that legitimate children may take under the bequest. In every view of the case we think that they might; because the terms of the devise were large enough to comprehend them; but nothing is said in that judg-

ment from which we can collect that where a devise evidently points at illegitimate children, and where legitimate children are admitted under it, because the words are large enough to reach them, the illegitimate children cannot take together with the legitimate; nor that even in the case then before the Court, if the illegitimate child had been living, he would not have been permitted to take with the legitimate children." In *Owen v. Bryant* (*ubi supra*), Lord Cranworth says, "I reject the notion of there being a rule that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift or a bequest to children generally." And in *Hill v. Crook* (*ubi supra*) Lord Chelmsford says, "I know of no objection in law to a gift to children, with a clear intention that it shall apply to existing illegitimate children, being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future legitimate children." I consider, therefore, that I am warranted by authority, as I think I am clearly by principle, in saying, as I do, that future children of this testator and the plaintiff, if there had been any, would have been included in this gift. There must, therefore, be a declaration that the two infant defendants are the objects of the power of appointment given to the plaintiff, and that they take as the children of the testator by her, in default of her exercising that power. A contrary construction would leave these children, who are clearly shewn to have been the primary object of the testator's affection, destitute, and would also have the effect of making him die intestate as to the *corpus* of the estate, which it is quite clear he did not intend to do.

Solicitors—Messrs. Freshfields, for plaintiff; Mr. J. B. Batten, for defendant.

HALL, V.C. }
1874. }
Jan. 22. }

TURTON v. BARBER.

Discovery—Privilege—Communications with Solicitor.

Communications (including a bill of costs) of suitor with his solicitor, relating to the matters in suit, before commencement of proceedings, held privileged, though the solicitor made an affidavit on behalf of the suitor.

Minet v. Morgan (42 Law J. Rep. (N.S.) 627), *followed*.

This was a claim for damages carried in under a decree for the administration of the trusts of a will. The claim was made by Matthew Tildesley, and the damage alleged was in respect of the testator's non-performance of an agreement to grant a lease of certain mines after Tildesley had laid out money on the faith of the lease being granted. The chief clerk directed an enquiry, and Tildesley made an affidavit in support of his claim, in which he stated that "in consequence of obstacles as to the mine" the lease had not been granted. The solicitor who had acted for Tildesley in the matter of the the agreement and lease, also made an affidavit in behalf of the claim. An order was then obtained to cross-examine Tildesley upon his affidavit before a special examiner.

The circumstances under which the claim arose were shortly as follows. In 1864, Tildesley and another desired to work the testator's mines jointly with a mine which they were already working, and in which shafts were already sunk and apparatus prepared. In December, 1864, a preliminary written agreement was entered into for the demise of the testator's mine, but some difficulties having arisen with the lord of the manor of the surface, which was copyhold, in June, 1865, the testator agreed to use his best efforts to procure the enfranchisement of the surface within a month, and then to grant a lease as previously agreed upon.

Tildesley alleged that the testator took no steps to get the surface enfranchised, and the lease was not granted until Janu-

ary, 1870, after the testator's death, by which means the damage arose. The testator's representative on the other hand alleged that it was by Tildesley's own wish that the lease was postponed, and that there were difficulties in obtaining the enfranchisement of which Tildesley knew from the beginning.

At the examination he was asked by the cross-examining counsel to produce the bill of costs of his solicitor relating to the negotiations for the lease, but he declined to do so, and claimed that it was a privileged document. He was then asked "whether the obstacles alluded to in his affidavit were suggested to him by his solicitor, or to his solicitor by him," but this question he also refused to answer on the ground of privilege. The object of the present motion was to compel Tildesley to answer the question put, and to produce the bill of costs.

Mr. Digby Seymour and *Mr. W. W. Karslake*, for the motion, urged that both the question and the bill of costs referred to matters of fact occurring before the commencement of these proceedings, and were therefore not privileged.

[*HALL, V.C.*, referred to—

Minet v. Morgan, 42 Law J. Rep. (N.S.) Chanc. 627; s. c. Law Rep. 8 Chanc. 361.]

They relied on—

Merle v. More, *Ryan & Moody*, 390; *Taylor on Evidence*, Part 2, chap. 16; *Sawyer v. Birchmore*, 3 Myl. & K. 572; s. c. 4 Law J. Rep. (N.S.) Chanc. 249;

Desborough v. Rawlins, 3 Myl. & Cr. 515; s. c. 7 Law J. Rep. (N.S.) Chanc. 171.

They also contended that the solicitor having made an affidavit in the suit prevented the client from claiming privilege.

Mr. Powell and *Mr. Grosvenor Woods*, for Tildesley.

HALL, V.C., held that the question here was directly a question as to what had occurred between the solicitor and client, and it could not be put, and it was immaterial that litigation had not commenced when the communication took place. The solicitor had made an affidavit in support of Tildesley's claim, but that

could not be held such a waiver of the client's privilege as to cause the client to be subject to cross-examination as to everything that had occurred between them. With regard to privilege that had been claimed for the bill of costs, it was claimed on the ground that it was a confidential communication, and he was of opinion that it was so. A bill of costs was little more than a record of what had taken place between the solicitor and client, and if the verbal communications therein described were privileged, the account of them given in the bill must be so too. This motion therefore was unfounded, and must be refused with costs.

Solicitors—*Mr. A. Hemsley*, for the motion; *Messrs. Bellamy, Strong & Edgelow*, for Tildesley.

BACON, V.C. }
1873.
Aug. 1. }

RAINE v. WILSON.

*Lunatic not so found by Inquisition—
Substituted Service on Medical Officer—
Practice.*

Where the medical officer of an asylum refused to allow service of a bill on a lunatic who was not so found by inquisition the Court allowed substituted service on the medical officer.

In this case the defendant Wilson, residing in Hanwell Lunatic Asylum, was a person of unsound mind, but not so found by inquisition. The plaintiff desired to serve him with copy of a bill, but the medical officer at the asylum refused to allow such service to be effected.

Mr. Caldecott now applied for leave to effect substituted service on the medical officer, but mentioned—

Anonymous, 2 Jur. N.S. 324, where a similar application had been refused.

BACON, V.C., allowed the substituted service.

Solicitors—*Messrs. Shum, Crossman & Crossman*.

JESSEL, M.R. }

1874. }

March 2. }

SALE v. LAMBERT.

Specific Performance—Sect. 4 of Statute of Frauds—Sale by Auction—Particulars and Memorandum—Description of Vendor—Rescission of Contract.

On sale of real estate by auction the particulars stated that the property was put up for sale by "the proprietor." No further description of the vendor was given in the particulars or conditions. The auctioneer signed a memorandum in his own name, by which he agreed "that the vendor on his part should in all respects fulfil the conditions of sale mentioned in the said particulars." On bill for specific performance by the purchaser,—Held, that on the particulars and memorandum there was a sufficient description of the vendor within the 4th sect. of the Statute of Frauds.

Part of the property sold was in the occupation of a tenant under a lease, by which the vendor agreed to repair. The repairs not being done, the tenant instituted a suit against both vendor and purchaser. The purchaser sent in an objection and requisition in respect of the repairs not being done,—Held, that such an objection was not an objection to title in respect of which the vendor was entitled to rescind the contract under a condition applying to objections to the abstract.

This was a suit for specific performance by a purchaser of an agreement for purchase of certain freehold hereditaments. The sale was made by auction in July, 1872.

The particulars stated that the property was put up for sale by "the proprietor." No further description of the vendor was given in the particulars or conditions. The auctioneer signed in his own name a memorandum appended to the conditions which was as follows—

"Memorandum of agreement on sale of an estate by auction, at Baldock, on the 19th day of July, 1872, as follows—

"I do hereby acknowledge that Mr. William Sale by Mr. Thomas Veasey, his solicitor, has been this day declared the purchaser of lots 3, 5 and 6 mentioned and described in the particular hereto

annexed at the sum of 1,242*l.*, and that he has paid a deposit of 186*l.* And I do hereby agree that the vendor on his part shall in all respects fulfil the conditions of sale mentioned in the said particulars.

"Witness my hand, this 19th day of July, 1872.

	£
Purchase Money . . .	1,242
Deposit paid . . .	186
Remains due . . .	<u>1,056</u>

(Stamp) 6 <i>d.</i> Geo. Jackson, July 19, 1872.
--

"Approved by me,

"William Sale."

The fourth condition was as follows—

"An abstract of title shall be delivered to each purchaser or his solicitor with all convenient despatch, and each purchaser or his solicitor shall within fourteen days from the delivery of his abstract transmit to the vendor's solicitor a statement in writing specifying his objections, if any, to the title, arising under such abstract, and in default thereof the title shall be considered as approved and accepted, and all other or subsequent objections shall be considered as waived; and if any objection shall be taken which the vendor shall be unable or unwilling to remove he shall be at liberty to rescind the contract upon returning to the purchaser his deposit without interest in full satisfaction of all damages and expenses."

The tenth condition was as follows—

"If there shall be any error or omission in these particulars respecting the description, tenure, outgoings or otherwise, the sale of any lot or lots shall not be void, but the purchaser or vendor, as the case may be, shall pay or allow such sum by way of compensation as shall be deemed to be fair and equitable by two indifferent persons, one to be chosen by each party within fourteen days after request in writing from the other of them, such two persons to choose an umpire, and the decision of such two referees or their umpire, as the case may be, shall be final. And in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone shall make a final decision."

The eleventh and last condition was as follows—

"If the purchaser of any lot or lots shall fail to comply with any of the above conditions his deposit money shall be forfeited and the vendor shall be at liberty to resell such lot or lots either by public auction or private without being bound previously to tender a conveyance or other assurance thereof to the defaulter, and the deficiency (if any) on such resale, together with the expenses attending the same, shall on demand be made good by such defaulter at the present sale, and in case of non-payment the whole thereof shall be recoverable by the vendor as liquidated damages."

Lot 6 was let to a tenant for a term of seven years from the 25th of March, 1869, by a lease under which the vendor had covenanted to repair. The purchaser objected that the repairs had not been done. In October, 1872, the tenant instituted a suit against the vendor, to which the purchaser was afterwards made a party, claiming to have the repairs done according to the agreement. The purchaser delayed completion on account of the repairs not being done.

On the 10th of March, 1873, the vendor wrote to the purchaser that he could not comply with his requisitions as to repairs, and that he rescinded the contract under the eleventh condition and declared the deposit forfeited. Subsequently he withdrew that notice, and after negotiations on the 8th of April, 1873, he tendered the deposit to the purchaser, and stated that he rescinded the contract under the fourth condition. Subsequently the purchaser instituted a suit for specific performance against the vendor. Before the hearing the tenant's suit and claim with respect to repairs was settled, and the bill in the specific performance suit was amended so as to state the fact.

Sir R. Baggalay and *Mr. O. Walker*, for the plaintiff.—Two objections on points of law are taken by the defendants.

First. That there is no contract in writing within the Statute of Frauds, because the vendor's name is not mentioned.

Second. That the contract has been rescinded.

It is not necessary that the name of the vendor should appear if there is sufficient signature by a duly authorised agent.

The usual form is for the auctioneer to sign on behalf of the vendor. Here he agrees that the vendor shall perform the contract which is the same thing. Further it appears from the particulars that the property is put up on behalf of the proprietor, and this, taken with the memorandum, is quite sufficient—

Hood v. Lord Barrington, Law Rep. 6 Eq. 218.

As to the second objection the vendor can only rescind in case of an objection to the title. No objection to the title has been made, the only objection insisted upon was the dispute with the tenant as to repairs, that was not an objection to the title and has been satisfied.

Mr. Southgate and *Mr. Dauney*, for the defendant.—In order to constitute a binding contract within the Statute of Frauds it is necessary that the vendor should be mentioned either by name or specific description—

Dart's Vendors and Purchasers, 4th edit. 202;

Wheeler v. Collier, 1 Moo. & M. 123;

Jacob v. Kirk, 2 Moo. & R. 221;

Williams v. Lake, 6 Jur. N.S. 451;

s. c. 29 Law J. Rep. (N.S.) Q.B. 1;

Williams v. Byrnes, 9 Jur. N.S. 363.

The case of

Hood v. Lord Barrington (*ubi supra*) recognises the same principle. The objection by the plaintiff as to repairs was pressed by him as an objection to title, and we were accordingly entitled to rescind on account of it, and we did rescind the contract before the objection was satisfied.

THE MASTER OF THE ROLLS.—An objection is taken by the defendant that there is no binding agreement within the 4th section of the Statute of Frauds, because the name of the vendor does not appear in it, and the agreement is signed by the auctioneer only. Now in the first place I may say that I never saw any conditions of sale by auction with a memorandum of an agreement appended to them in the form which the defendant contends is necessary in order to make a binding contract within the statute. The usual form is for the auctioneer to sign "on behalf of the vendor." However

the question is, what is the law ? Now I have no reason to quarrel with the statement of the law by Mr. Dart in the passage referred to in argument—*Dart's Vendors and Purchasers*, 4th edit. 202—"It appears to be now clearly settled that in order to satisfy the statute both parties should be specified either nominally or by a sufficient description." I do not object to this, but the question is what is a sufficient description ? Of course the statute is satisfied if the description appears in any part of the particulars or conditions. Here the particulars state that the property is put up for sale by "the proprietor." The proprietor is the vendor and the person for whom the auctioneer signs the contract, and "the proprietor" is an excellent description. Proprietor is the term constantly used in Acts of Parliament as a description of the person to sell, and by it in this case I think the vendor is sufficiently described. If authority were wanted *Hood v. Lord Barington* (*ubi supra*) is an authority in point, but I do not think that an authority is wanted. It is clear that on this memorandum and particulars the vendor is sufficiently described and that it is a good agreement.

The next objection on the part of the defendant is that they have rescinded the contract under the fourth condition. The word objection in that condition clearly means an objection to the abstract mentioned in the preceding part of the condition. Now no objection to the title as shewn on the abstract has been made, and the defendant at first did not attempt to rescind under the 4th condition. On the 10th of March, 1873, he writes to say that he rescinds under the eleventh condition, and declares the deposit forfeited. Subsequently he withdraws that letter and after further negotiations he writes on the 8th of April to say that he rescinds under the 4th condition. I am of opinion that he is not entitled to do so, and shall decree specific performance of the contract with costs.

Solicitors—Mr. Saffery William Johnson, agent for Mr. Thomas Veasey, Baldock, for plaintiff ; Mr. A. Balderston, agent for Mr. Samuel Veasey, Baldock, for defendant.

JESSEL, M.R. }

1874.

April 17. }

POTTER v. DUFFIELD.

Specific Performance — Contract for Sale—Name of Vendor Omitted—No sufficient Description of Vendor.

To satisfy the 4th section of the Statute of Frauds, both parties must be specified either nominally or by such a description that their identity cannot be fairly disputed.

A memorandum, signed on behalf of the vendor by the auctioneer without further specifying the vendor, is not a good contract within the Statute.

Certain land was purchased at an auction by G. P. The particulars and conditions of sale did not disclose the name of the vendor ; they shewed that Messrs. Duffield & Bruty acted as his solicitors, Messrs. Beadels as his auctioneers. The purchaser's agent, in his own name, signed the memorandum of purchase. The memorandum did not contain the name of the vendor, but was signed by the auctioneer "on behalf of the vendor." No abstract was sent to the purchaser, and he was informed by Duffield that the property was mortgaged to several mortgagees, that W. Polley was the owner of the equity of redemption, and the vendor. W. Polley denied that he had authorised the sale, and the purchaser having discovered that Duffield was a puisne mortgagee, filed a bill for specific performance against him. Duffield pleaded the Statute of Frauds, and put in evidence to shew that the property was put up on behalf of Polley:—Held, That the memorandum did not sufficiently specify the vendor to make a binding contract within the Statute of Frauds. That in order to shew who was the vendor it was necessary to have recourse to parol evidence, which was contrary to the statute, and further, that the evidence shewed that the defendant was not the vendor. Bill dismissed with costs.

In August, 1869, certain freehold hereditaments were put up for sale by auction in four lots. Lot 2 was purchased by Potter, by his agent. The other lots were not sold.

The particulars and conditions of sale did not disclose the name of the vendor.

but they shewed that Messrs. Duffield & Bruty acted as his solicitors, and that Messrs. Beadel acted as his auctioneers in the matter of the sale.

The 3rd, 4th, and 6th of the conditions of sale were in the following terms—

“3. The purchaser shall pay to the auctioneers a deposit of 10*l.* per cent. in part of his purchase money, and sign an agreement for completing the purchase and payment of the residue of the purchase and valuation moneys at the office of Messrs. Duffield & Bruty, at Chelmsford, Essex, on or before the 29th day of September next, from which day the purchaser shall, on completion of his purchase, be entitled to rent or possession; but if, from any cause whatever, the said purchase shall not be completed on the 29th day of September next, the purchaser shall, notwithstanding any notice to the contrary, pay interest on the remainder of his purchase and valuation moneys at 5*l.* per cent. per annum from that time until the purchase shall be completed, and shall not under any circumstances be entitled to compensation on account of the purchase money having been lying idle; but this proviso is not to preclude the vendor from requiring the completion of the purchase on the said 29th day of September next.

“4. The vendor will, at his own expense, deliver an abstract of title to each purchaser or his solicitor, within ten days after the sale, and will, on payment of the residue of the purchase and valuation moneys, execute proper conveyances, to be prepared and executed, including the concurrence of the mortgagees therein, at the expense of the purchaser; but should the purchaser fail to complete his purchase on the said 29th day of September next, (and in this respect time shall be the essence of the contract,) or make such objections to the title as the vendor may be unable or unwilling or decline to remove or answer, the vendor may, by notice in writing to the purchaser, declare the contract at an end; and in that case the deposit only shall be returned, and the purchaser shall have no claim in any shape to interest, costs or compensation, notwithstanding any intermediate correspondence or investigation of title.

NEW SERIES, 43.—CHANC.

Each purchaser shall, within fourteen days after the delivery of an abstract of title, make out and deliver in writing to the said Messrs. Duffield & Bruty, at their offices at Chelmsford, all such objections to and requisitions on the title (if any) as he shall insist on, and subject to such requisitions and objections (if any) so made, the title shall, from the expiration of such fourteen days, be considered as having been fully approved of and accepted by the purchaser, and in this respect time shall be considered as the essence of the contract. No requisition or other objection to the title shall be made or taken other than such as may be so delivered in writing within such fourteen days. If two or more lots shall be purchased by one person, such purchaser shall be entitled to one abstract only.

“6. The title to Lot 1 shall commence with certain indentures, dated 11th and 12th of January, 1810, and no earlier title shall be required or investigated, nor any requisition or objection be made in respect thereof, notwithstanding any recital or statement in those or any subsequent deeds. John Polley, by his will, dated the 3rd of December, 1842, devised all the above property to William Polley, charged with an annuity of 10*l.* during the life of his sister, Anne Frances, now aged fifty-nine, payable half-yearly, and after her decease, in case any child or children of the said Anne Frances should have attained the age of twenty-one years or should survive her, also charged the same with the payment of 200*l.* as therein mentioned, the said charges are henceforth to be charged exclusively upon Lot 1, and the same is sold subject thereto; and the purchaser of that lot shall, at his own expense, give a satisfactory indemnity to the vendor as to the other lots, and such other lots shall be conveyed with the benefit of such indemnity. The vendor shall not be bound to identify the property with any former description, nor to distinguish the freehold from the copyhold. The vendor shall not be required to enter into any covenant except that he has not incumbered, and the respective purchasers shall not be entitled to any other indemnity as to the said annuity or legacy, except such as shall be

accepted by the vendor under the above conditions."

Condition 7 provided that until the whole of the lots to which the deeds or documents of title related were sold, "such deeds or documents should remain in the hands of the vendor, who would covenant for their production to each purchaser in the usual manner."

The plaintiff's agent, John Rogers, purchased Lot 2, and paid 20*l.* by way of deposit to the auctioneers, who thereupon signed and delivered to J. Rogers the following memorandum, appended to the particulars and conditions of sale —

"Memorandum.

"I, John Rogers, of Maldon, do hereby acknowledge myself to be the purchaser of Lot 2 of the property described in the foregoing particulars for the sum of 200*l.*, and having paid the auctioneers 20*l.* as a deposit and in part payment of the purchase money, I hereby bind myself, my heirs, executors, administrators and assigns, to pay the balance of the purchase money and to complete the purchase subject and according to the foregoing particulars and conditions of sale. Dated this 20th day of August, 1869.

"Amount of sale 200*l.*

"Deposit 20*l.*

"Balance 180*l.*

"Confirmed on behalf of the vendor.

"Beadels,

"Per N. J.

"Aug. 20th, 1869."

Rogers signed and delivered to Messrs. Beadel a duplicate of this memorandum, and then informed Mr. Duffield, who was present at the sale, that Potter was the purchaser, and directed that the abstract should be sent to his solicitors. No abstract having been sent, some correspondence ensued between the solicitors, and the purchaser was informed by Mr. Duffield that the vendor, for whom the property had been put up for sale, was Mr. Polley, who was the owner, subject to several mortgages; that the mortgagees refused to concur, and therefore that it was impossible to complete the sale, and that the deposit would be returned.

The purchaser having applied to Polley,

the latter denied having ever authorised the sale.

The purchaser subsequently ascertained that Mr. Duffield was himself owner of a third mortgage on the property, with a power of sale exercisable in default of payment or demand. The purchaser thereupon filed a bill against Mr. Duffield, alleging that he had in fact put up the property for sale and employed Messrs. Beadel, and praying for a specific performance of the agreement, or that if the Court should be of opinion that specific performance could not be decreed, that the defendant might be decreed to pay damages to the plaintiff in substitution for such specific performance.

The defendant put in an answer by which he pleaded that there was no sufficient agreement in writing within the Statute of Frauds, and alleged that Polley and not he was the vendor. He also put in an affidavit by himself to the same effect, and an affidavit by the auctioneer that he was instructed to put up the property for sale on behalf of Polley, and always understood that Polley was the vendor.

Mr. Booth (Mr. Rosburgh with him).—The signature on behalf of the vendor by the agent was sufficient—

Sale v. Lambert, ante, p. 470.

[THE MASTER OF THE ROLLS.—All that I decided in *Sale v. Lambert* was that "the proprietor" was a sufficient description of the vendor. The Master of the Rolls also referred to

Dart, Vendors and Purchasers, 4th edit. p. 202;

and to

Williams v. Byrnes, 9 Jur. N.S. 363;
Williams v. Lake, 6 Jur. N.S. 451;
s.c. 29 Law J. Rep. (N.S.) Q.B. 1.]

In

Hood v. Lord Barrington, Law Rep. 6 Eq. 218,

it was held that a contract signed by the auctioneers "as agents for the vendors" was a good contract within the Statute. He further contended that from the conditions it sufficiently appeared that the property was put up for sale on behalf of a mortgagee.

Mr. Southgate and *Mr. Begg*, for the defendant, were not called upon,

THE MASTER OF THE ROLLS.—I think there is no contract here. It has been laid down in the very clearest terms by the present Lord Chief Justice of England in the case of *Williams v. Lake* (*ubi supra*) that you cannot have a contract without the names of the contracting parties, and here we have a contract with one of the contracting parties neither named nor described. I use the word described, because I think the statement in the judgment in *Williams v. Lake* (*ubi supra*) saying that the parties must be named, must have reference to the subject matter of the action. The law appears most correctly laid down by Sir John Taylor Coleridge in the case of *Williams v. Byrnes* (*ubi supra*), in which, referring to the words of the Statute of Frauds, he says—"The words require a written note of a bargain or contract, the Statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing, and a bargain or contract cannot so appear unless the parties to it are specified either nominally, or by description or reference." I think the language might have been "sufficiently described so that their identity could not be fairly disputed," because, as the counsel for the plaintiff has said, to-day you may describe a man as the vendor of the estate. It cannot mean that. It means described in such a manner as that there can be no fair or reasonable dispute as to the person who is selling or buying. In the same way the estate must be sufficiently described. In some cases the mere name of the owner may be sufficient. In some other cases you must require some other and more complete description.

In this case what have we? We have nothing but the words "on behalf of the vendor." The purchaser first states in the usual manner that he purchased, and then we have these words—"confirmed on behalf of the vendor, Beadels," Messrs. Beadel being the auctioneers. There is not a syllable in the particulars of sale to shew who the vendor is, and, in fact, so far from it being clear that there is a vendor, in one part it is vendor and

in the other vendors, so that it is by no means clear.

That being so, this bill is filed against a gentleman named Duffield, who, oddly enough, says, I never was the vendor. It is not a case in which the man says he was the vendor and pleads the Statute of Frauds, but it is a case in which he says he was not, and what is more, I think he has conclusively proved he was not. He was the solicitor, in partnership with a gentleman named Bruty, the firm being Duffield & Bruty. They were the solicitors for a person named Polley. Polley had made two mortgages of the estate for a considerable amount, and he had also obtained a third loan from Mr. Duffield. Mr. Duffield being the third mortgagee, with a power of sale, could have sold the estate. But what he says is this, "My firm, as solicitors for Polley, instructed Messrs. Beadel," and not only does he say so, but Mr. Beadel says so; and Mr. Beadel produces his books also, in which Polley is described as the owner of the estate, and in these books an interview with Polley is mentioned, at which Mr. Beadel took instructions from him as to the reserved price; and when we look at the particulars of sale we find Duffield & Bruty named as solicitors to the vendor, which is again an odd thing if Duffield alone were the vendor. Therefore, the whole of the evidence, if it can be gone into at all, shews that whether they were or not right in thinking they had Polley's authority, they did think they had Polley's authority, and they did instruct Mr. Beadel to sell on behalf of Polley, and Mr. Beadel accepted the instructions to sell on behalf of Polley, and therefore if you could go into the evidence as to the person who is described as vendor by Mr. Beadel, the answer Mr. Beadel would give you would be "Polley." But that is exactly what the Act says shall not be described by parol evidence. If it were not so I should be thrown on parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing. I think we could not have a clearer or better illustration of the extraordinary result of otherwise deciding than that in this case I should have to decide on the

parol evidence of Mr. Duffield and Mr. Bruty as to who was in fact the real vendor.

That being so, I think there is no contract. I think that the plaintiff having been informed before bill filed of the real circumstances of the case, that the mortgagees, whose consent had been anticipated and who had given their consent on the very reasonable condition that the whole estate should be sold so as to pay them off, were not able to concur in the sale, and the vendor was not able to pay them off, the result is that the contract cannot be carried out. With that the plaintiff does not choose to be satisfied, but having received that information with an offer for the return of the deposit, and his costs up to that time, not only without any evidence in support of the allegation that Mr. Duffield was the vendor, but without any contract which could be supported according to the provisions of the statute, chooses to file his bill.

Under these circumstances I must dismiss the bill with costs.

Solicitors—Messrs. Denton, Hall & Barker, for plaintiff; Messrs. Duffield & Bruty, for defendant.

JESSEL, M.R. } YSTALYFFERA IRON COMPANY
1873. } v. NEATH AND BRECON
Nov. 19. } RAILWAY COMPANY.

Lands Clauses Act (8 Vict. c. 18), ss. 16, 17—2 & 3 Vict. c. 71. s. 14—Certificate of Subscription—Sufficient Evidence—Conclusive Evidence.

A certificate of two justices under section 17 of the Lands Clauses Consolidation Act, or of one police magistrate under the 2 & 3 Vict. c. 71. s. 14, that the capital of a company is all subscribed, being made sufficient evidence by the Lands Clauses Act, is conclusive on all landowners with whom the company deals, unless it be proved to have been obtained by fraud.

This was a suit by a landowner to restrain a railway company from exercising

its compulsory powers of taking land, and from remaining in possession of some land of the plaintiff on which it had entered, under section 85 of the *Lands Clauses Act*, on the ground that its capital had not been all subscribed as required by section 16 of the same Act (8 Vict. c. 18).

The company alleged that the capital had been all subscribed, and in proof thereof adduced a certificate of a police magistrate certifying that such was the case. They relied on section 17 of the *Lands Clauses Act*, and section 14 of the 2 & 3 Vict. c. 71, whereby such a certificate is made sufficient evidence that the capital has been subscribed.

The sections of the Acts of Parliament referred to and the certificate were respectively in the following words—

Lands Clauses Consolidation Act, ss. 16, 17; s. 16: “Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking, the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract, binding the parties thereto, their heirs, executors and administrators, for the payment of the several sums by them respectively subscribed, before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking.”

Section 17: “A certificate under the hands of two justices certifying that the whole of the prescribed sum has been subscribed, shall be sufficient evidence thereof, and on the application of the promoters of the undertaking and the production of such evidence as such justices think proper and sufficient, such justices shall grant such certificate accordingly.”

And section 14 of the 2 & 3 Vict. c. 71, is in the following words: “That it shall be lawful for any one of the said magistrates appointed, or hereafter to be appointed, to do alone any acts at any of the said courts, or at any place where Her Majesty shall order any such court to be holden within the limits of the

metropolitan police districts for the time being, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is, or shall be directed to be done by more than one justice, provided always that none of the said magistrates shall be competent to act as a justice of the peace, either alone or with any other justice or justices, in anything which is to be done at a special or petty session of all the justices acting in the division, or by the justices of any of the said counties or liberties in quarter session assembled."

And the certificate was in the words following: "Whereas evidence has this day been adduced before me by the Swansea Vale and Neath and Brecon Junction Railway Company, incorporated by the Swansea Vale and Neath and Brecon Junction Railway Act, 1864, that the whole of the capital authorised to be raised by such Act, namely 120,000*l.*, has been subscribed for, and that one half of such capital has been actually paid up, I do hereby certify that the whole of the said capital of 120,000*l.* has been subscribed for, and one half thereof paid up. Given under my hand this 16th day of February, 1866.

"H. S. Selfe."

Mr. Southgate and *Mr. Osler*, for the plaintiffs.—Sufficient evidence must mean sufficient for parties to act upon without making further enquiries; but it cannot mean that it is to be conclusive against a party who proves the contrary. The Act 20 & 21 Vict. c. 77, s. 64, enacts that a party relying on a devise of real estate may give the other party ten days' notice before trial that he intends to offer the probate as evidence of the devise, and unless the other party gives a counter-notice that he disputes the will, the probate is made sufficient evidence. Yet in

Barraclough v. Greenhough, 36 Law J. Rep. (N.S.) Q.B. 26; s. c. on appeal, *ibid.* 251; s. c. 7 B. & S. 170, 943 (1867); s. c. Law Rep. 2 Q.B. 612,

it was held that this did not make the probate conclusive evidence; it excused the first party from tendering further evidence in support, but did not preclude the other party from bringing evidence to the con-

trary. The effect of the certificate is also illustrated by

The Queen v. The Ambergate, &c., Railway Company, 1 E. & B. 372; s. c. 22 Law J. Rep. (N.S.) Q.B. 191 (1853).

Mr. Fry and *Mr. Dundas Gardiner*, for the defendants, were not called upon.

THE MASTER OF THE ROLLS said that, assuming that sufficient evidence merely meant *prima facie* evidence, as the plaintiff contended, he was of opinion that on the evidence the plaintiffs had not rebutted that *prima facie* evidence. It was therefore unnecessary to rely on the point of law raised, but as it had been argued he would express his opinion upon it. He thought that sufficient evidence meant conclusive evidence in this case. The meaning of the word in section 64 of the Probate Act might well be different, for by section 62 the probate was made conclusive in certain cases, and then by section 64 it was made sufficient in others. In the Land Clauses Act "sufficient" was nowhere opposed to conclusive. The legislature thought it would be unadvisable to leave it open to every landowner to litigate the question whether the capital had been paid or not. So they provided a tribunal where it could be settled once for all. The Judge of that tribunal represented the interests of all the public; and if the company satisfied him that the whole capital was subscribed, no one else could dispute it. Of course if it were shewn that the certificate was obtained by fraud the case would be different; but where it was only suggested that the magistrate was mistaken as to what amounted to a subscription of capital and what did not, his decision could not be reviewed.

Solicitors—*Mr. W. M. Hacon*, agent for *Mr. C. Norton*, Swansea, for plaintiffs; *Messrs. Dean and Taylor*, for defendants.

LORDS JUSTICES. }
 1874. } THE ATTORNEY GENERAL
 March 23. } v. RAY.

Contract—Government Annuity—Misrepresentation—Avoidance of Contract—Official Discretion.

An Insurance Company purchased Government annuities on the life of T. O., with a statement and declaration that he was born at Barking in 1779, he having, in fact, (as was discovered after his death,) been born at Brighton in 1786, and T. O. of Barking having died in early infancy. The Act (10 Geo. 4. c. 24) under which the purchase was made enabled the Commissioners (section 45) to correct, rectify or amend, any contract or certificate in cases wherein any mistake or accidental error should have been made. The Insurance Company offered to pay, with interest, the difference between the price they paid and the price they ought to have paid, but the Commissioners desired to treat the contract as void ab initio:—Held, that they were entitled to a decree on that footing, that the power of rectification in the Act was merely discretionary, and that neither on the general law nor under that power could the company demand a rectification of the contract.

This was an appeal from a decree of Vice-Chancellor Hall.

On the 18th of December, 1843, and the 30th of March, 1844, the Commissioners for the Reduction of the National Debt granted to the Atlas Insurance Company two annuities, of 100*l.* 1*s.* 6*d.* and 100*l.* 2*s.* respectively, on the life of Thomas Chalk of Kingston, the first in consideration of a sum of 937*l.* 2*s.* 6*d.* cash, and the second in consideration of a sum of 953*l.* consols, paid and transferred to the Commissioners in accordance with the provisions of the Act 10 Geo. 4. c. 24.

The purchase was made as a speculation, the Atlas Company purchasing at the same time over 160 annuities on various lives. They effected the purchase of the annuities on Thomas Chalk's life on the recommendation of a Mr. Joseph Marsh, who was employed by them to obtain information as to good

lives, and who reported on Thomas Chalk—"I have known this friend upwards of thirty years. I never knew or heard of his having a serious illness. Not a robust man, but appears the same as he was thirty years since." Mr. Marsh gave Thomas Chalk's place of birth as Barking, and the date as 1779.

The first grant was founded on a declaration of the actuary of the company, by which he declared his desire to purchase the annuity on behalf of the persons named (the trustees of the company). "And I do hereby nominate Thomas Chalk, of Kingston, Surrey, gentleman, now of the age of sixty-four years, to be the person on the continuance of whose life the said annuity is to depend, and whose age is certified and verified by the declarations now produced."

This declaration was accompanied by a statutory declaration by J. O. Hanson, that Thomas Chalk, residing at Kingston, was of the age of sixty-four years, and was born at Barking, in the county of Essex, and that the names of his parents or reputed parents were William Chalk and Elizabeth, his wife, and that he was the same person who was appointed to be the nominee on whose life an annuity was proposed to be purchased.

Annexed was a certificate referred to in the declaration and extracted from the register of births of the Society of Friends, of the birth on the 11th of November, 1779, unto William Chalk and Elizabeth his wife, of a son, who was named Thomas.

The second annuity was granted on the faith of the same declarations and certificate.

The two annuities were duly paid until the 8th of January, 1869, the usual certificate being made on the occasion of the last payment, that Thomas Chalk was still living, with a declaration that the Thomas Chalk named in the certificate was the nominee on whose life the annuity was granted.

The said Thomas Chalk died on the 2nd of February, 1869.

It was afterwards discovered that the Thomas Chalk on whose life the annuities were granted was really born at Brighton in April, 1786. The Thomas Chalk, to whose birth the certificate given when

the annuity was purchased referred, had died in early infancy.

It was not disputed that the misstatement was a *bona fide* mistake on the part of the company, and they had offered before suit to pay, with interest, the difference between the price paid for the annuities and the price that would have been paid if the age had been rightly stated. This amounted to 1,012*l*. The Commissioners, however, claimed a right to rescind the contract altogether; and, debiting the company with the amounts received on account of the annuities, and crediting them with the prices paid for the annuities, with compound interest in each case at the rate of $3\frac{1}{2}$ per cent, the Commissioners claimed from the company in August, 1871, a sum of 3,425*l*. 5*s*., since increased by interest to an amount exceeding 4,000*l*.

The Act contained a power for the Commissioners to correct errors, and it appeared that in a previous case of a similar nature the Commissioners had accepted a repayment on the principle now contended for by the company; but in the correspondence which had taken place and in their information and bill they insisted that the power to correct, rectify and amend contracts for sums given, by the Act, was absolutely discretionary (1).

(1) Section 3 of the Act provided for the payment or transfer of the consideration for the annuity to be purchased. Section 5 provided the declarations to be made by the person purchasing the annuity. Section 16 fixed the price of the annuity, according to certain tables to be approved as therein mentioned. Section 26 enacted that upon the production of such certificate and affidavit as by the Act required, it should be lawful for the officer, and he was thereby required to grant a certificate as therein mentioned, authorising the receipt of the annuity, Section 40 enacted that if any certificate, &c., contained an untrue statement, with intent to obtain an annuity at a higher rate than would be allowed under the provisions of the Act, the price of the annuity, any payments made in respect of it, and a further sum of 500*l*. were to be forfeited to the Crown. Section 45 gave power to the Commissioners to accept evidence not strictly in the form provided—“And also to correct, rectify and amend, any contract for any such annuity, or certificate, or other instrument, in cases wherein any mistake or accidental error shall or may have been made in the execution of this Act, anything in this Act to the contrary thereof in anywise notwithstanding.”

It was stated in the information and bill that it was customary to give notice of an annuitant's death, and to claim an apportioned part of the annuity down to the death, but neither was done in this case. And the first letter of the correspondence on the subject was written on behalf of the Commissioners, in May, 1870.

The Vice-Chancellor made a decree rescinding the contract. The company appealed.

Mr. Dickinson and Mr. H. D. Greene (of the Common Law bar), for the appellants (Mr. Kekewich, with them, waiving his right to address the Court in Mr. Greene's favour).—There is no doubt as to the annuity we intended to purchase. On that we were at one. The only thing is, that, owing to an unfortunate mistake, we paid the wrong price. Even on the principles of general law, therefore, the contract will not be set aside. If the contract was only executory the question whether a misrepresentation was intentional might be unimportant, but on an executed contract fraud must be shewn—

The New Brunswick & Canada Railway and Land Company v. Conybeare, 31 Law J. Rep. (N.S.) Chanc. 297; s. c. 9 H.L. Cas. 711.

But we do not depend here solely on the general law. Section 45 of the Act, giving power to correct mistakes, taken in connection with section 40, directing what is to be done in case of fraud, indicates the principle on which mistakes are to be dealt with, and on the faith of those provisions the public have been induced to buy annuities.

Restitutio in integrum is impossible. We have run the risk, and on that ground the Court would not rescind the contract—

The Western Bank of Scotland v. Adie, 1 H.L. Sc. & div. 145.

At the conclusion of the arguments for the appellants—

JAMES, L.J., asked if the respondents insisted upon compound interest being allowed.

Mr. Hemming (with the *Attorney-General*), for the respondents, said they did not. Simple interest at four per cent. would come to almost the same thing.

LORD JUSTICE JAMES.—In this case I am of opinion that the decree of the Vice-Chancellor, with the variation that has been mentioned as to interest, must be affirmed. No doubt it is an unfortunate case for the Atlas Insurance Company, because I quite feel the truth of what has been said by Mr. Dickinson and his junior, that they have been running the risk all the time, of this contract turning out to be a good one—and it has turned out to be a good one—although it is probably mixed up with a good many that are not good ones among the hundred and odd they paid for. But, at the same time, I think that that is not a thing open to them to allege, having regard to the ground upon which the Attorney-General, on behalf of the Crown, seeks to set aside this contract. The Atlas Insurance Company produced to the Commissioners for the Reduction of the National Debt the representation which they were bound to produce under the Act of Parliament, and which was the very basis of the grant of the annuity which they obtained from these Commissioners. The Commissioners have no authority, except to follow strictly the Act of Parliament and the tables prescribed for them by the Commissioners of the Treasury. They were obliged to require a statement of age and a verification of that age, as the basis and the essence of the contract on which they were proceeding to grant the annuity. The Atlas Assurance Company produced to them, without any fraud, but through some most extraordinary mistake, a statement, a statutory declaration of John Oliver Hanson. It speaks of Thomas Chalk as residing at Kingston, with only this description of him. He is stated to be of the age of sixty-four, to have been born at Barking, and the names of his parents are given, and so on. It appears that all that is an entire mistake. That he was not of the age of sixty-four, but of a much younger age. That he was not born at Barking, and that his parents' names were not the names given there. The Atlas Assurance Company say now that they made that statement because they were misled by somebody whom they had employed to get up information for them as to good lives upon which they

were to buy annuities. It is impossible to allow persons in this Court to escape from the effect of such positive representations or misrepresentations of matters of fact upon the ground that they relied upon the representations made to them by their own servant or agent, or person employed by them for the purpose of getting information for them. If a man makes a statement based upon the information which he gets, and if the information is wrong he is answerable for it, but he has his remedy over—whatever the remedy may be—against the person who has deceived him. There was that positive representation made. The contract was based upon it. They entered into the contract under the Act of Parliament, and the grant being, to my mind, entirely in violation of the Act of Parliament, the grant of the annuity from the first was wrong.

It was said, however, that we ought not to treat it so, but that we ought to treat it as a thing capable of being amended under the 45th section of the Act—that is to say, the Commissioners having the power to amend any mistake under the 45th section of the Act of Parliament, we ought to treat it as if they had so amended it. It was said that the public were induced to enter into these transactions upon the notion that the Commissioners had such power of amendment. I quite agree that it is very likely that the provision was intended to be an assurance to the public that any mere mistake would not be harshly dealt with, that is to say, that in a proper case the Commissioners would amend it. But the public had only to rely for this upon the fact that the Commissioners were a public body, who would be responsible to public opinion, the Legislature and the Lords of the Treasury, for anything harsh or oppressive in what they did. It is not that the Commissioners, instead of being agents of the Government, or agents subordinate to the Lords of the Treasury, are to be subject to this Court sitting as a Court of Appeal from their decision on a matter which they are left by the Act of Parliament to decide. We are not to correct a mistake of theirs, nor is any Court of Law or Equity made a tribunal to

correct any such mistake. The Commissioners for the Reduction of the National Debt are persons entrusted by law with that authority, and if they exercise it wrongly the person aggrieved ought to appeal to the proper authorities and complain of their conduct. There can be no appeal to this Court, nor can this Court exercise its jurisdiction in a matter of law or equity, because this Court thinks that they ought to have taken a more liberal view of the case of the defendant than they have done. It is for them to act, and the defendant may appeal from them as he may be advised. We cannot substitute another contract for the contract so made. We can only set it aside, declare that it was obtained improperly, that it was obtained through misrepresentation, and that being so, the money must be restored on either side. Simple interest only, at the rate of four per cent., will be allowed on both sides, according to the ordinary rule in this Court where accounts are taken in similar cases.

The appeal must be dismissed, and dismissed with costs.

LORD JUSTICE MELLISH.—I am of the same opinion. I entirely agree with the view taken by the Vice-Chancellor and the Lord Justice, that here there was a material misrepresentation of fact on which the contract was obtained. I am disposed myself to go even further than that, and to say it is part of the contract itself and the basis of the contract, that this representation should be true; and it is clearly the same thing as in an ordinary case of a policy of life assurance where certain representations as to the age of the person named and as regards his state of health are made the basis of the contract, and if they are not true the Insurance Office is not bound by the contract. In this case there is no actual written contract or grant at all. There is merely a contract made, which is to be made in pursuance of the Act of Parliament. And when we have looked at the Act of Parliament, it appears to me that the person who obtains the policy—whether on his own life or upon the life of somebody else—is obliged by the Act of Parliament to make a representation to the Commissioners of the age of the life

upon which he wishes to get an annuity, and he is obliged to send in a proper certificate of the baptism or birth, and then the Commissioners are in a particular way to ascertain the price of stock, the three per cents., at the time, and by certain tables, to be approved from time to time by the Lords of the Treasury, they are to calculate the value of the annuity to be granted. They can grant the annuity upon those terms, and upon no other terms; and where, through the misrepresentations of the person who seeks to get an annuity upon the life, it is granted upon different terms, it appears to me that the Commissioners are not bound by that contract, but that they are in this Court entitled to have it rescinded.

Then with reference to what is said as to the 45th section of the Act, I am clearly of opinion that this does not make it compulsory upon the Commissioners to amend any contract in which there has been a mistake, but it only gives them the power to do so if they please. The words are in themselves permissive—that it shall be lawful for them to do it. And although it is not necessary to say whether this is such a case or not, it appears to me that there are many cases where it would be perfectly right in the Commissioners to refuse to amend any such contract. As, for instance, in the case I put to Mr. Dickinson in the course of the argument. If it was found that the misrepresentation as to the age had been an honest mistake at the time it was made, yet if it appeared that the person discovered it some time afterwards and had gone on for some years receiving the annuity without communicating the fact of the mistake to the Commissioners, it appears to me that that would be obviously a ground on which they would be entitled to refuse to make the amendment. That goes very strongly to shew that the 45th section never could have been intended to be compulsory. But then I think there may be cases of extreme negligence on the part of the person who procures the life in not ascertaining the right age, which may very well be a ground for the Commissioners refusing to amend the contract. I am not at all certain that

this may not fairly be said to be a case of that kind. I think at least you might expect that the person who is going to insure, if he really does not know where the man was born for certainty, so that he might know where to go and get the certificate of his birth and baptism, that he would go to the man himself and ask him how old he was and where he was born, so as to be certain that he got the right certificates. At any rate, I am of opinion that the 45th section is not compulsory, but that it is in the discretion of the Commissioners whether they choose to amend the contract or not where there has been a mistake with respect to the age. If they decline to amend the contract, the consequence is that there has been *ab initio* no contract binding upon the Commissioners for the Reduction of the National Debt, and they are entitled not merely to have it set aside, but they are entitled to have an account of what money is due to them calculated upon that basis.

Solicitors—Messrs. Dawes & Son, for appellants;
Messrs. Raven & Bradley, for respondents.

LORDS JUSTICES.
1874.
Feb. 25.

{ *In re* PARAGUASSU STEAM
TRAMROAD COMPANY (LI-
MITED).
FERRAO'S CASE.

Company—Calls on Shares—Payment in Cash—Set-off—Companies Act, 1867, s. 25.

F. was the holder of fifty shares in the company, which had been issued before the Companies Act, 1867, came into operation, and on each of which 14l. was unpaid. In 1868 W. brought an action against the company, which was compromised upon the terms that the company should pay to W. 3,200l. and should credit F. with 700l. in respect of his shares so as to make them fully paid-up shares. The arrangement was carried out and certificates for fully paid-up shares were issued to F. The company was afterwards wound up:—Held, that there had

been payment in full of the amount due upon F.'s shares, and therefore he was not a contributory.

Semble.—The 25th section of the Companies Act, 1867, is not retrospective so as to apply to shares taken before the commencement of the Act.

This was an appeal by the official liquidator of the above company from an order of Vice-Chancellor Bacon (reported *ante*, p. 264), where the material facts are fully stated.

Mr. H. M. Jackson and Mr. Ingle Joyce, appeared in support of the appeal.

Mr. Kay and Mr. Cracknall, for the respondent Captain Ferrao, were not called upon.

LORD JUSTICE JAMES.—The thing is to my mind clear beyond all doubt. It was a case of payment. Webb brings an action against the company, which is settled for 3,900l. to be paid by the company. He agrees with the company that he will take 700l. of this in payments on shares to be credited to a friend. The 700l. was credited to Captain Ferrao, and 700l. was written off the debt, as between the company and Webb. That was a payment. The Vice-Chancellor seems to have assumed that the 25th clause of the Companies Act, 1867, would have applied to this case. As at present advised I do not think I should agree with him, but that point was not argued and need not be decided.

LORD JUSTICE MELLISH.—I am of the same opinion. There was an order taken by consent in the action by Webb against the company, staying the action on payment of 3,900l. by the company. Certain bills of exchange were to be given by the company to Webb, and Ferrao was to be credited with 700l. upon shares in respect of which that amount was unpaid, so as to make the same fully paid-up shares. When the company credited these shares with the 700l., that was equivalent to a payment by the company to Webb. If it became so paid by the company, it was as if 700l. of the amount had been repaid to the company by Webb on account of Ferrao. It was the same thing as if Webb had received in payment

from the company 700*l.* in bank notes, and had handed them back to the company in payment for the amount payable on the shares. I agree with the Lord Justice that, as at present advised, I think the case does not come within the 25th section of the Companies Act, 1867. The appeal must be dismissed with costs to be paid by the official liquidator, leaving him to get his costs over out of the company's estate.

Solicitors—Messrs. Wansey & Bowen, for the official liquidator; Messrs. Whitakers & Woolbert, for Captain Ferrao.

LORDS JUSTICES. } *In re* THE LIMEHOUSE WORKS
1874. } COMPANY (LIMITED).
Jan. 22. }

Practice—Irregular Notice of Appeal—Appeal set down for Hearing—Subsequent Enrolment of Order—Vacating Enrolment—Waiver.

Notice of an appeal motion which was served upon the respondent's solicitors, was irregular by reason of it being neither dated nor signed by the appellants' solicitors, although their names appeared on the back of it. The irregularity having been discovered, the appellants' solicitors applied to the respondent to waive it, but he refused to do so and stated that he would avail himself of every technical objection. The appeal was afterwards set down for hearing, but no proper notice of its having been set down was served on the respondent's solicitors. Before the appeal came on to be heard, the respondent's solicitors enrolled the order appealed from. The appellant moved to have the enrolment vacated:—Held, that the respondent was under the circumstances entitled to avail himself of the irregularity in the notice of motion of appeal and to retain his enrolment.

This was a motion by the official liquidator of the above named company to vacate the enrolment of an order, made by Vice-Chancellor Malins, dismissing an application of the said official liquidator that the respondent Coates might be put

upon the list of contributories to the company.

The order was made on the 11th of December, 1873. On the 24th of December, notice of an appeal motion from it was served upon Coates' solicitors. But such notice was undated and unsigned, although it was endorsed with the names of the official liquidator's solicitors. On the 5th of January, a clerk from the office of the liquidator's solicitors called upon the respondent's solicitor, and asked to be allowed to rectify the omission. But the respondent's solicitor said he had no authority to allow it to be rectified and that he should not be disposed under the circumstances of the case to waive any technical objections. Ultimately he went with the clerk to consult his client Coates upon the matter. Coates stated positively that the objection would not be waived. The appeal motion was then set down for hearing. Subsequently to this some correspondence passed between the respondent's and the appellant's solicitors, relating to copies of the short-hand notes of the Vice-Chancellor's judgment, which at the request of the appellant's solicitors were supplied to them by the respondent's solicitor. Nothing was said in this correspondence about the appeal. On the 10th of January, the order was passed, and it was enrolled on the 12th of January. The official liquidator now moved to vacate the enrolment on the ground that such enrolment, after notice of appeal had been given, was irregular, and that it was a surprise upon him by reason of the respondent's solicitor having by his conduct led him to believe that he had no intention of enrolling the order.

Mr. Glasse and Mr. Robinson, in support of the application, argued that the notice of motion of appeal prevented the enrolment. That notice was sufficient although not signed. The names of the appellant's solicitors appeared on the back of it, and that was equivalent to signature. The statement in *Daniell's Chancery Practice* (5th Ed.), 1440, that a notice of motion must be signed by the solicitors of the party moving was not supported by authority. If there was any irregularity in the notice of motion, the respondent's solicitor had waived it. The appeal mo-

tion was set down before enrolment, and that in itself prevented enrolment of the order. It was not necessary to give the respondent any formal notice that the motion had been set down for hearing.

Mr. Cotton, Mr. Higgins and Mr. Methold, for the respondent.—The notice of motion of appeal was irregular in consequence of not being signed: Cons. Ord. III. rule 10. The appellant had full knowledge that the respondent would take every technical objection. The notice of motion was inoperative, and the respondent was never served with proper notice that the appeal was set down—

Groom v. Stinton, 2 Ph. 384; s. c. 17 Law J. Rep. (N.S.) Chanc. 1.

The enrolment was perfectly regular, and the knowledge that the other party intended to appeal was no ground for vacating it—

Hill v. Curtis, Law Rep. 1 Chanc. 425.

There had been no waiver of any irregularity by the respondent. On the contrary he and his solicitor had always expressed their intention to take advantage of every technical objection.

Mr. Glasse replied.—Cons. Ord. III. rule 10, applied only to pauper cases.

LORD JUSTICE JAMES.—I am of opinion that under the circumstances this motion cannot succeed. Standing by itself the correspondence might have led me to suppose that all objections on the ground of informality had been waived by the respondent. But it appears to me that the force of that inference is destroyed by what had taken place before. The irregularity in the notice of motion had been discovered by both sides. A clerk of the appellant's solicitors had asked that the irregularity might be waived, but that had been refused not only by the respondent's solicitor, but also by the client to whom the solicitor and clerk went together. The client positively stated that nothing whatever could be waived to which objection could be taken. It was therefore known to the appellant's solicitors that the question whether the notice of appeal motion was sufficient would be raised, and therefore the asking and giving of short-hand notes of the judgment could

not have any effect as a waiver of the irregularity. There had been a distinct notice to the appellant that nothing would be waived. It is therefore now open to the respondent to say there never was any notice of an appeal motion given such as is required by the rules of the Court. The appellant could not have supposed there would be any waiver on the part of a person who had told him that every technical objection would be taken, and he cannot be heard to say that he was misled. He might have entered a caveat and thus prevented the enrolment. The respondent is entitled to retain his enrolment, and this motion must be refused with costs.

LORD JUSTICE MELLISH concurred.

Solicitors—Messrs. Wood & Hare, for the official liquidator; Messrs. Bevan & Whitting, for Coates.

BACON, V.C. }
1874. }
April 17. }

CREDLAND v. POTTER.

Registration — West Riding of York Registration Act (2 & 3 Ann, c. 4.)—Priority of Mortgagees—Notice.

In a registered county a duly registered second mortgage will take precedence of an unregistered further charge to the first mortgagees which was prior in date, and this, notwithstanding that the memorial registered of the first mortgage, did not state the amount due under it, and that the second mortgage was given as security for a past debt.

In August, 1871, John Capell Darlow and George Darlow agreed to purchase a freehold property in Rotherham, in the West Riding of Yorkshire, and the day fixed for the completion was the 16th of October following. Before that day arrived John and George Darlow had arranged to borrow from John Wright Potter and Samuel Brown, who were solicitors at Rotherham, 1,100*l.* on mortgage of the property purchased by them. When the day fixed for the completion arrived

the purchasers found that it would not be convenient to them to pay the balance of the purchase-money, which amounted to 363*l.*, for a short time, and Messrs. Potter & Brown advanced this sum to complete the purchase. A conveyance was executed to John and George Darlow, dated the 16th of October, 1871, and they executed a legal mortgage to Messrs. Potter & Brown, dated the 17th of October, to secure the 1,100*l.* On the 30th of October, when the 363*l.* still remained unpaid, Messrs. Potter & Brown took from the purchasers a memorandum of further charge on the property for this amount. The conveyance and the legal mortgage were, on the 16th of November following, registered at Wakefield in pursuance of the Registration Acts for the West Riding of Yorkshire, but the memorials did not in any way refer to the nature of the deed or the amount of the consideration paid. No memorial of the further charge for 363*l.* was registered.

In January, 1872, John and George Darlow were indebted to the plaintiff, a timber merchant at Sheffield, in a sum of 300*l.* The plaintiff required payment of this sum, but agreed to forbear enforcing his rights if the debtors would give him a second mortgage on the property purchased by them at Rotherham as security for the 300*l.* Accordingly on the 31st of January, 1872, John and George Darlow gave to the plaintiff a mortgage of the property, but subject to the mortgage to Potter & Brown. Before completing the mortgage of the 31st of January, the plaintiff's solicitors searched in the registry at Wakefield, but found only three memorials relating to the property in question, namely, one of the deed of the 16th of October, being the conveyance to the mortgagors, one of the 17th of October of their first mortgage to Potter & Brown, and one of the 6th of November, 1871, of a lease of a portion of the property by the mortgagors and first mortgagees.

On the 12th of February, 1872, a memorial was registered of the mortgage of the 31st of January, 1872, and on the 14th of February notice of this mortgage was given by the plaintiff's solicitor to

Messrs. Potter & Brown. On the 15th of February the latter acknowledged the notice, and in doing so stated that their charge upon the property was upwards of 1,500*l.*

Several attempts were made by the plaintiff to obtain an account of the amount due to the first mortgagees but without success. At length the plaintiff filed his bill for an account of the amount due to Potter & Brown in priority to his mortgage, and for an order that upon his paying the amount so found due Messrs. Potter & Brown might be directed to convey the property to him.

The question really in dispute between the parties was whether Messrs. Potter & Brown could add the amount due to them on their memorandum of further charge of the 30th of October, 1871, no memorial of which had been registered, to their former security, or whether the second mortgagees took in priority to this charge.

Mr. Bagshawe and *Mr. Rogers*, for the plaintiff.—The further charge of the 30th of October was void for want of registration—

Wright v. Stansfield, 27 Beav. 8 ; s. c.

28 Law J. Rep. (N.S.) Chanc. 183, has been overruled by

Moore v. Culverhouse, 27 Beav. 639 ; s. c. 29 Law J. Rep. (N.S.) Chanc. 419 ;

Neve v. Pennell, 2 Hem. & M. 170 ; s. c. 33 Law J. Rep. (N.S.) Chanc. 19 ;

In re Wight's Mortgage Trust, 43 Law J. Rep. (N.S.) Chanc. 66 ; s. c. Law Rep. 16 Eq. 41.

We had no actual notice of the further charge. That we had notice of the first mortgage was not sufficient—

Wyatt v. Barwell, 19 Ves. 435 ;

Chadwick v. Turner, 35 Law J. Rep. (N.S.) Chanc. 349 ; s. c. Law Rep. 1 Chanc. 310.

The mortgagees ought to pay our costs for refusing to render an account—

Powell v. Trotter, 1 Dr. & S. 388.

Mr. Kay and *Mr. Henderson*, for the first mortgagees.—The legal mortgage requires registration, but the further charge does not. None of the cases cited shew that it is necessary to register

a mere further charge. Our case is similar to

Wright v. Stansfield (*ubi supra*), and that is a decision in our favour.

The second mortgagees had notice, for having obtained notice of the first mortgage, it was their duty to enquire from the first mortgagees if there was any further charge upon the property. Their not making such enquiry amounted to fraud—

Jones v. Smith, 1 Ha. 43; s. c. 12 Law J. Rep. (N.S.) Chanc. 381; 1 Ph. 244, affirming s. c. 11 Law J. Rep. (N.S.) Chanc. 83.

Notice to the solicitor was notice to the client—

Roland v. Hart, 40 Law J. Rep. (N.S.) Chanc. 701; s. c. Law Rep. 6 Chanc. 678.

Constructive notice was sufficient—

Wormald v. Mailland, 35 Law J. Rep. (N.S.) Chanc. 69.

Had the plaintiff been lending money at the time he would have taken care to make enquiries, but he was anxious to get a security for a past debt, and he therefore purposely abstained from doing so.

Mr. Bush, for the mortgagors.

Mr. Bagshawe, in reply.

BACON, V.C.—This is a case of some nicety, but the facts are, fortunately, not much in dispute. After the mortgage to Messrs. Potter & Brown was executed they agreed to make a further advance, which was to have been repaid to them in a few days. It was not repaid at the time expected, and they therefore then took a further charge upon the property. Now this was a totally separate transaction, and, in my opinion, as much required registration as the original mortgage, but it was not registered. Under these circumstances the plaintiff, having a debt due to him from Darlow, agreed to forbear pressing for payment on condition of Darlow's executing to him a second mortgage of the property in question. Before this second mortgage was taken search was carefully made in the registry but no charge other than the mortgage to Messrs. Potter & Brown was discovered. It is true the amount of this mortgage was not stated in the memorial registered, and

that it is not essential to state it, but, in my opinion, it is right and proper that the amount should be stated. Believing, however, that it was for 1,000*l.*, the plaintiff took the second mortgage; and the question is, whether this second mortgage is to take precedence of the further charge to the first mortgagees. Now, having regard to the cases, and to the well settled law on the subject, I cannot doubt that the deed which is first registered without notice of the other security must come first. The second mortgage must, therefore, take precedence of the further charge, but under the circumstances I shall not give any costs.

Solicitors—Messrs. Singleton & Tattershalls, agents for Messrs. Mellor & Porret, Sheffield, for plaintiff; Mr. J. A. Redhead, agent for Messrs. Potter & Brown, Rotherham, for defendants.

LOARDS JUSTICES. }

1874.

Feb. 25. }

PATCH v. WARD.

Practice—Enrolment of Decree—Cons. Ord. XXIII. rule 28—Expiration of five Years—"Peculiar Circumstances."

A plaintiff after having allowed all but a few weeks of five years from the date of a decree dismissing his bill to elapse, obtained an order to enrol the decree. He was unable to complete the enrolment within the five years by reason of the necessity of reviving the suit in consequence of the death of a defendant of which he had not known when he obtained the order for enrolment. He then applied for liberty to enrol the decree notwithstanding the expiration of the five years. The application was refused.

This was an original motion by the plaintiff Patch that he might be at liberty under the provisions of Cons. Ord. XXIII. rule 28, to enrol the decree in this suit notwithstanding the expiration of five years from the date thereof.

A decree dismissing the plaintiff's bill in this suit was made on the 16th of December, 1867. On the 23rd of November,

1872, the plaintiff obtained *ex parte* the usual order for the enrolment of the decree unless the defendants Ward and Vulliamy should within twenty-eight days after service shew cause against the enrolment. The notice was served on Ward who was a solicitor, and had acted in the suit for Vulliamy. Vulliamy had in fact died some years previously, but the plaintiff was ignorant of that circumstance. Ward died on the 2nd of December, 1873. On the 16th of January, 1874, the order for inrolment was made absolute, Ward's executors having appeared by counsel to oppose it. On proceeding to have the order drawn up, the plaintiff discovered for the first time the fact of Vulliamy's death. He then obtained an order for revivor against the executors of Vulliamy and Ward, and under these circumstances moved that the decree might be enrolled.

Mr. Osborne Morgan and Mr. Cracknall, in support of the motion, contended that there were peculiar circumstances in this case which made it just and expedient to enlarge the time for enrolment.

Mr. Lindley, Mr. Bevir and Mr. Phear, for the respondents, were not called upon.

LORD JUSTICE JAMES said.—The rule in the Consolidated Orders was a very reasonable one. In this case the five years had elapsed, both the defendants were dead, and the Court was asked to say the plaintiff should be allowed to enrol the decree, although he applied for the order only a month before the expiration of the five years when he was unable to serve the order. He would have had no difficulty in reviving the suit within the five years, and the executors of Vulliamy were entitled to consider the matter at an end. There appeared to be no ground for giving to the plaintiff the indulgence asked for, and the motion must be refused with costs.

Solicitors—Mr. E. G. Randall, for plaintiff; Messrs. Tamplin, Tayler & Joseph and Messrs. Frere & Co., for respondents.

LOEDS JUSTICES.

1874.

April 18, 20.

LEECH v. SCHWEDEE.

Light—Grant by Owner of two Tenements—General Words—Covenant for quiet Enjoyment—Extent of Right.

A grant of lights by the general words in a lease or other conveyance, followed by the ordinary covenant by the grantor for the quiet enjoyment of the premises, confers on the grantee, as against the grantor and those claiming under him, a right of no greater extent than the ordinary right to light which is acquired by twenty years' user. A plaintiff, therefore, who claims under such a grant, and who complains of an interference with the access of light to his premises, must, in order to sustain his case, shew that a substantial injury has been or will be done to him.

Decision of the MASTER OF THE ROLLS reversed.

This was an appeal from a decision of the Master of the Rolls. The bill was filed to restrain an alleged obstruction of the plaintiffs' lights by the defendant.

By an indenture, dated the 1st of February, 1866, the Master and Wardens of the Skinners' Company demised to William Haynes, a messuage and premises, known as No. 34, St. Mary Axe, in the City of London, together with (*inter alia*) "all lights, easements and appurtenances whatsoever thereto belonging or in anywise appertaining," to hold the same to Haynes, his executors, administrators and such assigns as should be allowed by the master and wardens for the time being of the Company, for the term of eighty years from the 25th of March, 1865. The lease contained a covenant by the master and wardens that, the stipulation on the lessee's part being duly observed, he, his executors, administrators and such assigns as aforesaid, "shall and may peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises during the said term without any let, suit, trouble, molestation, hindrance or disturbance whatsoever of, from, or by the said master and wardens, their successors and assigns, or any person or per-

sons claiming under or in trust for them or any of them." The buildings existing on the ground at the date of the lease were pulled down by Haynes, and a new warehouse was erected. By an indenture, dated the 30th of August, 1868, Haynes, with the consent of the master and wardens of the company, demised the warehouse and premises to W. Leech, W. H. Dodwell (the plaintiffs) and A. Bedwell, their heirs, administrators and such assigns as by the master and wardens for the time being should be allowed, for twenty-one years, from the 25th of December, 1866. This underlease contained general words similar to those in the lease by the company to Haynes, and a covenant by Haynes for quiet enjoyment by the plaintiffs, in terms similar to the terms of the covenant by the master and wardens in the lease to Haynes. The plaintiffs and Bedwell were partners in trade, and in 1869, Bedwell retired from the firm, and assigned all his interest in the premises to the plaintiffs. The defendant was at the time the bill was filed in occupation of premises adjoining those of the plaintiffs, under an agreement with the Skinners' Company for a lease, which was to be granted to him on the completion of certain buildings. At the time when this agreement was entered into he had notice of the prior lease to Haynes. The bill alleged that the defendant had raised, and was about still further to raise a party wall, which divided his premises from those of the plaintiffs, to such a height as to interfere with the access of light to some of their windows. The Master of the Rolls was of opinion that the case stood in the same position as if the suit had been by Haynes against the company, and that the plaintiffs by virtue of the grant of lights and the company's covenant for quiet enjoyment stood in a better position than if they had been claiming the enjoyment of light by virtue of twenty years' possession; that they were entitled to the enjoyment of the light exactly as it existed at the date of the lease by the company to Haynes, and that, independently of the extent of the interruption, they were entitled to an injunction so as to prevent the breach of the covenant for quiet enjoyment in any degree whatever.

His Honour accordingly decreed a perpetual injunction to restrain the defendant from erecting, and from permitting to remain any wall or other building which should molest, hinder or disturb the plaintiffs in the enjoyment of all their lights belonging or in anywise appertaining to the plaintiffs' warehouse, or any of them. And the defendant was ordered to pay the costs of the suit (1). The defendant appealed.

(1) In the course of his judgment the Master of the Rolls (Sir G. Jessel) said—I think it is not incumbent upon me to decide whether the molestation or disturbance is of so substantial a character, or likely to become of so substantial a character, as to prevent the comfortable enjoyment of the plaintiffs' warehouse, or the proper use of it for the purposes of their business. I think I must decide whether there is any molestation or disturbance, but if I come to the conclusion that there is such molestation or disturbance, then according to the law, as I consider it to be settled by the authorities I shall refer to, I am bound to grant this injunction. [His Honour then reviewed the evidence, and said that he had arrived at the conclusion that there was molestation, hindrance and disturbance of the rights granted to the plaintiffs. His Honour proceeded.] The next question is, what is the law of the Court on that subject? I have been pressed by the defendant's counsel very properly (and not at all at too great a length) with considerations as regards the seriousness of the consequences to him and the public generally if I adopt the view that, without proving so great an extent of damage as would entitle the plaintiffs to damages in an ordinary case of nuisance, an injunction ought to be granted in this case. I am not at liberty to take those considerations into account. No principle can be more sacred than that a man shall be compelled to perform his contract. In all cases where a Court of Equity has jurisdiction to enforce the specific performance of contracts, and persons voluntarily, without any fraud, accident or mistake, enter into contracts, the jurisdiction should be exercised. Again, if it is not a case of distinct specific performance, but that kind of relief which is given where the contract has been substantially performed, viz., by restraining a breach of some covenant in a deed of grant, or lease or other document of title by which, or under which, the possession is changed and now enjoyed, in all those cases the Court does not exactly enforce specific performance, but prevents a breach of the covenant by the party who has entered into the agreement, in aid of the enjoyment and possession granted to the other party. That has been the course universally pursued, from the earlier cases where a farmer was prevented by injunction from taking hay or straw off land when he had covenanted merely that all the hay and straw should be used on the land, to the more recent cases

The Attorney-General (Sir R. Baggallay) and *Mr. W. D. Gardiner*, for the appellant.—An express grant of lights as appurtenant to a house or to land only gives

where persons have been restrained from building on land. The Courts have uniformly adopted the principle that in all these cases an injunction will be granted, so as to make the person who has entered into the contract specifically perform it, and not break the covenant he has entered into, and as was said in *Lumley v. Wagner* (1 De Gex, M. & G. 604), the extent to which that jurisdiction has been exercised is not to be abridged. I should be disposed to go further, if I had the power, and to extend the jurisdiction in cases of specific performance very much beyond what has been the practice of the Court of Chancery. The Courts of Equity have considered that convenience, and not want of justice, has rendered that rule desirable.

Now how does the matter stand on the authorities as to granting injunctions in cases of covenant? It is clearly established by authority that there is sufficient ground for the Court to interfere if there has been a breach of the covenant. It is not for the Court but for the plaintiff to estimate the amount of damage that arises from the injury inflicted upon him. The moment the Court finds there has been a breach of the covenant, that is injury, and the Court has no right to measure it and no right to refuse to the plaintiff the specific performance of his contract, although the remedy is that which I have described. [His Honour then referred to and commented upon *Lumley v. Wagner*, *Tipping v. Eckersley*, *Dickinson v. The Grand Junction Canal Company*, and *Western v. McDermott*, and proceeded.]

In that state of the authorities I think it is plain that, if the plaintiffs have established that they have a grant of all the lights appertaining to the house, and if the defendant is interfering with or obstructing any of the lights, so as to commit a breach of the covenant for quiet enjoyment, they are entitled to the aid of this Court. It was pressed upon me that such a decision would be extremely inconvenient, not only to the defendant in this case, but to persons in general who build houses in rows, and grant leases to persons who purchase one or more of these houses. This Court has nothing to do with that. If persons are so careless or so oblivious of their interests that they choose to enter into contracts which are inconvenient to them, that is no reason why the Court should not at the instance of the other party enforce such a contract. It may be inconvenient and injurious to the Skinners' Company, that, having granted a lease with all the lights, they are not allowed to build on their adjoining land to the extent of obstructing one of those lights, though the use of that one is not necessary, or even perhaps desirable for the tenant of the house to which that privilege is afforded. I have nothing whatever to do with that. I must construe the contract as I find it.

NEW SERIES, 43.—CHANC.

to the grantee a right to the enjoyment of light to the same extent as if he claimed by twenty years' uninterrupted possession—

Kelk v. Pearson, Law Rep. 6 Chanc. 809;

Booth v. Alcock, 42 Law J. Rep. (N.S.) Chanc. 557; s. c. Law Rep. 8 Chanc. 663.

The covenant for quiet enjoyment does not enlarge the grant—

Ingram v. Morecroft, 33 Beav. 49.

Of the cases on which the Master of the Rolls relied, in

Lumley v. Wagner, 1 De Gex, M. & G. 604; 5 De Gex & S. 485; s. c. 21 Law J. Rep. (N.S.) Chanc. 898;

Dickinson v. The Grand Junction Canal Company, 15 Beav. 260;

Western v. McDermott, 35 Beav. 243; s. c. 35 Law J. Rep. (N.S.) Chanc. 190; Law Rep. 1 Eq. 499; s. c. (on app.) 36 Law J. Rep. (N.S.) Chanc. 76; s. c. Law Rep. 2 Chanc. 72,

there was a distinct covenant not to do a particular act, and the Court restrained the breach of the covenant. They do not, therefore, apply to the present case. In

Tipping v. Eckersley, 2 Kay & J. 264,

though there may be some *dicta* in favour of the view of the Master of the Rolls, yet the real ground of the decision was the construction of the words of demise, and it was held that there was material damage proved.

Mr. Southgate and *Mr. Locock Webb*, for the plaintiffs.—We rely upon the express grant of "lights" and the covenant for quiet enjoyment. The words "belonging or appertaining" may mean, not only legally appurtenant, but actually existing at the date of the demise—

Dickinson v. The Grand Junction Canal Company, 7 Exch. Rep. 282; s. c. 21 Law J. Rep. (N.S.) Exch. 241;

Tipping v. Eckersley (*ubi supra*)

and

Watts v. Kelson, 40 Law J. Rep. (N.S.) Chanc. 126; s. c. Law Rep. 6 Chanc. 166.

3 R

MELLISH, L.J.—The Master of the Rolls decided this case on a question of law which is one of very considerable importance, and as we have the misfortune to differ from him on that question, we think it is desirable to give judgment upon that point at once. It is well known that there are two ways by which at present the right to light can ordinarily be acquired. First, it can be acquired by twenty years' user or occupation under the Prescription Act, and secondly, it can be acquired by what is ordinarily called the disposition of the owner of two tenements. It is perfectly well established that if a man owns a house, and also owns property of any other kind adjoining that house, and then either conveys the house in fee simple to another person, or demises the house to another person for a term of years, a right to light unobstructed by anything to be erected on the other property which at the time belonged to the grantor passes to the grantee. I am clearly of opinion, as I said in *Kell v. Pearson* (*ubi supra*), that there is no difference between those two rights. It makes no difference whatever, whether a person has acquired the right to light by twenty years' user, or has acquired it by the disposition of the owner of the two tenements. In either case the extent of the right is exactly the same. If the mode in which the right to light is acquired at law is considered this will be quite clear, because, before the passing of the Prescription Act, almost all rights to light were obtained by a grant expressed or implied. No doubt they might be claimed by prescription, but of course there were very few lights that could practically be claimed by prescription, because, in order to support a right to light by prescription, the light must have existed ever since the time of Richard I. There were, in fact, very few houses which had existed from the time of Richard I., but lights in all other cases were in point of law always considered to be claimed by what was called a lost grant, and if it was necessary to plead the right at law it was pleaded in this way, that a certain person was seised in fee of the dominant tenement, and a certain other person was

seised in fee of the servient tenement, and that, by a grant which had been lost by time or accident, the one granted to the other and his heirs the right to the free access of light to the premises. The Courts of law, on the consideration of the extent of that right to light, had long before the Prescription Act held that it did not entitle the grantee to every ray of light that might happen to come through his windows, but that he could not maintain his action for the obstruction of his light unless he could make out that the comfort of his house was diminished by the deprivation of light, or that he was prevented, if he was an owner of business premises, from carrying on his business in the same manner as he was accustomed to carry it on before.

That being so, in the present case the light is claimed by what is called the disposition of the owner of two tenements. The first question we have to consider is, whether in fact any right greater than the ordinary right is passed by the terms of the deed.

[His Lordship read the words of the grant in the lease by the Skinners' Company, and proceeded—]

Now, I am very clearly of opinion that the use of the word "lights" among the general words in the lease beyond all question means nothing but the ordinary right to light, namely, that well known easement which has been known and which has existed in the law from time immemorial. I think it is unnecessary to decide the question, which may possibly admit of some doubt, whether from the use of the words "belonging or appertaining" the right to the light in this case passes under those words, or whether it passes merely by the grant. The words "belonging or appertaining" would, strictly speaking, apply to rights legally appertaining, which these rights are not, but it may be that, having regard to the situation of these premises which are described as being newly erected, a rather more extensive meaning would be put on the words "belonging or appertaining," and they might be held to include lights usually held and enjoyed. It appears to me unnecessary to decide

that point, because under any circumstances it is clear that the right to light as against the lessors, in respect of any premises which at the date of this deed belonged to them, passes to the lessee, and it is quite clear that no greater right passed, even assuming that the words "lights belonging and appertaining" did include the right to the entrance of light into all the windows then existing in the house over the premises of the lessors, because it is quite clear that the word "lights," when used among the general words in a conveyance, means the ordinary right of light as it is known and limited by the law, and no greater right.

The next question is, does the covenant for quiet enjoyment make any difference? In a Court of law I have no hesitation in saying, without the slightest doubt in the world, that nothing can be clearer than that the covenant for quiet enjoyment in its plain and ordinary terms does not increase or enlarge the rights which were granted by the previous part of the conveyance. Of course it would be possible to insert in any covenant words which would increase that right, which, even if they did not amount to a grant as between the lessor and the lessee, would, by way of covenant, entitle the lessee to greater rights, that is to say, would entitle him to damages at law if the right was violated, and would entitle him to an injunction in equity to enforce that right. For instance, it might be said in a covenant that the lessee should freely enjoy the house with an uninterrupted view from his drawing-room windows over all the existing land of the lessor. If such a provision were inserted no doubt it would give a larger right than had previously been granted, and damages might be recovered at law if the lessor broke the covenant, and a Court of equity would grant an injunction against the lessor if he were intending to break the covenant, and would no doubt also grant an injunction against a person claiming under the lessor, if he took with notice of the covenant. In my opinion the covenant in this case is simply a covenant for quiet enjoyment, and I am clearly of opinion that it does not enlarge the right in any way. It is perfectly true that the lessee

is to enjoy without any suit, let or hindrance, and so forth. But what is he peaceably and quietly to hold and enjoy? The premises. What are the premises? The things previously demised and granted. The covenant does not enlarge what is previously granted, but an additional remedy is given, viz., an action for damages, if the lessee cannot get or is deprived of that which has been previously professed to be granted. Nothing, I apprehend, can be plainer at law (I am speaking merely of the construction of the right at law) than that it would not in the least degree enlarge what was before granted. This being the grant of an easement well known to the law the benefit of it passes with the dominant tenement, and the burthen of it passes with the servient tenement, to every person into whose occupation the dominant and servient tenements respectively come. Therefore the plaintiff in this case, being the occupier of the dominant tenement, could, if his lights were really disturbed, bring an action at law for the disturbance of that right of easement which was so granted, and it would not make the least difference whether the right had been created by twenty years' enjoyment or whether it had been created by grant express or implied; he would have the same remedy in either case.

The question we have to decide now is, has the plaintiff a greater right in equity? I must say it somewhat surprises me to find it supposed that he has any greater right in equity. I always thought that where a right exists at law, and a person comes into equity only because a Court of Equity gives a more convenient remedy than a Court of law (which is the case where a person has a legal right to lights) that there equity followed the law, and the plaintiff had no greater right in equity than at law. In my opinion there is a distinction between this case and the cases referred to by the Master of the Rolls in which there was no grant at law, but the right had merely come into existence by covenant. When a right comes into existence by covenant the burthen does not run at law with the servient tenement, but a Court of equity says that a person who takes the pro-

perty with notice of the covenant shall be compelled to observe it. That is the ordinary case of such a covenant as I before referred to, that a person shall have an uninterrupted view from his drawing-room window, because the law will not allow you to attach what is called an unusual and unknown covenant to property, so that a man who buys the property in the market, without the least knowledge that it is subject to any such burthen, would find that some previous owner had professed to grant a thing unknown to the law, such as an obligation not to obstruct the view from the windows of another person's house. In such a case as that, though the man who makes the covenant is liable on it, yet a person claiming under him is not liable at all at law, but a Court of Equity says, if you have taken the property with notice of that contract it is contrary to equity that you should violate it. But in the case of a grant of a well known easement such as a right to light, or a water-course, or a right of way, or any of the numerous easements which are well known to the law, when the easement is once validly created the right passes at law, and the owner and occupier of the dominant tenement may maintain an action against the occupier of the servient tenement if the right is interfered with, and in all such cases the rule in equity ought to follow that at law. If the legal right is not broken, or if such damage has not been occasioned as would entitle an action to be maintained at law, then in my opinion no relief ought to be given in this Court. The only ground on which there could be supposed to be any difference would be this, that it has, I think, been thrown out on some occasion that an action might be maintainable at law, and yet that there would not be damage sufficient to justify this Court in granting an injunction.

Then possibly it might be said (though I doubt whether it ought to be said) that the covenant for quiet enjoyment would be a reason why this Court should grant an injunction when less damage has been occasioned than would have justified an injunction in a case where there was no such covenant, but the right had

been merely gained by twenty years' user. Practically, though they are described in somewhat different words, in my opinion there is at this moment no difference in respect to light between the amount of damage which would entitle a person to maintain an action at law, and that which would entitle him to file a bill in equity. The circumstance that all cases of interference with light are brought to this Court seems tolerably good evidence that the world at large does not consider that there is practically a better chance of succeeding if the right is tried before a Judge and jury than if it is decided in this Court. I am most unwilling to make a difference between law and equity when I do not find one existing.

Therefore, in my opinion, in this case the plaintiff has only the ordinary right to light, and it does not make the slightest difference whether the right has been acquired by twenty years' user, or whether it has been acquired, as here, by the disposition of the owner of two tenements. I think this case must be tried in the ordinary way in which every case is tried where a person alleges that he has a right to the access of light, and that that right has been disturbed. I think not only that this is the law, but that it is manifestly for the convenience of society that this should be the rule. Nothing could be more inconvenient than that there should be two rights, one more extensive than the other, according as it happened how or in what way the right had been acquired, for whenever premises come into the occupation of the same owner, of course the right to lights is gone by reason of the servient and the dominant tenements belonging to the same owner, and then if they come to be separated again, the right again arises by what is called the disposition of the owner of the two tenements. I believe that whenever a thing of that kind takes place, whether it is by means of a lease or a conveyance, there is always, in the common and ordinary practice of conveyancers, a covenant for quiet enjoyment. I cannot help thinking that it would be most mischievous if it was held that a person who claims a right to light by express or

implied grant under a conveyance has a greater right than a person who obtains his right to light by a twenty years' user. Therefore, I cannot agree with the ground upon which the Master of the Rolls has decided this case, and I am of opinion that the plaintiff has the ordinary right to light and no more.

JAMES, L.J.—I am of the same opinion. It was to me a very startling novelty to find that the case was supposed to turn upon the covenant for quiet enjoyment. The covenant for quiet enjoyment is in the ordinary form, the form which has been in use for centuries, and in hundreds of thousands, if not millions, of instruments of all kinds. I certainly never understood that it was the object or effect of a covenant for quiet enjoyment to enlarge the rights of the grantee, or to increase the liabilities of the grantor. The covenant is simply a covenant that the grantee shall have that which has been purported to be granted to him either expressly or by implication. I quite agree with the Lord Justice in saying that the fact that there was a covenant for quiet enjoyment in this case ought to be entirely put out of the question. I quite agree also that it would be a source of infinite litigation, mischief and injustice if every landlord in this country was supposed in every lease of a dwelling-house or other property to be giving by the general words, or by a covenant of general assurance, to the lessee or grantee any right greater than he would have by the ordinary rule of law as against a third person, always of course excepting the distinction that the twenty years' enjoyment is wanted in the one case and not in the other. As I understand the terms of the grant, my strong opinion would be, if the grant is construed strictly according to its legal meaning, that the grant of lights is the grant of lights over another man's property, that it is really a grant of that which had in law an existence as an easement over another man's property, at the time when the grant was made. There was the grant of the property, and there was the grant of this thing belonging to it, and which appertained to it in respect of some other person's estate. I think, however, that that is wholly imma-

terial, because to my mind the grant of those rights as there expressed only deals with that same thing (whichever way it is construed) which has been given by the grant of the house itself, or the conveyance of the house to the lessee. Therefore there would be a reason for not giving more than the actual legal meaning to the words of the conveyance of the property, which, as between the owner and the grantee of the property, would give him *de facto* the enjoyment of everything which could be enjoyed in the nature of an easement against a third person. I quite agree with the Lord Justice that the right to lights means the very same thing as is expressed in the Act of Parliament by the words "access and use of light to and for every dwelling-house, workshop or other building." If the words in this grant had been "together with the access and use of light to and for the said dwelling-house to the existing windows," it would have had exactly the same effect as the word lights here, and those words in the deed would have the same effect as the words in the Act, and the supposed words in a lost grant, as it is put in the old cases.

I quite agree with the Lord Justice that this question is to be tried on exactly the same principles as if it were a suit against an adjoining landowner, on the assumption that the lights were of sufficient antiquity, which is the only difference arising from the fact that there is a grant by the owner of the adjoining land. Therefore the question will now be put in train for further inquiry, and for further argument as to costs in case the parties do not agree (2).

Solicitors—Messrs. Travers, Smith & Co., for appellant; Messrs. Lumley & Lumley, for plaintiffs.

(2) The hearing was then adjourned in order that, if the parties could not come to an agreement, an architect or surveyor, to be appointed by the Court, might view the premises and make a report to the Court, as to the effect produced by the defendant's buildings, and the probable effect when the buildings should be completed.

JESSEL, M.R. }
1873.
Dec. 13.

SACKVILLE v. SMYTH.

Mortgage—Locke King's Act and Amendment Act (17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69)—Direction for Payment of Debts—Specific Devise—Charge on other Real Estate for Payment of Debts.

A testator devised his mansion house and other real estate (which were subject to a mortgage) to trustees, upon trust as to the mansion house to permit his widow to reside in it for her life, and as to the residue upon trust for certain persons in tail. He gave the trustees power to sell all except the mansion house, and out of the proceeds discharge "incumbrances," he gave his residuary personal estate to trustees upon trust to pay "debts" and legacies, and to pay the surplus, if any, to his brother, and declared that if the residuary personalty was not sufficient for payment of debts and legacies, the same should be charged on the real estate other than the mansion house:—Held, that the mansion house was not to be exonerated from the mortgage out of the personal estate.

Brownson v. Lawrance (37 Law J. Rep. (N.S.) Chanc. 351) *questioned*.

William Smyth by will, dated the 23rd day of June, 1864, gave and devised his mansion at Little Houghton, wherein he then resided, with the garden, coachhouse, stables and outbuildings thereto belonging, and also all his messuages, farms, lands, hereditaments and other real estate whatsoever and wheresoever situated in the said county of Northampton, or elsewhere, of, to or in which at the time of his decease he should be beneficially seised, entitled or interested either in possession or expectancy, and at law or in equity, or of which he might then have power to dispose with their appurtenances, unto and to the use of Sackville George Stopford Sackville and David Watts Russell (the plaintiffs), their heirs and assigns for ever, as to his mansion and the garden, coachhouse, stables and outbuildings thereto belonging, upon trust to permit and suffer his wife, Lucy Charlotte Smyth, during her life, if she should so long continue unmarried, to reside in,

occupy and enjoy the same, but not to let or demise the same to any person or persons whomsoever; and as to his said mansion, garden, coachhouse, stables and outbuildings, subject to the trusts thereinbefore declared thereof, for the benefit of his said wife, and as to all other his messuages, farms, lands, hereditaments and real estate, from and immediately after his decease, upon trust to receive and take the rents and profits thereof and with and out of the same to pay and discharge a jointure or yearly rent-charge of 400*l.* payable to his stepmother, Anne Smyth, during her life, and also the jointure or yearly rent-charge of 500*l.* which under their marriage settlement would upon his decease become payable to his said wife during her life, and the costs and expenses of insuring and keeping insured his said mansion and the buildings thereto belonging from loss or damage by fire, for such sum or sums of money as his said trustees or trustee should think proper, and also the costs and expenses of repairing and keeping in repair his said mansion and all other the messuages and buildings upon his estates, and also pay certain annuities, and then hold the real estate upon trust for his first and other sons in tail, in default of issue for his nephew, Christopher Smyth, for life, with remainder to his first and other sons in tail. The will contained a power to sell the real estate, except the mansion house and gardens, and to apply the proceeds in discharge of "incumbrances."

The testator, after giving certain legacies and bequests, gave the residuary personal estate to the trustees upon trusts to convert and out of the proceeds and his money, "to pay and discharge all his just debts and funeral and testamentary expenses" and legacies, and to pay the surplus, if any, to his brother, Christopher Smyth.

And the testator by his said will provided that, in case his said general residuary personal estate should be insufficient to pay and discharge his debts and funeral and testamentary expenses, and the pecuniary legacies thereinbefore given, then and in such case the testator thereby charged all his real estate (except his mansion and the garden, coachhouse,

stables and outbuildings thereto belonging) with the payment of such of the same debts, expenses and legacies as his said general residuary personal estate should be insufficient to pay and discharge.

At the date of the testator's will the testator's mansion house at Little Houghton and all the adjoining estates were subject to three mortgages for 8,000*l.*, 2,000*l.* and 2,000*l.* respectively.

By a mortgage dated the 29th of May, 1865, the mansion house, grounds and part of the adjoining estate were mortgaged to secure the sum of 20,000*l.*, and the previous mortgages were paid off with part of the 20,000*l.* then borrowed.

The testator died on the 23rd of March, 1872, and the trustees filed a bill praying as follows—

1. That it may be declared, whether under the Act 17 & 18 Vict. c. 113 and the Acts amending the same, the lands and hereditaments comprised in the said mortgage security, dated the 29th day of May, 1865, are, as between the persons claiming through or under the "testator primarily liable to the payment of the said mortgage debt of 20,000*l.* and interest, or whether, as between such persons, the personal estate of the testator not specifically bequeathed and not applied or applicable in payment of the testator's funeral and testamentary expenses and debts (other than the said mortgage debt), ought to be applied by the plaintiff so far as the same will extend in reduction of the said mortgage debt and interest in exoneration of the said devised estates and hereditaments."

† *Mr. Fry* and *Mr. Chapman Barber*, for the plaintiff.

Sir B. Bagge, for Christopher Smyth, the testator's brother.

Mr. Southgate and *Mr. Borrett*, for the testator's widow.—There is clear indication in the will that the testator's widow was to hold the property as a residence, and that it was to be free from the debts. She is to reside in it, but not to let it. The trustees have power to insure and repair. All the rest of the property may be sold, and the proceeds applied in discharge of the "incumbrances," but the mansion house is expressly excepted from the power of sale. This, with the

express direction for payment of debts out of the residuary personalty, is sufficient to shew an intention to exonerate the mansion house.

[THE MASTER OF THE ROLLS.—The mortgages are previously referred to as incumbrances as distinguished from debts.]

Then here, as in

Brownson v. Lawrance, 37 Law J.

Rep. (N.S.) Chanc. 351; s. c. Law

Rep. 6 Eq. 1,

the testator has specifically devised the mansion house, which was in that case held sufficient indication of a contrary intention.

Mr. Whitehead, for Christopher Smyth, the nephew.

THE MASTER OF THE ROLLS said that he could not find in the will any indication of a contrary intention within the meaning of the Act; he did not agree with the decision in *Brownson v. Lawrance* (*ubi supra*), that the mere "fact of the testator having specifically devised part of the mortgaged estate, and left the other part to pass by the general residuary gift" was sufficient to shew an intention to exonerate the specifically devised property, and that he should hold that the mortgaged hereditaments were not to be exonerated from the mortgage.

Solicitors—Messrs. Markby, Wilde & Burra, for plaintiff and for Mr. Smyth; Mr. G. H. Fisher, for other defendants.

JESSEL, M.R. }
1874. } HOWARD v. THE EARL OF
Jan. 13, 14, 15. } SHREWSBURY.

Ejectment Bill—Infant—Recovery of Land—Legal Title—Equitable Title—Construction—Pleading—Private Act of Parliament.

An infant may file a bill in equity to recover land under an equitable title, whether he has been in possession himself or not. Crowther v. Crowther [23 Beav. 305;

s. c. 26 Law J. Rep. (N.S.) Chanc. 702 (1857)] dissented from.

An infant filed a bill claiming real estate under an equitable title, it was held at the hearing that on the construction of the documents he had a legal title, but the Court made a decree without requiring any amendment.

A private Act of Parliament vesting lands in trustees on trust to sell, proceeding on the supposition that the lands are comprised in a settlement, does not bring the lands within that settlement if they really were not in it previously.

This was a suit arising out of the well-known Parliamentary settlement of the Shrewsbury estates, which were permanently entailed on the Earls of Shrewsbury by the Act 6 Geo. 1. c. 29, and respecting which two subsidiary Acts, namely, the 43 Geo. 3. c. 40, and 6 & 7 Vict. c. 28, were afterwards passed, vesting portions of the settled estates in trustees on trust to sell them and purchase other lands. Between the passing of these two subsidiary Acts, one of the Earls of Shrewsbury attempted to bring very valuable estates of his own into the Parliamentary settlement, under the colour of a sale of them at a gross undervalue to the trustees of the first Act; but this transaction was afterwards set aside by the Court of Chancery. See—

Howard v. Earl of Shrewsbury, 36 Law J. Rep. (N.S.) Chanc. 283; on appeal, ditto 908; s. c. Law Rep. 3 Eq. 218, 2 Chanc. 760.

The case made by the present bill was that each of the subsidiary Acts included by inadvertence some small parcels of lands which were not within the Parliamentary settlement, but were the private property of the persons who were Earls of Shrewsbury at the respective times at which the Acts were passed; and that the second subsidiary Act included also about eleven acres of land which were not within the Parliamentary settlement, but were comprised in the sale which had been set aside.

The bill charged that the equitable interest in these lands devolved as if the Acts had not been passed, and was therefore vested in the plaintiffs, to whom Earl Bertram, who died in 1856, after barring

all estates tail he was capable of barring, had devised all his land. The defendants to the suit were the present Earl of Shrewsbury, who was in possession of the lands in question, and the trustees of the two Acts of Parliament. In the course of the argument, the Court expressed its opinion that some of the lands, the private property of the Earl of Shrewsbury, in the 43rd Geo. 3, were not included at all in the Act of that year, so that the legal estate in them, as well as the beneficial interest, devolved on the plaintiffs. It appeared that the plaintiffs were minors.

All the lands in question still remained in specie.

The principal point of law argued was whether the plaintiffs could recover in the present suit the lands of which the Court considered they were seised at law, and the back rents of the same lands.

Sir R. Baggallay, *Mr. Southgate*, and *Mr. Ingle Joyce*, appeared for the plaintiffs.

Mr. Joshua Williams, *Mr. Fry*, and *Mr. Kekewich* for the defendants.

Mr. Fischer and *Mr. Agnew* for the trustees.

The following authorities were cited and commented on—

A. On the plaintiffs' part, to shew that the private Acts of Parliament did not affect the equitable rights in the lands;

Jackson v. Innes, 1 Bligh, 104 (House of Lords, 1819),

where it was laid down that on a mortgage the equity of redemption follows the prior uses, unless an intention to change them and make a new settlement be clearly manifested;

McKenzie v. Stuart, 5 Cruise's Digest 23 (House of Lords, 1754),

where a private Act of Parliament recited that certain debts were due, and authorized a sale of estates to pay them, and the remaindermen were afterwards allowed to shew that some of the debts were fictitious, being got up by the tenant for life of the estates;

Chapman v. Brown, 3 Bro. P.C. 269; s. c. 3 Burrow 1626 (n) (K.B. 1765),

where a private Act of Parliament recited that one was tenant for life of certain estates, and it was nevertheless held that he was tenant in tail.

B. On the defendant's part to shew that the private Acts did affect the equitable rights in the lands ;

Bullock v. Fladgate, 1 Ves. & B. 471 (1813),

where a private Act of Parliament vesting estates in trustees was held to have the effect of taking a legal estate out of trustees of a prior settlement ;

The Edinburgh Railway Company v. Wanchope, 8 Cl. & F. 710 (House of Lords, 1842),

where it was held that a party interested in the subject matter of a private Act of Parliament will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him ;

Earl of Shrewsbury v. Hope Scott, 6 Com. B. Rep. N.S. 1 ; s. c. 29 Law J. Rep. (N.S.) C.P. 34 (1859),

the case in which it was decided that the restriction on alienation of the Shrewsbury estates was not abolished by the Acts removing the disabilities of Roman Catholics ; and in which it was also held that after a private Act of Parliament had been in force for a long time it was not open to any parties to attempt to shew that the proper parties did not concur in it at the time of its passing.

C. On the defendant's part as to whether an infant could file a bill in equity under the circumstances here existing, to recover land under a legal title ;

Crowther v. Crowther (*ubi supra*),

where it was held that the rule that an infant can file an ejectment bill did not apply where the infant had never been in possession personally, or by his guardian or an agent, and the estate had been held by a title adverse to the infant ;

Roberdeau v. Rous, 1 Atk. 543 (Lord Hardwicke, 1738),

where the Lord Chancellor's judgment contained conflicting dicta, but the decision was sustainable on the ground that it was a partition suit ;

Bloomfield v. Eyre, 8 Beav. 250 ; s. c. 14 Law J. Rep. (N.S.) Chanc. 261 (1845),

where it is stated that an infant may file a bill against one who enters on his estates during his minority ;

Morgan v. Morgan, 1 Atk. 488 (1737),

NEW SERIES, 43.—CHANC.

where it was held that where any person enters upon an infant's estate the Court will treat him as guardian, and decree an account against him ;

Cary v. Bertie, 2 Vern. 333 (1696),

where the doctrine is stated that an infant may file a bill against a stranger who enters and receives the rents of his estates ;

Thomas v. Thomas, 2 Ir. Eq. 109 (1839),

where it appeared that an infant filing a bill for a receiver of personal estate, asked leave to bring an ejectment for real estate, and sought to restrain the defendant from setting up a legal estate outstanding in a mortgagee.

D. On the defendant's part to shew that the plaintiffs could not recover the land on a legal title, when the bill alleged an equitable one ;

Lord Darnley v. The London, Chatham and Dover Railway Company, 1 De Gex, J. & S. 204 ; s. c. 33 Law J. Rep. (N.S.) Chanc. 9 (1862),

where it appeared on the hearing that the plaintiff was not entitled to the relief prayed, on the ground of contract stated in the bill, but that he was entitled to it on general law, and the Court refused to grant the relief, but gave him leave to amend the bill ;

Wheeler v. Horne, Willes 208 (1740),

where one tenant in common having a right to an action for an account against another under the statute 4 & 5 Anne, c. 16, brought an action against him as his bailiff, without setting out that he was tenant in common with him ; and it was held that he must be nonsuited in such an action.

THE MASTER OF THE ROLLS held upon the construction of the two subsidiary Acts of Parliament that the beneficial interest in the lands comprised in them devolved as if they had not been passed, and that the plaintiffs were consequently entitled in equity to such of the specified lands as were comprised in them. He also held that on the proper construction of the first of the two Acts the lands which the private property of the Earl of Shrewsbury at the time did not pass by it at all, so that the legal estate in them was vested in the plaintiffs. The plaintiffs, however, were

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entitled to the relief prayed in respect of these lands also, for a bill in equity might be filed by an infant to recover land under a legal title. That was established by many early cases, and though there was a recent decision to the contrary, *Crowther v. Crowther* (*ubi supra*), the earlier authorities were not cited in that case, and it was in fact an erroneous decision. The law was laid down correctly by *Wyllie v. Ellice*, 6 Hare 505 (1848), and the authorities cited in *Boddy v. Lefevre*, 1 Hare 602 (n.) (1842).

The plaintiffs were therefore entitled to the decree they asked for.

Solicitors—Messrs. Currie & Williams, for plaintiffs; Messrs. Parkin and Pagden, for defendants and the trustee.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} PRESCOTT v. BARKER.
JAMES, L.J.	
MELLISH, L.J.	
1874.	
Feb. 19.	

Will—Construction—Wills Act (1 Vict. c. 26), s. 26—Devise of Lands—Leaseholds—Contrary Intention—Strict Settlement.

The object of the 26th section of the Wills Act (1 Vict. c. 26) was to abrogate a merely technical rule tending in many cases to defeat the intention of a testator using language in a natural sense, and not to establish instead of that another technical rule, which in particular cases might have a like effect in a contrary direction. The section merely shifts the onus probandi in accordance with the natural prima facie use of language, and throws it on those who deny that in a will the word "lands" is meant to include customary copyhold and leasehold estates.

The effect of limitations in strict settlement upon such question of construction considered.

George Barker, by his will dated the 21st of January, 1861, devised his man-

sion-house at Stanlake, Berks, to his wife for life, and subject thereto, he gave and devised the same and all other his messuages, lands and hereditaments in the county of Berks, and also all his lands and hereditaments in the parish of Padbury or elsewhere in the county of Bucks, and all his messuages, lands and hereditaments in the county of Middlesex, and all other lands and hereditaments, if any, wheresoever situated and being in England, belonging to him at his death, to the use of his eldest son, George William Barker, for life, with remainder to his first and other sons successively and daughters in strict settlement, the issue to be born in the lifetime of the testator taking only life estates, with remainder to his second son, Alfred Gresley Barker, for his life, with like remainders to his first and other sons successively and daughters in strict settlement, with remainder to the testator's daughter, Emma Blanche Barker, for her life, with similar remainders in strict settlement, with remainder to the testator's son, Charles Henry Barker, for his life, with similar remainders over, and with ultimate remainder to the use of the testator's own right heirs for ever.

The will contained a power enabling tenants for life to limit jointures in favour of their respective wives and husbands, to be secured by a term of years, and a proviso that if any person entitled to the possession of the premises as tenant for life or tenant in tail male or in tail, should be under the age of twenty-one years, the trustees should enter into the possession or receipt of the rents and profits thereof, and after paying the expenses and applying a sufficient sum for maintenance, should invest and accumulate the surplus and the resulting income thereof during the minority of such tenant for life or tenant in tail male or in tail by purchase, and stand possessed of the accumulated fund upon trust, if such tenant for life or tenant in tail male or in tail by purchase should attain the age of twenty-one years, or die under that age, leaving issue entitled or inheritable under the will, to pay or transfer the same to such tenant for life or tenant in tail male or in tail,

his or her executors or administrators. But if such tenant for life or tenant in tail male or in tail by purchase should die under the age of twenty-one years, without leaving issue entitled or inheritable under the will, then upon trust to lay out the accumulated fund in the purchase of lands, tenements and hereditaments of freehold tenure for an estate in fee simple, to be settled and assured to the like uses as were thereby declared concerning the hereditaments thereinbefore devised in strict settlement.

The will contained the usual power of sale and exchange; with a direction to invest the proceeds of any sale in the purchase of other manors, lands or hereditaments in England or Wales for an estate of inheritance in fee simple, or of lands of a leasehold or copyhold or customary tenure convenient to be held therewith, or with any hereditaments for the time being subject to the existing uses or trusts of the will; such of the manors, &c., so to be purchased or taken in exchange as should be freehold of inheritance, to be settled to the same uses, &c., as the hereditaments sold or exchanged away would, if the same had not been sold or exchanged away, have stood settled to and such of the said manors, &c., so to be purchased or taken in exchange as should be of leasehold, copyhold or customary tenure, to be settled upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisos and declarations as should or might correspond with and be similar to the uses, &c., upon, for, under and subject to which the hereditaments sold or exchanged away would, if not so sold or exchanged away, have stood settled and assured, or as near thereto as the different tenure and quality of the premises and the rules of law and equity would admit; but so that if any of the lands purchased or taken in exchange should be held by a lease for years, the same should not vest absolutely in any person thereby made tenant in tail male or in tail by purchase, who should not attain the age of twenty-one years; but on his or her death under that age should go, devolve and remain in the same manner

as if they had been freeholds of inheritance, and had been settled accordingly.

The testator also bequeathed his pictures, prints, books, plate, glass, china, ornamental and other clocks, articles of linen, household goods, furniture and effects whatever, which at his decease should be in or about his said mansion house at Stanlake, to the trustees, in trust to permit the same to go along with, and be used and enjoyed, so far as the rules of law and equity would permit, by the person or persons who should for the time being be in possession or entitled to the receipt of the rents and profits of the said mansion house, yet so that the same should not vest absolutely in any person thereby made tenant in tail male or in tale by purchase, unless such person should attain the age of twenty-one years, but on the decease of any such person should go, devolve and remain in the same manner as if they had been freehold of inheritance, and had been included in the devise in strict settlement. And he gave and bequeathed all the money, securities for money, goods, chattels and personal estate, of or to which he was or at his death should be entitled, either at law or in equity, or of which he had or at his death should have power to dispose by will, to his trustees, upon trust, at their discretion, either to permit the same or any part thereof to remain in its actual state of investment, so long as they should think fit, or to convert the same into money, and to invest such money as therein mentioned, and, subject to the payment of an annuity and to a trust for accumulating 1,500*l.* a year for twenty years after his decease, to stand possessed thereof, and of the accumulated fund, upon such trusts as should correspond with and be similar to the uses, &c., thereinbefore declared concerning the hereditaments devised in strict settlement, so nevertheless that the said residuary estate, accumulations and premises should not vest absolutely in any tenant in tail male or in tail by purchase, unless such person should attain the age of twenty-one years, but on the decease of any such person should go, devolve and remain in the same manner as if they

had been freeholds of inheritance, and had been included in the devise in strict settlement.

The testator died on the 16th of November, 1868, seised of considerable freehold estates, and also possessed of leaseholds for years at Paddington, in the county of Middlesex.

George William Barker, the eldest son of the testator, died in 1869, a bachelor.

Alfred Gresley Barker, the second son, had three children, two of whom were born in the lifetime of the testator, and one after his death.

Under these circumstances the question arose whether the leaseholds at Paddington passed under the residuary bequest or were included in the devise of messuages, lands and hereditaments by virtue of the 26th section of the Wills Act (1 Vict. c. 26), and a Special Case, in which the trustees were plaintiffs, was stated for the opinion of the Court. If it were held that the leaseholds passed under the devise of messuages, lands and hereditaments, the effect would be that they would belong absolutely to the first tenant in tail, whether he attained the age of twenty-one or not; but if otherwise, they would have to be dealt with under the residuary bequest of personalty.

Vice-Chancellor Malins held that the leaseholds passed under the residuary bequest, and not under the devise of land, and from this decision Alfred Gresley Barker, and his two children born in the testator's lifetime, appealed.

Mr. Bristowe and *Mr. Cust*, for the appellants.—The Wills Act (1 Vict. c. 26), s. 26, enacts that “a devise of the land of the testator or of the land of the testator in any place, or in the occupation of any person, mentioned in his will or otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates or any of them to which such description shall extend, as the case may be, as well as free-

hold estates, unless a contrary intention shall appear by the will.” No such contrary intention appears by the will in this case, which is governed by

Wilson v. Eden, 11 Beav. 237; s. c. 17 Law J. Rep. (N.S.) Chanc. 459; s. c. 5 Exch. Rep. 752; s. c. 20 Law J. Rep. (N.S.) Exch. 73; 18 Q.B. Rep. 474; 21 Law J. Rep. (N.S.) Q.B. 385; 14 Beav. 317; s. c. 16 ib. 115 (reversing 11 Beav. 237);

Reeves v. Baker, 18 Beav. 372; s. c. 23 Law J. Rep. (N.S.) Chanc. 599.

They also referred to

Stone v. Greening, 13 Sim. 390.

Mr. Cotton and *Mr. Tucker*, who appeared for the child of A. G. Barker, born after the death of the testator, were not called upon.

Mr. Whitehead and *Mr. Bryce* appeared for the trustees.

THE LORD CHANCELLOR.—We are of opinion that the Vice-Chancellor's judgment and decision in this case are clearly right.

The argument of the appellants is founded on the 26th section of the Wills Act, but, as we understand it, the object of that section was to abrogate a merely technical rule tending in many cases to defeat the intention of testators using language in a natural sense, and not to establish, instead of that, another technical rule which in particular cases might have a like effect in the contrary direction. The intention is to be regarded, and really all which that section does that is material for the present purpose is, in conformity with the natural *prima facie* use of language, to alter the *onus probandi*, and to throw it on persons who deny that in a will “lands” was meant to include leasehold estates in land. To that extent, of course, the statute operates in the appellants' favour, because the word “lands” being found in the part of the will under which the appellants claim, the effect of the statute is to throw the *onus probandi* on the other side, that in those parts of the will the word “lands” does not include the leaseholds in question. But when that *onus probandi* is thrown on the other side,

all that they have to do is to shew to the Court from the whole will sufficient grounds to satisfy a reasonable man that the testator did not intend by the word "lands" to pass the leasehold estate. So the rule is stated by the Court of Queen's Bench in the case of *Wilson v. Eden* (*ubi supra*), that in acting under that section the Court is not to look to any technicalities, but to collect the intention from the whole will—a sound maxim in all cases. I was reminded by the nature of the argument of a somewhat parallel, although converse, case, and not depending on the statute. The case is *Coard v. Holderness* (1), where a testator gave "all his estate, effects and property whatsoever and wheresoever which he was or might be possessed of or entitled to upon trust for his children," plainly throwing on the heir-at-law the *onus probandi* to shew that the real estate did not pass by that. But that *onus probandi* in the case of *Coard v. Holderness* (*ubi supra*) was held to be satisfied, not of course by the same detail of proofs as we have here, for the indications of one will are not indications of another will, but by a process similar in principle to that which the Vice-Chancellor has applied, and which we apply, to the present will, that is, by looking at every part of the following devise and seeing whether you would or would not by applying it, as *prima facie* it ought to have been applied, to real estates, be defeating and departing from the intention manifestly indicated by the expressions which occur from time to time in the clauses which related to that devise. The Master of the Rolls, in that case, as to the principle on which he investigated it, which I think is equally applicable here, said this—"I am of opinion that the burden of proof is thrown upon the heir-at-law to shew that these words are, according to the settled rules of construction, to be cut down so as to include personal estate only. But throwing that burden upon the heir-at-law, I think the rest of the will does justify the conclusion that personal estate alone passes. The view I take of this case is this: that these

words are to be construed with due regard to the general scope and object of the testator, and that for this purpose the whole will must be looked at together." So looking at the present will, the first thing which occurs is the fact which, and which alone is common to the present case and *Wilson v. Eden* (*ubi supra*), that here the gift in which the appellants' counsel seek to include the leasehold estates is a gift to uses in strict settlement, which in their entirety and integrity cannot be applied to leasehold estates, but must more or less fail, that is, fail from the time at which the first tenant in tail is reached. There they must stop by the irresistible operation of law as to the leasehold estates, while they would go on as to the freeholds. The whole intention, therefore, apparently indicated by such a settlement, is capable of taking effect as to the freehold estates, but is not capable of taking effect as to the leasehold estates. Lord Langdale appears to have thought in *Wilson v. Eden* (*ubi supra*) that that alone was a sufficient ground for holding that the intention could not be to include leasehold estates, and Mr. Cust appears to have felt that there was considerable force in Lord Langdale's view, for he speaks of the Judge as having overcome that difficulty, which was like swallowing a camel, to which all the other difficulties in this will are in comparison but as gnats.

I think Lord Langdale, who was an eminent Judge, had at least such reason for his opinion as this—that a construction which cannot take effect equally as to all the subjects of the gift when they are blended together, is probably and *prima facie* one which had not presented itself as involving those differences as to the different subjects of the gift to the mind of the testator; but the Courts of law, and eventually this Court in *Wilson v. Eden* (*ubi supra*), came to the conclusion that that standing alone was not sufficient, and the argument now seems to be that, because it is not sufficient standing alone, it is to have no weight at all, even if it be not a weight in the contrary direction, when accompanied by various other indications in the context of the

(1) 20 Beav. 147; s. c. 24 Law J. Rep. (N.S.) Chanc. 388.

will which support that which might *prima facie* perhaps have been inferred (if anything was to be inferred) from that kind of disposition standing alone. I am not very much surprised that the Courts of law should have come to that conclusion. It is not at all necessary for me either to affirm or to express any opinion of my own independently of that authority, by which undoubtedly we are bound. I am not very much surprised, because one knows that in other cases not depending upon statute, such as *Forth v. Chapman* (2), Courts of law had become accustomed to very violent divorces, upon the construction of the same words, of different kinds of property which apparently the testators had intended to go together. But, admitting that that is not by itself a sufficient ground, and would not by itself sufficiently discharge the burthen of proof here lying upon the respondents, what is the present will?

Now, the first thing that strikes us in the present will, and which is entirely different from anything in *Wilson v. Eden* (*ubi supra*), is this—that whereas in *Wilson v. Eden* (*ubi supra*) there was a gift of land in strict settlement to one set of persons, and another gift of the testator's residuary personal estate absolutely to another person, a single individual, the Court had to determine which of two conflicting interests was to prevail with respect to the leasehold estates. Here we have, on the whole will, the most perfect evidence of intention on the part of the testator to keep his whole estate, personal as well as real, together, and make the whole, by the most effectual legal means which he could employ, the subject of one strict settlement in favour of one designated succession of persons, to take beneficially one part as well as the rest, as far as possibly could be done consistently with the rules of law and equity. When we follow that scheme in detail we find, as it appears to me, almost at every step where we could possibly look for special indications of purpose, indications of a purpose inconsistent with the separation and divorce of the

leaseholds from the freeholds, which would be the practical result of the success of the appellants' arguments. In the present case there is a clause the force and effect of which I had not myself distinctly perceived until our attention was drawn to it in reading the judgment of the Vice-Chancellor, which would be entirely and absolutely defeated if the argument for the appellants were to prevail. It is this: that as often as any person who under the previous words was designated as tenant for life or tenant in tail by purchase, should be under the age of twenty-one years, the testator's trustees should enter into the possession or the receipt of the rents, issues and profits of the same premises, evidently all and every part of them, and receive and invest and accumulate, subject to maintenance and proper charges, the whole of those rents during the minority of the tenant for life or tenant in tail by purchase, and if that person attained twenty-one, then pay over to him the accumulated rents, and if he died under twenty-one, then to invest those accumulated rents in the purchase of freehold land, to be settled to the same uses. It is, as far I can see, difficult, if not quite impossible, to reconcile the operation of that clause with the argument, which, as soon as ever a tenant in tail comes into *esse*, vests in him absolutely the whole of the leaseholds, there being in this part of the will no provision whatever to prevent leaseholds, if they pass by the words, from vesting absolutely in the first tenant in tail at the moment of his birth or at the moment of the testator's death, as the case might be. That is the first indication, and I think it a very strong one. The second is in that part of the will where a power of sale is given applicable to the whole property; and that which results from the exercise of that power of sale is to be invested "in the purchase of other lands or hereditaments in England or Wales for an estate or estates of inheritance in fee simple, or of lands of a leasehold or copyhold or customary tenure convenient to be held therewith," the first place in which leaseholds are expressly mentioned in the will, unless somewhere as a security on which money might be lent, which is not material.

The testator there authorises an investment (not upon any leaseholds, but leaseholds convenient to be held with the settled estates) of money that might have arisen from a sale of part of the settled estates, and he goes on to distinguish what is to be done in the case in which freeholds are purchased and in the case in which leaseholds, copyholds or customary estates are purchased. If freeholds of inheritance are bought they are to be settled to the same uses as those to which the hereditaments, by the sale or exchange of which the purchase-money should have arisen, previously stood settled; the word "hereditaments" alone being used as signifying the subject matter of the sale, but which might be anything that was part of the settled estates, and "hereditaments" being a word which, after the statute, as I conceive, as well as before, means heritable property. If the thing purchased is freehold of inheritance, it is to be settled to the same uses, but if that which is purchased shall be of leasehold, copyhold or customary tenure, then it is to be settled as follows. [His Lordship read the clause providing that leaseholds should be settled to similar uses with those declared of the freehold estates, and should not vest in a tenant for life or in tail dying under twenty-one.] Now let us just consider the effect of that. If leaseholds were sold under that power the proceeds of such sale could not be invested in other leaseholds to be settled on the same trusts as the leaseholds which had been sold but upon different trusts, which would prevent a tenant in tail by purchase from taking absolutely if he died under twenty-one. There is an equally careful provision to prevent the heir-looms in the mansion-house from vesting absolutely in a tenant in tail dying under twenty-one. I agree, however, that there the reference is to the trusts of the mansion-house, and not of the other property, so that the argument has not in all points the same cogency.

Then lastly, we come to the bequest of the general personal estate, words which most clearly include the leaseholds if they did not pass before, and the whole of that personal estate is to be converted. An

annuity is to be paid out of it to the tenant for life, and 1,500*l.* a year is to be accumulated for twenty years, and subject to these directions the whole residuary personal estate is to be held upon trusts corresponding with the uses of the estates devised in strict settlement. To my mind there is in every one of those clauses a distinct, and in the whole of them a cumulative indication of intention, that leaseholds should not pass by the specific devise in the settlement, but should pass by the ultimate gift of the personal estate. Therefore I am of opinion that the Vice-Chancellor's decree must be affirmed with costs.

THE LORDS JUSTICES concurred.

Solicitors — Messrs. Bowker, Peake & Bird, for all parties.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} WILSON v. THE NORTHAMPTON AND BANBURY JUNCTION RAILWAY COMPANY.
JAMES, L.J.	
MELLISH, L.J.	
1874.	
Feb. 19.	

Specific Performance—Contract to build a Railway Station—Damages.

A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the Court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrong doers.

The bill was filed for specific performance of an agreement entered into in June, 1863, between the promoters of the Northampton and Banbury Junction Railway Company and the plaintiff,

whereby it was agreed amongst other things that in consideration of the plaintiff withdrawing all opposition to their bill then before parliament, the company would at their own cost, "in a good, substantial and workmanlike manner, erect, fit up and construct a station, to be made on Nos. 24, 25 and 26, parish of Wappenham, or some part or parts thereof."

In pursuance of this agreement the plaintiff withdrew his opposition to the bill, which received the royal assent in the session of Parliament 1863 (26 & 27 Vict. c. cxxx.)

In constructing their works the company found that it would be more convenient to build the station at a place about two miles distant from the spot agreed upon, and negotiations were entered into with the plaintiff to induce him to acquiesce in the alteration. The parties, however, could not come to terms, and the company commenced building their station at the newly selected spot, declining to build one at the place agreed upon.

In answer to the bill for specific performance, the company admitted that they were bound by the agreement, but declined to carry it out. They submitted that the Court would not decree specific performance of an agreement to erect a building, and insisted upon the greater convenience to the public of the station now in course of erection.

Bacon, V.C., expressed a strong opinion that the Court had jurisdiction to decree specific performance of an agreement to erect a building, but being of opinion that justice could be better done by directing an enquiry as to damages under 21 & 22 Vict. c. 27, directed accordingly.

The plaintiff appealed.

Mr. Eddis and Mr. D. Jones, for the plaintiff, contended that he was entitled to specific performance, and the Court having jurisdiction to decree it, would do so, unless there were insuperable difficulties in the way, which was not the case.

They cited

Lloyd v. The London, Chatham & Dover Railway Company, 2 De Gex, J. & S., 568; s. c. 34 Law J. Rep. (N.S.) Chanc. 401;

Sanderson v. The Cockermouth, &c., Railway Company, 11 Beav. 497

Storer v. The Great Western Railway Company, 2 You. & C.C.C. 48; s. c. 3 Rail. Cas. 106; s. c. 12 Law J. Rep. (N.S.) Chanc. 65;

Lytton v. The Great Northern Railway Company, 2 Kay & J. 394;

Hood v. The North Eastern Railway Company, Law Rep. 8 Eq. 666; 5 Chanc. 525.

Mr. Kay and Mr. Kekewich, for the respondents, were only called upon to argue the question of costs.

THE LORD CHANCELLOR. — The principle as to specific performance, which is material to be considered in the present case, is, that the Court gives specific performance instead of damages when it can more perfectly and in a manner more certainly just to all parties execute an agreement, and not when there is any doubt or difficulty in doing that. An agreement which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to enforce it than by leaving the parties to their remedy in damages, is not one which the Court will specifically enforce.

Now in this particular case the only words expressing with certainty anything at all which we have to deal with, are the words of the engagement adopted by the company, that they will, "at their own cost, in a good, substantial and workmanlike manner, erect, set up and construct a station, to be made on Nos. 24, 25 and 26 in the parish of Wappenham, or some part or parts thereof." If it had been the intention of the parties to exclude any contract as to the use of the station when erected, they could hardly have adopted better words for that purpose, for every word in the contract is applicable to the making of the station, and not to the using of it. The words are in a good, substantial and workmanlike manner, "erect, set up and construct." It is suggested that that must have been with a view to use, but if so, which is very probable, it is not so expressed, and the Court, if it attempted to impose anything like a definite obligation

as to use, would not be executing the written agreement, but enlarging it. If anything whatever is to be implied as to use, then in that respect the agreement is vague and indefinite. It is definite and not vague only as to erecting, setting up and constructing a thing capable of being erected, set up and constructed; and with regard to that thing, there is no other definition than that which is involved in the necessary meaning of the words "a station." I apprehend that that expression is definite to this extent, that it means a stopping-place on the line of railway, that is, a place at which traffic of some description may be taken up and set down by the carriages moving upon the line. To that extent it is definite and not vague, but the moment you suggest any considerations as to the nature and the degree of the convenience and accommodation intended by the parties, then it is wholly vague and wholly indefinite, and there are no elements which would enable the Court, adhering simply to the agreement and not going beyond it, to determine how those uncertainties are to be reduced to certainties. The Vice-Chancellor has thought that under those circumstances the case, which I agree is so far a strong case, the company coming to the Court and saying distinctly, "We admit ourselves to be bound by this agreement, but we refuse to perform it," is a case in which the Court cannot satisfactorily do justice by means of a decree for specific performance, certainly not better justice than might be done at law; but that having now authority to do what a Court of law could do, namely, to give damages, it will be able in that way to do the best justice of which the case is capable. It has been a matter of some surprise to us that the plaintiff should have been dissatisfied with that conclusion, for if the view which has already been expressed is correct, supposing the Court could have properly granted him specific performance, it could not have extended the express obligation of the company, and therefore could only have given him the very minimum of that which is expressed in the terms creating the obligation; whereas, in the case of damages, as it appears to me, the plain-

NEW SERIES, 43.—CHANC.

tiff will be entitled to the benefit of such presumptions as according to the rules of law are made in Courts both of law and equity against persons who are wrong doers, in the sense of refusing to perform and not performing their contracts. It is an established maxim that in assessing damages every reasonable presumption may be made as to the benefit which the other party might have obtained by the *bona fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond (1) which had disappeared from its setting, and was not forthcoming, a great Judge (Sir John Pratt, C.J.) directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case. So, applying it to the circumstances of the present case, it appears to me that a jury might with perfect propriety take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping-place on the line to which traffic might have been attracted, or which might have been convenient to the persons resident upon the estate. They might take into account the reasonable probability that if the company had *bona fide* performed the agreement, they would have made the station in a reasonable manner, as regards the mode of construction and the extent of the accommodation; and they might also take into account the reasonable probability that if the company had made the station, they would in their own interest have thought it worth while to make reasonable use of it. All those are elements, no doubt more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this Court when it discharges the functions of a jury.

It appears to me, therefore, that substantial justice may in that way be done

(1) *Armory v. Delamirie*, 1 Str. 504; s. c. 1 Smith's L. Cas. 301 (5th edit.).

between the parties ; but I do not see how it could possibly be done by way of specific performance.

Looking, however, at the attitude assumed by the defendants, although we cannot but think that the plaintiff would have been better advised if he had been content with the order which he has obtained, yet we think ourselves justified in marking our disapprobation of the conduct of the defendants in refusing to perform their agreement by declining to give them the costs of the appeal. The appeal will therefore be dismissed without costs.

THE LORDS JUSTICES concurred.

Solicitors—Messrs. Johnston, Farquhar & Leech, for plaintiff; Messrs. Bircham, Dalrymple, Drake & Co., for defendants.

BACON, V.C. }
1874. }
Jan. 23, 24. }

SNELLING v. THOMAS.

Statute of Frauds—Suit for Specific Performance—Agreement varied by Parol Stipulation—Restrictive Covenants.

G. T. agreed in writing to take an underlease of two of six houses, held under one lease subject to existing tenancies, the covenants to be similar to those in the original lease. G. T. died before the underlease was executed, but there was some evidence to shew that he had seen and approved of a draft of the underlease which contained a covenant, not in the original lease, against carrying on the business of a grocer in either of the houses. The tenant of one of the other four houses had an agreement for a lease to contain the restrictive covenant. On bill filed against G. T.'s administrator for specific performance of the agreement, and a declaration that G. T. had accepted the underlease in the form of the draft,—Held, that the administrator could not be compelled to accept an underlease containing the restrictive covenant.

This suit was instituted to obtain the specific performance of an agreement to

take a lease, and the defence was that a restrictive covenant was introduced into the lease which was not in the agreement.

In January, 1870, William Stark assigned to Frederick Snelling the remainder of a lease of eighty-eight years, less three days, from the 24th of June, 1823, in six houses in the Old Kent Road.

On the 24th of March, 1870, Snelling agreed to grant to George Sowman, a ham and beef seller, a lease of one of the houses, No. 737, for not less than forty years from the date of the agreement. This agreement contained no restrictive covenant, and under it Sowman entered into possession.

Snelling on the same day entered into a similar agreement with Carter, a grocer, as to one other of the houses, No. 735, but in the latter agreement was a clause by which Snelling agreed not to let any of the other six houses to be used as a grocer's or cheesemonger's shop.

By an agreement dated the 6th of July, 1870, Snelling agreed to sell his interest in two of the houses numbered 737 and 739, by way of underlease to George Thomas for 1,000*l.* The purchase was to be completed on the 11th of August, and the covenants in the underlease to Thomas to be similar to those in the original lease, and the purchase was to be subject to existing tenancies, but nothing was said in the agreement about a restrictive covenant. On the 11th of August, and before the underlease was executed, George Thomas died suddenly intestate. On the 31st of August letters of administration were granted to the defendant, John Thomas.

An affidavit was filed by a Mr. Atchley, a clerk of Snelling's solicitors, stating that George Thomas had called at the office on the morning of the 11th of August, had seen a draft of the proposed underlease, and had had his attention particularly called to the restrictive clause in it against carrying on the business of a grocer in either of the houses, and had made no objection to such clause.

After the death of George Thomas Snelling granted a lease of No. 737 to Sowman, and the lease contained a cove-

nant against carrying on the business of a grocer or cheesemonger.

In September, 1870, and before John Thomas knew of the proposed restrictive covenant, he put up the benefit of the agreement for the lease of the two houses, Nos. 737 and 739, for sale by auction and a sale was effected.

In November, 1870, a draft of the proposed underlease from Snelling to John Thomas was sent to the solicitors of the latter for approval. The draft contained the restrictive covenant, and John Thomas, while willing to take an underlease in strict accordance with the agreement of the 6th of July, declined to accept one with a restrictive covenant.

It was in evidence that the restriction would depreciate the property to the amount of about 250*l*.

In May, 1871, Snelling filed his bill for specific performance of the agreement of the 6th of July, 1870, and prayed for a declaration that George Thomas had accepted the underlease in the form of the draft prepared before his death.

Mr. Eddis and *Mr. Decimus Sturges*, for the plaintiff.—The evidence is clear that George Thomas adopted the agreement subject to the restriction. He knew of the agreements with Sowman and Carter, and took the houses subject to existing tenancies. Parol evidence is admissible to explain the subject matter of an agreement, though not to vary its terms—

Ogilvie v. Foljambe, 3 Mer. 53.

George Thomas had notice of the restrictive covenants. Notice is sufficient, and the fact need not appear upon the contract—

Smith v. Capron, 7 Ha. 185, 189;

McMurray v. Spicer, 37 Law J. Rep. (N.S.) Chanc. 505; s. c. Law Rep. 5 Eq. 527.

Mr. Kay and *Mr. W. Pearson*, for the defendant.—We rely on the Statute of Frauds, which was passed to prevent claims of this nature being set up. The purchaser, being a trustee, could not accept the lease with this onerous covenant, when no mention of the covenant was made in the agreement. Usual covenants will not extend to covenants in restraint of trade—

Van v. Corpe, 3 Myl. & K. 269; s. c. 6 Law J. Rep. (N.S.) Chanc. 208.

You cannot have an agreement specifically performed with a variation—

Jordan v. Sawkins, 1 Ves. 401;

Nurse v. Lord Seymour, 13 Beav. 269;

Sugden's Vendor and Purchaser, 14th ed. 165.

Mr. Eddis in reply.—When George Thomas contracted to purchase the house he knew of the arrangement between Snelling and Sowman; he must surely then be bound by that arrangement—

Tulk v. Moxhay, 2 Ph. 774; 1 Hall & Tw. 105; 11 Beav. 671; s. c.

18 Law J. Rep. (N.S.) Chanc. 83;

Wilson v. Hart, 35 Law J. Rep. (N.S.) Chanc. 569; s. c. Law Rep. 1 Chanc. 463.

BACON, V.C. (after stating the facts of the case, and examining the evidence, which consisted mainly of the statement of the plaintiff and the affidavit of Atchley, to which he did not attach much importance, continued his judgment as follows)—

There is but one fact material and that fact is this—that there is a written agreement, clear, distinct and express in its terms; and then the plaintiff says, "You must add to that agreement another stipulation of a character very onerous to you, the purchaser, for my benefit and advantage, and I ask you to add it, because I say that the arrangement was come to between us." A case more clearly within the Statute of Frauds cannot be stated. Anything more dangerous than to permit a legal or equitable right to be established on such evidence cannot be conceived, when, after the sudden death of Thomas, no one remains who can throw any particular light upon the subject of these negotiations between the parties. The agreement shews on the face of it that the lease is to contain the covenants contained in the original lease, and I must say that in my judgment, it was to contain no other conditions. It naturally follows that if two persons having a derivative title under a lease agree that they shall retain it as under the original lease, they retain it under the stipulations contained in that

lease, and no others. As there is nothing to lead to any other conclusion, in my opinion it was agreed that the lease should contain those covenants and no others.

Then it is said that he takes it subject to the existing tenancies. The words of the agreement in that respect I think are sufficiently explicit—"On such completion the purchaser shall have possession of the premises, and from that day be entitled to the rents and profits, subject to the existing tenancies." That is simply a qualification of the right which the agreement proposes to transfer to the purchaser—a qualification of his interest in the rents and profits, and of the fact that he shall have possession. He shall not receive the rents, or have possession of the premises otherwise than subject to the existing tenancies. The "existing tenancies" were obvious enough, and about which the purchaser did not care a straw. He saw Carter in possession of one of these houses, when I say "houses," I mean the six. Carter was in possession of one, and Sowman in possession of another. What did it concern the purchaser what the tenancy of Carter was? and as to Sowman, he had entered, and it is certain that at that time there was no binding agreement as to a restrictive covenant between Sowman and the plaintiff. In my opinion it would be a great hardship on George Thomas if he were alive, under these circumstances, to say that he was bound to accept a lease with these restrictive covenants; and it would be a much greater hardship and directly against the law, to say that his legal representative, who is bound to carry out his intestate's contract, and who is bound not to add anything to that contract, nor to burthen the estate with anything which the estate was not burthened with in the intestate's lifetime, must accept such a lease.

The answer founded upon the Statute of Frauds seems to be clearly made out, and I cannot treat this stipulation about the restrictive covenants otherwise than as a distinct and collateral agreement, which differs entirely from the subject matter and the tenor of the writing, and which would throw upon the purchaser a burthen of no inconsiderable amount, for it

appears from the evidence that to agree to be bound by these covenants would be to diminish the value of the property by 250*l*. That is not a sum which is lightly to be taken out of this testator's estate. In my opinion, therefore, the evidence clearly establishes, according to the plaintiff's own shewing, that an agreement not reduced into writing subsisted between him and George Thomas, and that there had been no act of part performance, and no recognition. The transaction of the sale does not in the slightest degree confirm the plaintiff's view, but it is consistent with all that the defendant now says. He is, under the agreement, bound to take a lease with the covenants contained in the original lease, and with no others. To suffer the plaintiff now that George Thomas is dead (and whether he were dead or alive it would be the same) to establish such a case by his own evidence alone would, in my opinion, be to encounter that very danger which the Statute of Frauds was designed to prevent; and, therefore, I think the plaintiff fails in his demand to have a specific performance of any contract, other than that which the defendant expresses his present readiness to execute, and which he says he has always been ready to execute whenever a proper document was presented to him for that purpose. The bill must be dismissed with costs.

Solicitors—Messrs. Jenkinson, Owen & Olivers, for plaintiff; Messrs. Bridger & Collins, for defendant.

BACON, V.C. }
1874. }
March 16. }

SEAND v. DU BUISSON.

Jurisdiction—Attachment out of Lord Mayor's Court—Garnishee.

Plaintiffs, merchants in London and Madras, issued an attachment out of the Lord Mayor's Court, to attach moneys in the hands of B. for a debt due from V. of Madras. B. pleaded a prior attachment by S., a foreign creditor, and so the action of the plaintiffs in the Lord Mayor's Court

was defeated. *Plaintiffs filed a bill alleging that the prior attachment was not for a bona fide debt, and praying for an account and payment of their debt:—Held, that this Court had jurisdiction to decide the matter, and the Court being of opinion that no debt was due to S., directed payment to the plaintiffs of the debt due to them.*

The plaintiffs, Messrs. Shand, were merchants carrying on business in London, having a branch house at Madras.

On the 2nd of April, 1868, Veerabudra Chetty, a native Indian merchant residing at Madras, was indebted to the plaintiffs' London house in a sum of 752*l.* upon the balance of an account stated. The defendants James Du Buisson and John Cleverley were merchants carrying on business in London, and in April, 1868, had in their hands 1,035*l.* 4*s.* 5*d.* belonging to Veerabudra Chetty.

On the 2nd of April, 1868, the plaintiffs issued an attachment out of the Lord Mayor's Court against Du Buisson & Co. to attach the 1,035*l.* 4*s.* 5*d.* in their hands as garnishees.

On the 12th of June, 1868, the garnishees pleaded that they were not indebted, and that a previous attachment had been issued by the defendant Sarabiah Chetty, a son of Veerabudra Chetty, for the sum of 1,035*l.* 4*s.* 5*d.* (the exact sum in their hands as garnishees).

On the 17th of May, 1868, Veerabudra Chetty died at Madras utterly insolvent, and his property was by an order of the Court vested in a Mr. Benjamin Brooks, of Madras, as trustee, but he disclaimed all interest in this fund. Sarabiah Chetty alleged that this sum of 1,035*l.* 4*s.* 5*d.* was due to him from his father on account of debts paid by him for his father in Madras. He also held a bill of exchange from his father for this sum.

The plaintiffs filed their bill for an injunction to restrain the payment of the 1,035*l.* 4*s.* 5*d.* to Sarabiah Chetty under his attachment on the ground that his father was never truly indebted to him, and for an account of what was due to them under their attachment.

The 1,035*l.* 4*s.* 5*d.* was held by Du Buisson & Co. till the bill was filed,

and then, after deducting their costs, they paid the residue into Court and were dismissed from the suit.

Mr. Kay and Mr. Robinson, for the plaintiffs.—The debt of the defendant did not arise within the City, and the Lord Mayor's Court cannot grant an attachment for a foreign debt—

The Mayor and Aldermen of the City of London v. Coz, 36 Law J. Rep. (N.S.) Exch. 225; s. c. Law Rep. 2 E. & I. App. 239;

Banque de Credit Commercial v. De Gas, Law Rep. 6 C.P. 142.

The bill of exchange was clearly no equitable assignment—

Robey v. Ollier, Law Rep. 7 Chanc. 695.

Mr. Jackson and Mr. Bardswell, for the defendant.—An action cannot be brought from the legal side of the Lord Mayor's Court to an equitable superior Court.

Any instrument is an equitable assignment which will give the donee the property intended to be assigned, and that is the effect of this bill of exchange.

BACON, V.C., said—The claim of the plaintiffs in this case is rested upon various grounds which have been discussed at considerable length. In my opinion the plaintiffs have very clearly shewn and proved that in respect of the debt which they claim against Veerabudra, it was a debt contracted within the jurisdiction of the Lord Mayor's Court, and therefore suable for in the Lord Mayor's Court. The proceedings by attachment in the Lord Mayor's Court on the part of the plaintiffs were perfectly right as far as they went, and they were intercepted by the conduct which the defendant pursued. He said he had a right to attach the funds in the hands of the stakeholder, and he got a judgment. Then the assistance of this Court is invoked and the whole affair is transferred to this Court. Mr. Jackson has argued that it could only be by a writ of certiorari that the proceedings in the Lord Mayor's Court could be transferred to this Court. I am unable to adopt that. Either by the consent of both parties, or at the instance of one and in spite of the other, the question which arises in the Lord Mayor's Court is brought into this

Court, and the fund is brought in also; and the plaintiffs desire to have their right adjudicated upon by this Court, the other claimant to the fund (Mr. Brooks), who might have been looked upon in the light of an opponent having withdrawn. I consider, therefore, the Court has full jurisdiction to decide between these parties the questions raised upon this record, and that the Court can make a decree now as between these parties, and relating to the fund which the Court has taken into its possession, in order that the rights relating to it may be determined.

Considering therefore, as I do, that the plaintiffs' rights are just the same as they would have been if they had carried the proceedings in the Lord Mayor's Court to a conclusion, as they would have done, but for the interference of the defendant, I am bound now to make a decree according to the prayer of the bill, if I am satisfied that the plaintiffs are entitled.

Now, the evidence of the debt is clear and conclusive, and has not been called in question in the slightest degree. The sum claimed is 752*l.* the balance of an account.

Then it is suggested by the defendant that the plaintiffs have no equity to prefer his claim in this Court; I conceive (if I am right in saying that but for the interference of the defendant it is a suit which might have been brought to a determination in the Lord Mayor's Court, and could only have been determined there in one way), that the same right exists in the plaintiffs now, and that they have in this Court an equity which entitles them to a decision to be pronounced in their favour.

Now, the defence of the defendant is, that the bill of exchange of which he is the holder, amounts to an equitable assignment of the debt. I do not desire to narrow the jurisdiction that has been handed down to this Court by which an equitable assignment may be dealt with in this Court, but it is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of the debt. The note might have been endorsed to any individual or it might have been endorsed to any number of people who might have

endorsed it in succession. A mercantile instrument it is, in its origin, and in that shape it remains and has no other validity or effect. To call it an assignment of a debt would be to call it not by its right name.

The other ground upon which the defendant insists upon his right to it, is that he advanced money of his own for the payment of the debts of his father, and that upon a contract then entered into he was entitled to the money, and that the bill of exchange is only evidence of that contract. Now that must rest upon evidence, and if I look at the evidence I cannot say that it seems in the slightest degree satisfactory. [His Honour then examined the evidence, and having stated that he could not adopt it as proving that the defendant ever had paid any debts for his father, concluded his judgment as follows.]

Now, under those circumstances the case becomes an exceedingly simple one. The plaintiffs were entitled to have judgment in the Lord Mayor's Court, they have been prevented from having that by the interference of the defendant. The defendant has prevented them proceeding to judgment by an allegation which found favour in the Lord Mayor's Court, and obtained judgment in the Lord Mayor's Court, which judgment is utterly void and forms no obstacle to the plaintiffs' claim. The plaintiffs' evidence is clear that there was a debt contracted within the jurisdiction, and they ask that this debt may be satisfied out of the money brought into Court, and I do not entertain the slightest doubt that they are entitled to it. What is to be done with the surplus if there should be any surplus, which seems to be doubtful, I have not now to decide. The plaintiffs only ask for the payment of 752*l.* and the costs of the suit. To that they are entitled. When that is paid, if the defendant has any claim to it, he may have his claim satisfied, but until that is done, neither he nor anybody else can have it.

Solicitors—Messrs. Simpson & Cullingford, for plaintiffs; Messrs. Hillyer, Fenwick & Stibbard, for defendant.

MALINS, V.C. }
1874. }
March 23. }

THOMAS v. HOWELL.

Will—Construction—“Presuming and believing”—Conditional Gift—Reasons for Gift—Gift founded on Belief of certain Facts—Mistake.

A testator having by his will given 4,000*l.* to certain charitable institutions, made a codicil as follows: “Presuming and believing that the rental of my estate will produce 16,000*l.* a year, I give those institutions 4,000*l.* more.” The income of the testator’s estate, however, was at his death much less than 16,000*l.* a year:—Held, that the testator’s reason for the gift of the second 4,000*l.* being the supposed increase of his property, and the fact of such increase being incorrect, the gift of this 4,000*l.* failed.

Gifts founded on reasons applicable on the one hand to the legatee, and on the other to the testator’s property, distinguished.

The Attorney-General v. Lloyd (3 Atk. 551) observed upon.

Further consideration.

Thomas Howell, by his will, dated the 21st of April, 1870, after naming his executors and bequeathing various legacies, made the following charitable bequest—

“I also give to each of twenty charitable institutions, one of which institutions shall be the Royal National Lifeboat Institution, and the other nineteen institutions shall be such as my trustees or trustee shall select, the sum of 200*l.*”

And the testator directed his legacies to charitable institutions to be paid out of such part of his estate as should be legally applicable for such purposes.

The testator made two codicils, by the first bequeathing numerous legacies, and the second being in the following terms—

“Presuming and believing that the rental of my estate will produce from 16,000*l.* to 18,000*l.*, I desire the four executors who are named at the top of my will will appropriate 4,000*l.* more to the established institutions of the country, making it together 8,000*l.*”

The testator died in February, 1872, possessed of little real estate but considerable general personal estate; the income of his whole estate, however, fell

far short of the sum of 16,000*l.* referred to in his second codicil, and the amount of his personal estate applicable to the payment of the charitable legacies was very inconsiderable.

The question, therefore, was whether under the circumstances the 4,000*l.* given by the second codicil was payable.

Mr. Glasse and Mr. Ford North, for the plaintiff, a residuary legatee.—The income of the testator’s estate having turned out to be less than 16,000*l.*, the gift made by the second codicil fails. The gift is, in fact, conditional and dependent on a contingency which has failed.

Mr. Cotton and Mr. Davey, for other residuary legatees.

Mr. J. Pearson, Mr. Wood, Mr. W. F. Robinson, Mr. Humphry and Mr. Vaughan Hawkins, for various institutions claiming under the charitable bequests.—The gift is not conditional. It is merely the expression of the testator’s belief of a certain condition of things. The authorities draw a distinction between a gift founded on certain facts stated by the testator, but as to which he is mistaken—in which case the gift fails—and a gift, as here, founded merely upon his notion or belief of a certain state of things, in which case the gift remains—

Campbell v. French, 3 Ves. 321;

The Attorney-General v. Lloyd, 3 Atk. 551;

Gordon v. Gordon, 1 Mer. 141;

In the Goods of Martin, 36 Law J. Rep. (n.s.) Prob. & M. 116; s. c. Law Rep. 1 Prob. & Div. 380;

In the Goods of Dobson, 35 Law J. Rep. (n.s.) Prob. & M. 54; s. c. Law Rep. 1 Prob. & Div. 88;

1 *Jarman on Wills*, 3rd ed. 170, 171;

1 *Williams on Executors*, 5th ed. 151, 167.

Mr. Hemming, for the Attorney-General, cited

Johnstone v. The Earl of Harrowby, 6 Jur. N.S. 153.

MALINS, V.C., said it was clear that the will, from the manner in which it was framed, especially from its direction that the charitable legacies should be paid out of the pure personal estate, had been prepared by a skilled person. The second

codicil was, however, very inartificial in its terms. The testator, evidently contemplating that his estate was worth a certain amount, and that he had not been sufficiently generous towards the charities mentioned in his will; and believing that his estate was large enough to enable him to make a further provision for them, gave the additional 4,000*l.* mentioned in his second codicil. By the words "established institutions" there used he should, for the purposes of his decision, assume that the testator meant the charitable institutions mentioned in his will. Accordingly he said by this codicil, "I give these institutions 4,000*l.* more." Why did he do this? Because he believed his estate to be worth 16,000*l.* a year at least. He was of opinion that the case did not fall within the authorities which had been cited, because it was plain that where a testator, in giving a legacy, stated a reason for giving it applicable to the legatee only, the legacy took effect, although the reason failed. Thus if a testator made a gift to A. "because he is at the University" the gift took effect, even though A. was not at the University. But the case was different where a gift was founded on the testator's belief of a certain state of things applicable to his property. Here the testator made this additional gift of 4,000*l.* because he believed himself to be worth at least 16,000*l.* a year. If his estate turned out not to be worth 16,000*l.* a year, could it be said that he nevertheless intended that his previous gift should be doubled? The Court must decide according to the testator's intention. What, then, did he mean? He evidently meant, "I believe I am rich enough to double my legacies, and I therefore do so." He was, therefore, of opinion that the testator intended to give a reason for making this additional gift, and that as the fact which supplied the motive for the gift had turned out incorrect, the legacy failed. The authorities which had been cited had very little application to this case. *Campbell v. French* (*ubi supra*), if anything, supported his view. *The Attorney-General v. Lloyd* (*ubi supra*) was a very peculiar case, and with all the reverence which the decisions of Lord Hardwicke inspired

he was not sure that if a similar case were to come before him he should not decide the other way. At all events, in the present case the testator had stated a reason for the gift, namely, the supposed increase of his property. That increase being, in fact, untrue, the additional legacies failed altogether.

Solicitors—Messrs. Bower & Cotton, for plaintiff; Messrs. Merriman & Pike, for defendant; Messrs. Whittington & Son; Messrs. Farrer, Ouvry & Co.; Messrs. Raven & Bradley; Messrs. Cookson, Wainwright & Pennington; Messrs. Whitakers & Woolbert; Mr. H. T. Boodle; Messrs. Norris, Allens & Carter, for the various institutions.

MALINS, V.C. }
1874. }
April 24. } *Re SPURSTOWE'S CHARITY.*
May 1. }

Practice—*Lands Clauses Act*, 1845 (8 & 9 Vict. c. 18), s. 78—*Payment out to Charity Trustees.*

Purchase money paid into Court by a railway company for charity lands taken by them was ordered to be paid out to the trustees of the charity as persons absolutely entitled under section 78 of the Lands Clauses Act.

This was a petition by the trustees of a charity under section 78 of the *Lands Clauses Act* for the payment out to them of a fund in Court representing purchase money paid in by the Great Eastern Railway Company under section 69, in respect of lands taken by them belonging to the charity.

Mr. Chute, for the petitioner (on April 24), asked for payment out accordingly, whereupon

Malins, V.C., expressed a doubt as to whether the Court could order payment out to the trustees of the charity, and directed the petition to stand over to ascertain whether there was any authority for such an order.

Mr. Chute (on May 1) cited in support of the petition—

Ex parte The Trustees of Tid St. Giles's Charity, 17 W.R. 758.

Mr. Jason Smith, for the company, said it seemed doubtful whether the trustees were persons absolutely entitled within the meaning of the 78th section—

In re Reaston's Estate, 41 Law J. Rep. (N.S.) Chanc. 832; s. c. Law Rep. 13 Eq. 564.

MALINS, V.C.—That is a different case. There the trustees were trustees for sale. I think, *Mr. Chute*, you may take the order (1).

(1) *In re Faversham Charities*, 10 W.R. 291, Wood, V.C., required the consent of the Charity Commissioners to the payment out to the trustees.

Solicitors—Messrs. C. R. Randall & Son, for the petitioners; *Mr. Shaw*, for the company.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.

JAMES, L.J.

MELLISH, L.J.

1874.

Feb. 12.

BARNES v. ADDY.

Constructive Trustee—Breach of Trust—Solicitor, Responsibility of—Parties made Defendants for Payment of Costs.

Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees de son tort, or actively participating in any fraudulent conduct of the trustee, to the injury of the cestui que trust, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions may be such as the Court would not approve of.

A solicitor acting for the sole survivor of three trustees, prepared, by his direction, a deed appointing the husband of the cestui que trust sole trustee in his place, and another solicitor, acting for the cestui que trust and her husband, perused and approved of the draft. The deed was

executed, and the trust fund transferred to the husband as new trustee, and by him sold out and never replaced. There being no ground for imputing to either of the solicitors knowledge or suspicion of any improper design in the transaction,—Held, affirming the decision of WICKENS, V.C., that neither of them was liable for the loss occasioned by the breach of trust.

The Court disapproves of the practice of making solicitors or others, who are properly witnesses, and who are not chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone.

William Addy by his will, dated in November, 1835, appointed his nephew, *John William Addy*, and two other persons, executors and trustees, and devised and bequeathed to them all his real and personal estate upon trust for conversion, and subject to an annuity of 100*l.* to his widow, upon trust for his four children equally; the shares of his daughters, *Ann* (who afterwards became the wife of *H. N. Barnes*), and *Susan* (who afterwards married *J. W. Addy*), to be for their separate use, without power of anticipation, during their respective lives, with remainder to their children respectively.

The testator died shortly after the execution of the will, which was proved by *J. W. Addy* and one of the other executors, the remaining executor having renounced probate.

Subsequently family differences arose between the parties with regard to the respective shares of *Mrs. Barnes* and *Mrs. Addy* in the trust funds, and in 1852 a bill was filed against *Addy*, charging him with breaches of trust, and seeking to have him removed from the trusteeship, and a new trustee appointed in his place.

In February, 1857, *J. W. Addy* became by survivorship the sole trustee of the testator's will, and shortly afterwards a meeting took place between the parties interested in the estate and the suit was compromised, and an arrangement was come to to the effect that *Addy* should retire from the trust, so far as related to the share of *Mrs. Barnes* and her children in the fund, and that *H. N. Barnes* should be appointed sole trustee of that

share, and J. W. Addy should remain sole trustee of his wife's share.

Accordingly, in March, 1857, two deeds were prepared and executed, by one of which Addy, in pursuance of a power contained in the will, which, however, did not authorise any alteration in the original number of trustees, retired from the trust, so far as related to the share of Mrs. Barnes and her children, and appointed Barnes sole trustee of the fund in his stead. The other was a deed of indemnity from Barnes to Addy. On the 31st of March Addy sold 65*l.* 7*s.* 10*d.* Consols, part of 2,140*l.* 5*s.* 6*d.*, the share of Mrs. Barnes and her children in the trust fund, for the purpose of paying her share of the costs of the suit, and transferred the residue, amounting to 2,074*l.* 17*s.* 8*d.* Consols, into the sole name of H. N. Barnes. On the next day Barnes sold out the stock so transferred, and it was lost to the trust.

The bill in the present suit was filed by the children of Mrs. Barnes against John William Addy, and against Mr. W. W. Duffield, the solicitor who prepared the deed of appointment, and W. R. Preston, the solicitor who acted on behalf of Mr. and Mrs. Barnes, praying for a declaration that the appointment of Barnes as sole trustee of the will was a breach of duty and trust on the part of Addy, and a fraud on the power, and that it might, if necessary, be declared void and set aside; that the transfer into the name of Barnes as such sole trustee was not only a breach of trust and duty on the part of Addy, but also a fraud on the part of all the defendants, and that they were bound to make good the same, and all dividends thereon, which had been lost by reason of such breach of trust and transfer. The bill also prayed for costs against all the defendants.

The part taken by Mr. Duffield and Mr. Preston respectively in the matter appeared to be as follows—After the agreement for the compromise of the first suit had been entered into, Addy called upon Mr. Duffield, who acted as his solicitor, and told him he had made up his mind to retire from the trust in favour of Barnes. Mr. Duffield endeavoured to dissuade him from this, and pointed out the danger of allowing the trust fund to be in the power

of a sole trustee. Addy, however, said he was determined to take the risk, and gave Mr. Duffield positive instructions to prepare the necessary deeds. Duffield therefore prepared the drafts of an appointment of Barnes as a new trustee of the will, so far as regarded the share of Mrs. Barnes and her children, and a deed of indemnity to be executed by Barnes, and sent them to a Mr. Parker, who had formerly been the solicitor to the trustees of the will, for approval, on behalf of Mrs. Barnes and her children. Mr. Parker, however, declined to be concerned in the business, and Duffield refused to proceed further in the matter unless the drafts were perused and approved by some solicitor on behalf of Mrs. Barnes and her children. Mr. Preston was then applied to to act on behalf of Mr. and Mrs. Barnes; and having received from Duffield the drafts, with a copy of the testator's will, he wrote to Mrs. Barnes, pointing out to her the danger of allowing her husband to have the sole control of the trust fund, and suggesting that some other person should be associated with him in the trust. In reply to this Mrs. Barnes wrote, saying she was fully aware of the proposed arrangement, which it was her wish and desire should be carried out. Upon receiving this letter, Mr. Preston consented to peruse the draft deeds on behalf of Mr. and Mrs. Barnes, and after being approved of, the deeds were engrossed, and were executed by Mr. and Mrs. Barnes at the office of Mr. Preston.

J. W. Addy died during the progress of the suit, which was revived against his widow and administratrix.

At the hearing of the cause before Vice-Chancellor Wickens, his Honour made a decree declaring the estate of Addy liable to replace the fund which had been lost, and giving consequential relief, but dismissed the bill with costs, as against Duffield and Preston.

The plaintiffs appealed from this decree, so far as it dismissed the bill against Messrs. Duffield and Preston.

Mr. Greene and Mr. Bilton, for the appellants.—The defendants Duffield and Preston having contributed to the breach

of trust are liable to make good the loss—

Lee v. Sankey, Law Rep. 15 Eq. 204.

At all events, they are liable to pay the costs; and it is no excuse to say they only obeyed their instructions—

Bennet v. Wade, 2 Atk. 324;

Fyler v. Fyler, 3 Beav. 550;

Bowles v. Stewart, 1 Sch. & Lef. 209, 227.

See also

Baker v. Loader, 42 Law J. Rep. (N.S.) Chanc. 113; s. c. Law Rep. 16 Eq. 49,

and the cases there cited.

Mr. Lindley and *Mr. Begg* appeared for *Mr. Duffield*, and

Mr. W. Pearson, for *Mr. Preston*, but were not called upon.

Mr. B. B. Rogers, for *Addy's* administratrix.

THE LORD CHANCELLOR.—It is important to maintain the doctrine of trusts as established in this Court, and equally important not to strain that doctrine by unreasonable construction beyond its due and proper limits. There would be no surer mode of undermining the sound doctrines of equity than by making unreasonable and inequitable applications of them. In this case we have to deal with certain persons who are trustees, and with other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe a trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may, no doubt, be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actively participating in any fraudulent conduct of the trustee, to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, even transactions of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with

knowledge in what they know to be a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded, I know not how any one could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent, of any sort or kind to trustees. But, on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have a constructive trusteeship imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend that those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents, of all classes, from the responsibilities which are expressly incumbent by reason of the fiduciary relation upon the trustees.

Now what is there in this case to make either of these two solicitors responsible, as constructive trustees, for the breaches of trust, which were in fact committed by *Mr. Barnes*, *Mr. Addy* being also responsible for them? They appear to be neither more nor less than this—that *Mr. Duffield* had, on the part of *Mr. Addy*, prepared an instrument appointing *Mr. Barnes* a trustee of what I may call the *Barnes* share of a certain trust fund, of which *Mr. Addy* was at that time sole trustee, and that he afterwards introduced *Mr. Addy* to a broker, for the purpose of the sale of a part of the trust fund, which was sold for the payment of certain costs. That is—the case as against *Mr. Duffield*. As against *Mr. Preston*, the case is simply that he, as the solicitor of *Mr. Barnes*, perused and approved of the instrument by which *Mr. Barnes* was to be a trustee of the *Barnes* share of the trust property in *Mr. Addy's* place. Now, to take the latter case first, what are the principles upon which *Mr. Preston* can be held responsible for that? There is not the slightest trace whatever of a knowledge or suspicion on his part of an improper or dishonest design in the transaction. There was nothing to lead him to suppose that *Mr. Barnes*, when he had been so ap-

pointed a trustee, assuming the appointment to be followed up by a transfer, which was, after all, a thing made neither more easy nor less easy by what Mr. Preston did, intended to sell out the fund and put the money into his own pocket. He was called in as a solicitor to approve a form of deed which a person, having the legal power, proposed to execute. That is not quite a correct thing to do on the part of the persons having the legal power; but no authority has been cited to shew that the solicitor would be responsible, and if we were to hold that he became a constructive trustee by the execution of such a deed, never having had at any moment of time any part of the trust fund in his possession, and not having by the settlement of such a deed enabled anyone who otherwise might not have had the power, to commit a breach of trust, we should be acting not only without authority, but, as I believe, against authorities which might have been referred to, and making it nearly impossible for anyone safely to act as solicitor for any retiring or incoming trustee, unless he takes upon himself the office of a Court of Equity, and satisfies himself that there is nothing which can by any possibility be called in question in any part of the transaction. I am not prepared to hold that a solicitor is under any such responsibility, and as to Mr. Preston, I entirely concur with the Vice-Chancellor, who did not think it necessary to hear the defendant's counsel.

The case as to Mr. Duffield, when carefully examined, goes very little beyond that, and not at all, I think, beyond it in anything material to the alleged equity. In addition to settling for Mr. Addy, the proposed appointor, the appointment of Mr. Barnes as a trustee, he also approved a form of a deed of indemnity to be executed by Barnes to Addy, and he openly states that which indeed we must have inferred, that he was aware that, as a general rule, it was not a safe thing for a trustee to transfer a trust fund to a single new trustee, however regularly appointed, and therefore he advised his client against it. He says he advised against it from the beginning to the end on that ground and that principle, not at all apprehending,

and having no reason to apprehend any dishonest purpose on the part either of Addy or of Barnes, and he advised his client, if he did make a transfer, to have a deed of indemnity. I confess, I cannot see how, upon those grounds, we could hold him a constructive trustee, and liable for a breach of trust, either of Barnes or of Addy, unless we were prepared to go the length of saying that in every case in which a doubtful transaction being contemplated between trustee and *cestui que trust* a deed of indemnity is provided to make the trustee safe, the solicitor who prepares the deed is himself liable; because in every such case the same circumstances or principles must occur, namely, that it is apparent that the transaction may not be authorised by the terms of the trust, and that a Court of Equity may hold the trustee liable, and that, therefore, he takes an indemnity. It would be an alarming doctrine if we were to lay down, assuming honesty and the absence of fraud, that the solicitor is in such a case made a constructive trustee; and we are not going to be the first Judges to lay down that doctrine, it certainly not having been laid down by any of our predecessors. Now, was or was not Mr. Duffield (for as to Mr. Preston really there is not a serious attempt made to shew that he was), from the circumstances of the case to be held aware that something wrong must have been intended? There is not a scintilla of evidence that he was aware. He swears positively that he was not, as does also Mr. Preston, and Mr. Addy swears the same. They all say, and, if the evidence is true, they truly say, that down to the end of those things with which Mr. Duffield had anything to do, there not only was not any appearance of an improper or fraudulent purpose on his part, but that even to the knowledge of Mr. Addy no such purpose was entertained or believed in. The facts appear to be these: There was by will created a single trust of the residuary estate of the testator for three different families. The sequel of the trust, as it stood at the date of these transactions, being this, that as to one family the fund had become distributable, that is, one-third of the fund, and that as to the other two-thirds of the

fund it was settled for the separate use for life of Mrs. Addy as to one share, and for the separate use for life of Mrs. Barnes as to the other share, without power of anticipation, with remainder to children, Mrs. Addy having no children, Mrs. Barnes having children. Mr. Addy, the husband of one of those ladies, had become by the death of the others the sole survivor of the three original trustees of the entire fund, and, being such, if minded to commit a fraud, either by putting the fund into his own pocket or by dividing it with Mr. Barnes, nothing whatever was necessary to enable him to do so but that he should transfer the fund, and no help from Mr. Duffield, no settlement of any such deeds as those now in question by Mr. Duffield, or any other solicitor, would make this power to do that either greater or less than it would have been if no such deeds were executed. True it is that Mr. Barnes had put a *distringas* on the fund, which was in the sole name of Mr. Addy; but, according to the facts alleged, Mr. Barnes was a consenting party to whatever Mr. Addy had in his mind to do. If fraud was intended, Mr. Barnes was certainly a party to the fraudulent intention, and his *distringas* could not have stood in the way, nor would the execution of the deed get rid of the *distringas*, if he chose to maintain it. No transfer could be made to him without his own consent and concurrence; and, on the other hand, if fraud was not intended, still Mr. Barnes was a perfectly consenting party to the division of the fund; and, as far as the solicitor was concerned, he knew that there were at least reasons apparently for desiring to make the division. In the first place, the objection to it under the will is rather technical than substantial if there had been a proper number of trustees, and proper trustees, because it is certainly not a very convenient thing that the affairs of the two families should be unnecessarily mixed up in a single trust. Certainly, Mr. Addy being a sole trustee, it was very reasonable that that state of things should not continue, and Mr. Addy and the Barneses having quarrelled, it was not likely that they would agree to any reconstitution of the trust as a single trust;

nor was it any indication of a fraud that Mr. Addy should listen willingly to the suggestion that he and Mr. Barnes, being on bad terms, the trust should be separated, and he should have nothing more to do with Mr. Barnes and Mr. Barnes's family; and what corroborates the statement of Mr. Duffield that this was the real cause of the transaction, and honestly believed by him to be so, is that Mr. Parker, a gentleman who had been the solicitor for the Barnes' family, a friend of the Barnes' family, and one whose integrity seems to have been beyond all question, had urged that such irregularities and departures from the trust as would have been involved in a somewhat different proceeding, namely, putting the Barnes' portion of the trust into the names of a Mr. Clark and Mr. Barnes, as distinct trustees, were objectionable on the grounds—first, that the will did not clearly and certainly authorise any splitting of the trust; secondly, that there should have been three trustees and not two; thirdly, that Mr. Barnes being the lady's husband, was not a person whom a Court of Equity would have thought a proper trustee; and, fourthly, that in the event, which did afterwards happen, of Mr. Clark's death, the effect would be to leave the whole in Mr. Barnes's power. All those circumstances, and his own honest advice to his client, pointing out the risk and the dangers, and recommending that the transaction should not proceed, proved that he thought that that was all that he, as solicitor, was bound to do. He did not think he incurred any responsibility in settling the form of the deed, which, after all, did not increase the power of Mr. Addy to commit a breach of trust. Having done that, we cannot, consistently with the evidence, or justice, or reason, disbelieve Mr. Duffield when he says that he never knew nor suspected any dishonest purpose, nor believed that any actual fraud would result from what was done, and if that be a true interpretation of the facts, I certainly, for one, am unable to hold him responsible. Then it is said that if we do not find these gentlemen answerable for the money we ought to charge them with costs. I repeat what I said during the argument,

that I have been under the impression, and I hope the impression will go abroad, that of late years the Court has set its face against making solicitors or others who are properly witnesses, and who are not primarily chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. I know no principle on which they can be charged and made parties for that purpose, unless they are chargeable with more or greater relief. In this case we have held that these gentlemen are not so chargeable; and on all these grounds I, for one, am clearly of opinion that the decree of the Vice-Chancellor must be affirmed, and the appeal dismissed with costs.

JAMES, L.J.—I am entirely of the same opinion. I desire to add that I most cordially concur in the general principle with which the Lord Chancellor began his judgment. I have long thought, and more than once expressed my opinion from this seat, that this Court has, in some cases, gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of *cestuis que trust*, or the good of the world, that those cases should be extended. With regard to what was said by the Lord Chancellor on the subject of costs, I see that the Vice-Chancellor said that, "with a view to discouraging as far as possible suits of this nature against solicitors, I shall dismiss the bill against him also with costs." I entirely concur with his desire to discourage such suits.

MELLISH, L.J.—I entirely concur.

Appeal dismissed with costs.

Solicitors—Mr. R. A. Westbrook, for the appellants; Messrs. Duffield & Bruty; Mr. W. R. Preston; Messrs. Glynes, Son & Co., for the respondents.

LORDS JUSTICES. }
 1874. } THE GREAT WESTERN COL-
 March 23, 24. } LIERY COMPANY v. TUCKER.

Practice — Answer — Exceptions — Discovery of Accounts not material to the Issue.

A bill was filed by a company to make the defendants (a solicitor and a mining agent) account for a secret profit made on the sale to the company of a colliery which the defendants were alleged to have purchased on their own account in the name of the ostensible vendor, and resold to the company at an advanced price while they were engaged in getting up the company, and acting in a fiduciary relation towards it. The defendants were interrogated as to the cheques drawn on a banking account opened for the purposes of the purchase:—Held, that the required discovery was immaterial to the real question in the suit, namely, whether an agency had existed at the time of the purchase—and that the Court would not compel the defendants to answer the interrogatory.

This was an appeal from an order of Vice-Chancellor Malins, overruling exceptions to the defendants' answers.

After allegations to the effect that the defendants S. W. Tucker and E. H. Thomas (who were respectively a solicitor and a mining agent) had been previously associated in getting up public companies, the bill went on to allege that in the beginning of 1864, it having come to their knowledge that the Great Western Railway Company were about to sell their interest in a certain colliery, called the Gyfedllon Colliery, the defendants "conceived the design of forming a joint stock company for the purpose of purchasing and working the said colliery and of securing a large profit for themselves by charging the proposed company with a much higher price for the colliery than should be actually paid to the Great Western Railway Company."

The bill further alleged that the defendants had agreed that the defendant Tucker should provide the necessary moneys; and that in order to conceal the connection of the defendants with the matter, the purchase should be made in the name of a person of small means

named Ward, who was really ignorant of what took place.

On the 26th of July, 1864, an agreement was signed, Tucker signing as Ward's agent, for the purchase by Ward of the collieries for 35,000*l.* payable by certain instalments.

The deposit of 3,500*l.*, and a further sum of 3,500*l.* on account of the purchase money, were alleged to have been paid by cheques signed by the defendant Tucker and two other persons, named Picciotto and Rossall, on the Agra and Masterman's Bank. The bill alleged that a credit for 10,000*l.* in Tucker's favour was obtained at the bank on the guarantee for 1,000*l.* each, of ten persons, of whom it was arranged that two were to sign all cheques.

The bill further alleged that whilst the negotiations for the above agreement were in progress, and until the plaintiff's company was formed, in June, 1865, the defendants were actively engaged in getting up the company; and that they signed a prospectus stating amongst other things that the company was formed to work the collieries lately belonging to the Great Western Railway Company and to Messrs. Fowler, which had been purchased for 80,000*l.*

The bill further stated that the names of Messrs. Tucker and New (the defendant Tucker's firm) were given on the prospectus as the company's solicitors, and that Tucker acted not only as agent of the nominal and real purchasers in the transactions, but also as solicitor and agent of the promoters of the company, and of the company itself, after its formation, and the bill charged that he was bound to give the company all the information in his power as to the value of the colliery and the price for which the railway company sold it. There were similar allegations as to the other defendant.

The property had been sold to the company at an alleged advance in the price of 17,250*l.* and royalties amounting to 400*l.* a year, and the bill was filed to make the defendants account for this profit to the company, on the ground that it was made by them while standing in a fiduciary position to the company.

The plaintiffs by their interrogatories required the defendants to set out an ac-

count of all cheques drawn on account of Rossall and others in the books of the Agra and Masterman's Bank with various particulars.

The plaintiff further required at length an account of the profits made by the defendants or any other persons by the purchase whether by excess of price, royalties, stock of coal or otherwise, and how it was disposed of; and whether for the benefit of any person other than the defendants.

The plaintiffs further interrogated the defendants as to the way in which certain cheques given by the company in payment of their purchase money had been dealt with, and as to the persons who shared in the profits made on the re-sale to the company.

The answers to these interrogatories formed the subject of seven exceptions. The first only was argued. This was on the answer with respect to the cheques drawn on the account before mentioned at the Agra and Masterman's Bank.

The defendant Thomas, after answering as to specific cheques on the account, and after some general statements as to the manner in which the account had been drawn on and dealt with for working the colliery, had refused further to set out "a full, true and particular, or any other account of all or any other cheques drawn on the said account of Rossall and others, either with or without the dates," &c. The defendant Tucker also refused or neglected to give a full answer to the interrogatory.

The Vice-Chancellor after argument overruled this exception on the ground that the discovery required was irrelevant. Thereupon an order was taken overruling all the exceptions, and from this order the plaintiffs appealed.

Mr. Chitty and *Mr. Plummer* (*Mr. J. Pearson* with them), for the appellants.—Our equity is founded on

Hichens v. Congreve, 1 Russ. & M. 150.
As in

The Bank of London v. Tyrrell, 27 Beav. 273; s. c. 28 Law J. Rep. (N.S.) Chanc. 921; s. c. (on app.) 10 H. L. Cas. 26; 31 Law J. Rep. (N.S.) Chanc. 369.

Tucker was our solicitor.

[LORD JUSTICE JAMES.—Your company

was not in existence when the original purchase was made. If your agent has sold you his own property, pretending it was some one else's, can you do more than set aside the contract ?]

If that is so, the defendants should have demurred. If they answer they must answer fully—

Saull v. Browne, 22 W. R. 427.

We think we shall be able to prove the agency if we know where the money went.

Mr. Cotton and *Mr. Everitt*, for the defendant *Tucker*, and *Mr. Glasse*, *Mr. Higgins* and *Mr. Crossley*, for the defendant *Thomas*, were not called upon.

LORD JUSTICE JAMES.—I am of opinion that the Vice-Chancellor's order in this case was perfectly right. The case made by the bill is that certain persons, that is to say, *Mr. Tucker* and *Mr. Thomas*, the defendants, bought a property in the name of *Mr. Ward*. They had a right to buy it in the name of *Mr. Ward*, but when they bought it in that name, they had already conceived the design of getting up a Joint Stock Company, and selling it at a profit to that Joint Stock Company. That is a thing which is perfectly open to any man in this country to do. It is then said that *Mr. Tucker* used the name of *Ward* for the purpose of concealing the fact that he was really interested in the thing which the company were afterwards buying. That might give them a right to say—"We will set aside the whole thing, we trusted you and did not know when we were buying that we were buying a property in which you, our solicitor, were interested. We thought we were buying the property of *Ward*. *Ward* was not the real man, but *Thomas* and *Tucker*; it was a fraud upon us to conceal that *Tucker* and *Thomas* were the real owners, that *Ward* was not, but that *Ward* was a mere name." That is the case made by the bill. That might be a very good ground for setting aside the sale if they were minded to set aside the sale. They might say, "We gave you a very high price for this property, and we relied upon you in buying it." But that cannot give them a right to take the property at their own price. It makes no difference whether

they bought it in the name of *Ward* a year or a month before; or whether they had inherited the property and conveyed it to *Ward*; or whether it was property which for some reason or other they had a secret interest in, although it was nominally *Ward's*. It appears to me that the question of agency is on the face of the bill a thing which does not arise out of the transaction.

Independently of that the question raised by the bill is a question of agency or no agency. If they can make out there was a fiduciary relation at the time when the original bargain was made—at the time when this account was opened at the bank—if they can make that out, they may be entitled to some discovery of any profit the man made by reason of his breach of duty and by any neglect of his obligations to them. But then that is a thing which is denied by the answer. It is denied entirely, and the very issue in the case is whether the relation of principal and agent ever existed in respect of this transaction at the commencement, or in respect of that account.

It seems to me to be precisely the kind of case in which the Court has to consider whether it will compel a man to give a discovery of his own private dealings and transactions—in one view—accounts between himself and his bankers, and accounts between himself and his co-contractors or his co-promoters, whoever they may be, whether we will give that discovery upon the speculation that the matter may be wanted afterwards at the hearing, if the plaintiffs can succeed in establishing (that which in my opinion there will be great difficulty in establishing) the preliminary fact that he was an agent, or that the plaintiffs were in some way interested in the matter. It appears to me that it would be monstrous for a man, merely alleging he has bought a share of a partner, that he has acquired some interest in the concern of a banker or brewer, or the like, that a man merely framing his bill alleging that interest he had acquired, which is denied, that before that interest is established, and while it is very doubtful whether that interest ever will be established, he can go and get accounts, a man's own private

banking account or the accounts of his customers, or the accounts of the dealings and transactions between him and the rest of the world.

I am of opinion that the Vice-Chancellor was quite right in overruling this exception, and that it is precisely the kind of case which was referred to in the judgment in that case of *Elmer v. Creasy* (1), that the Court could be trusted to take care that no discovery should be given which was idle, oppressive or vexatious.

LORD JUSTICE MELLISH.—I am of the same opinion.

Mr. Chitty.—Of course I do not argue the other exceptions.

Mr. Higgins said his client was very anxious that it should be stated to the Court that in his answer he had denied that he was a promoter of the company, or that he had an interest in the concern.

LORD JUSTICE JAMES.—We are only dealing with the case made by the bill. It ought to be borne in mind in all these cases that the facts we are dealing with are only hypothetical.

Solicitors—Messrs. Speechly & Chamberlain, for company; Messrs. A. C. Hope & F. C. New, for defendants.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.

JAMES, L.J.

MELLISH, L.J.

1874.

Feb. 9.

MEYRICK v. MATHIAS.

MEYRICK v. LAWS.

Settlement—Will—Shifting Clause—New Estate under a Re-settlement—Continuation of Title.

A testator devised estates in P. in trust for T., the second son of C., for life, with remainders to his first and other sons in tail with remainders over, and declared that if T. or his issue male should come into possession of estates in S. settled on the marriage of his father, the trusts of the P.

(1) 43 J. Law Rep. (N.S.) Chanc. 166; s. c. Law Rep. 9 Chanc. 69.

estates in favour of T. and his issue male should cease, and the estates go over to the persons next entitled in remainder. The S. estates, which were settled on the marriage of T.'s father on the father for life, with remainder to his first and other sons successively in tail, were disentailed by the father and the eldest son, and a considerable portion of them, but not the whole, resettled to uses under which, on the death of the elder son without issue, T. and his father had an absolute joint power of appointment over them. The father afterwards died:—Held, that the event contemplated by the shifting clause had not occurred, the interest acquired by T. being under what was substantially a new title, and not a continuation of the old one.

By the settlement made in the year 1820, on the marriage of St. John Chiverton Charlton with Jane Sophia, the daughter of Thomas Meyrick, certain real estates in the county of Salop were settled to such uses as William Charlton (the father of St. J. C. Charlton) and St. J. C. Charlton should appoint, and, subject thereto, to the use of William Charlton for life, with remainder to St. J. C. Charlton for life, with remainder, subject to a term for raising portions for younger children, to the use of the first and other sons of St. John C. Charlton successively in tail male with remainders over.

St. J. C. Charlton had two sons, the elder of whom was St. John William Charlton, and the younger Thomas Charlton.

Thomas Meyrick by his will, dated the 11th of May, 1837, devised his estates in the county of Pembroke to trustees in fee upon trust for his grandson Thomas Charlton, the second son of St. J. C. Charlton, for life, with remainder to his first and other sons successively in tail male, with remainder to William Meyrick for his life, with remainder to his first and other sons successively in tail male, with remainders over; and the will contained a proviso that if the said Thomas Charlton or his issue male should, either in the testator's lifetime or after his decease, become seized of or entitled in possession to the estates settled on the marriage of St. J. C. Charlton, situate in

the county of Salop, then the trust of the testator's real estate in favour of the said Thomas Charlton and his issue male should absolutely cease, and his said estates should go to the person next beneficially entitled in remainder under the trusts thereinbefore contained, as if the said Thomas Charlton were then deceased without issue male.

The testator died shortly after the execution of his will.

In 1854 St. J. C. Charlton, being then tenant for life in possession of the Shropshire estates, and his eldest son, St. J. W. Charlton, executed a disentailing deed and conveyed a portion of the estates called Oakengates to the use of St. J. C. Charlton in fee, and resettled the residue to such uses as St. J. C. Charlton and St. J. W. Charlton should jointly appoint, and subject thereto to the use of St. John C. Charlton for life, with remainder to the use of St. J. W. Charlton for life, with remainder to the use of his first and other sons successively in tail male, with remainder to such uses as St. J. C. Charlton and Thomas Charlton should jointly appoint, and subject thereto to the use of Thomas Charlton for life, with remainder to the use of his first and other sons successively in tail male, with remainders over. And the deed also gave power to St. J. C. Charlton, which he afterwards exercised, to charge the estates with portions for younger children.

St. J. W. Charlton, the eldest son, died in 1864, a bachelor.

By indenture dated the 16th of February, 1866, St. J. C. Charlton and Thomas Charlton (who had, in accordance with a proviso in the will of the testator, taken the name of Meyrick) in exercise of the power of appointment contained in the deed of resettlement of 1854 again settled the Shropshire estates, subject to the life interest of St. J. C. Charlton, to uses for securing jointure rentcharges for their respective wives, and subject thereto to the uses following, that is to say: in case the estate in tail male in the Pembrokeshire estates, limited by the will of Thomas Meyrick in trust for the first and other sons of Thomas Charlton, should be then subsisting, then in the meantime, and until the same es-

tate in tail male and all remainders expectant thereupon should be barred, either in the lifetime of Thomas Charlton (Meyrick) or of Frederick Charlton his only son then born, or within twenty-one years after the death of the survivor of them, or the said estates in tail male should within the same period cease, the said estates thereby appointed should remain and be to the use of Dora Rhoda, the then only daughter of the said Thomas Charlton (Meyrick), with remainder to her first and other sons successively for life, and after the determination or expiration of the same period to the use of Thomas Charlton (Meyrick) for his life, with remainder to his first and other sons successively in tail male, with remainders over.

The suit was instituted in 1853 for the administration of the trusts of the will of the testator Thomas Meyrick, and upon the decease of St. J. C. Charlton, which took place in 1873, William Meyrick, the plaintiff, presented his petition for a declaration that the shifting clause in the will had taken effect, and for consequential relief.

The cause was attached to the Court of the Master of the Rolls, but his Honour having been engaged in the case when at the bar, the matter came on for hearing in the first instance before the Court of Appeal.

Mr. Southgate, Mr. H. M. Jackson, and Mr. Rowcliffe for the plaintiffs, Wm. Meyrick and his eldest son. The case is governed by the decision of Lord Cranworth in

Harrison v. Round, 2 De Gex, M. & G. 190; s. c. 22 Law J. Rep. (N.S.) Chanc. 322,

and the disentailing deed and resettlement of 1854 had not the effect of vesting the Shropshire estates in Thomas Charlton (Meyrick) under a new title, and the subsequent dealing with the estates in 1866 would not prevent the shifting clause from coming into operation.

They cited—

Fazakerly v. Ford, 4 Sim. 390; s. c. 1 Ad. & E. 897;

Taylor v. The Earl of Harewood, 3 Hare 372; s. c. 13 Law J. Rep. (N.S.) Chanc. 345;

Micklethwait v. Micklethwait, 4 Com. B. Rep. N.S. 790; s. c. 28 Law J. Rep. (N.S.) C.P. 121, affirmed 29 ib. 75;

Monypenny v. Dering, 2 De Gex, M. & G. 145; s. c. 20 Law J. Rep. (N.S.) Chanc. 153; 22 ib. 313;

Mr. Fry, Mr. Law, and Mr. S. P. Butler for Thomas Charlton (Meyrick), and his eldest son, were not called upon.

Mr. Rawlinson appeared for the trustees.

THE LORD CHANCELLOR.—We have none of us any doubt in this case.

Of course the whole question depends on the construction of this shifting clause in the will of the testator. Now the words of the clause are these: "I do hereby declare that if the said Thomas Charlton, or his issue male, should either in my lifetime or after my decease become seised of or entitled in possession to the estates settled on the marriage of the said St. John Chiverton Charlton, situate in the county of Salop," then the estates which he devises are to go over as if Thomas Charlton were then deceased without issue male. The question therefore which arises is a very simple one, quite distinct from anything like a doubtful, or conflicting, or uncertainly expressed intention of a testator, such as those which may have existed in some of the cases referred to. The first question is whether the testator there means to provide for the event of the Shropshire estates going under the settlement to which he refers. I cannot but think that on the same principle upon which Sir James Wigram in *Taylor v. Lord Harewood* (*ubi supra*) held that the mention of entailed estates was not merely an historical description of a pre-existing fact, but was intended to shew the course of the title by which the event was to take place, so here the word "settled" in this context has to my mind exactly the same force and effect; for nothing could be more absurd and unreasonable than to suppose that the testator meant the Pembrokehire estates to go over in the event of the acquisition of the Shropshire estates at any future time under any title whatsoever by any descendant of Thomas

Charlton. The mention of Thomas Charlton, or his issue male, in connection with the mention of the existing settlement, clearly proves that the testator had in view a title, and a right of seisin which might arise under the existing settlement. It was almost admitted in the argument that that was so, because, as I understood Mr. Jackson, he, knowing the authorities, some of which have been mentioned, and others, such as *Gardiner v. Jellicoe* (1), have not been mentioned, felt that he could not in the face of those authorities contend that if the Shropshire estates had come to Thomas Charlton or his issue male, after some other person had acquired the fee simple, the title to the Shropshire estates so acquired would have brought this shifting clause into operation; and yet unless the clause refers to the acquisition of the estate by a totally distinct title I do not see on what ground these cases can be distinguished.

The simple question is: Has the event happened which the testator contemplated? It is, I think, no more necessary for us in this case than it was for Sir James Wigram in *Taylor v. Lord Harewood* (*ubi supra*), to decide any abstract question, whether every form of re-settlement would necessarily destroy the identity of the title. We had better deal with each such question when it arises, according to the terms and nature of the settlement, the persons who make it, and the persons who take under it. In *Harrison v. Round* (*ubi supra*) we have an instance of a re-settlement, which plainly is a continuation of the title, where the descendant takes substantially the same estate under the new settlement as he would have had under the old. If, in such a case, the estate remains undiminished in quantity, it is held to be merely a modification of his original title; and if it is diminished in value for his benefit he is felt merely to have anticipated the possession. In this case it is clear that there is not only a re-settle-

(1) 12 Com. B. Rep. N.S. 568; s. c. 32 Law J. Rep. (N.S.) C.P. 17; affirmed on appeal 16 Com. B. Rep. N.S. 170; s. c. 33 Law J. Rep. (N.S.) C.P. 128; and in the House of Lords nom. *Jellicoe v. Gardiner*, 11 H.L. Cas. 323; s. c. 34 Law J. Rep. (N.S.) C.P. 282.

ment by virtue of the absolute power over the fee simple vested in different persons from the person now taking as tenant for life, but the subject matter is also different, because, from the re-settlement, there had been subtracted, not in his favour, but in favour of other persons, the whole of a particular property, the Oakengates property, which the father, with the consent of the eldest son, took out of the settlement for his own benefit; and there are also, as it is admitted, large charges laid upon the estate which destroy its identity in point of quantity and value. I do not think that the authorities are in any degree whatever open to question or doubt, which say that those circumstances prevent the condition being fulfilled, which is to defeat the clause. In the case of *Gardiner v. Jellicoe* (*ubi supra*), Sir W. Erle says with reference to the argument that the plaintiff was in possession of part of the lands, which had passed under Sir W. Gardiner's will to the testator, and so to his son James, and that therefore he was in possession of the Gardiner estate, and so incapable of holding the Clark Hill estate at the same time, there are two answers, each of which is sufficient. The second answer which he gives is: "It appears by the admissions that the lands, formerly part of those comprised in the Gardiner property, are only a small part held under a new title, and subject to incumbrances that could not have been imposed on the estate tail if the plaintiff had taken it under the devise. Though he holds some of the same lands he has not in substance the same amount of property, nor in title the same estate as that to which the shifting clause referred." As far as I know, all the cases on the subject are uniform. Therefore in our opinion this petition must be dismissed with costs.

Solicitors—Messrs. Gregory, Rowcliffes and Rawle, for plaintiffs; Messrs. Law, Hussey and Hulbert, and Messrs. Dimond & Son, for defendants.

JESSEL, M.R. }

1874.

May 4.

PATTISON v. GILFORD.

Injunction—Right of Shooting—Necessary Interference with Right—Sale for Building Purposes.

*G., owner of a farm of 180 acres subject to a right of shooting, which had been demised for a term to P., staked out a road across the farm, pulling down two hedges for the purpose, and put up the farm for sale by auction in thirteen lots, some of which were described as eligible for building purposes. The particulars mentioned the right of shooting, and stated that the sale was subject to such right. On bill for injunction by P. to restrain the sale,—Held, that it did not appear that the sale must inevitably result in an injury to the plaintiff's right of shooting, and that accordingly the bill must be dismissed with costs, and an enquiry was directed as to damages caused by the *ex parte* injunction.*

Principles on which Courts of equity act in granting injunctions to restrain threatened acts considered.

In 1871 a Mr. Legh demised to the plaintiff a farm of 480 acres, known as Kilnwood Farm, and at the same time the right of shooting over an adjoining farm of 180 acres, called Carylls, which was divided from the Kilnwood Farm by a turnpike-road. Both the farm and right of shooting were let to the plaintiff for twenty-one years, from the 29th of September, 1871.

On Carylls Farm there were some coverts which the plaintiff considered important to his shooting on both farms.

Mr. Legh subsequently sold Carylls to the defendant.

The defendant put Carylls up for sale by auction in thirteen lots, the particulars described the property as suitable either for agricultural or building purposes. They stated that the purchasers of the different lots were to maintain a new road about to be made by the vendor.

The particulars also stated the existence of the plaintiff's right of shooting as follows—"The tenant of the Kilnwood Farm (adjoining Carylls) is during his tenancy entitled to the shooting (except

rabbits) over the whole or the greater portion of the lots, and all the lots affected by such right will be sold subject thereto."

The plaintiff when he heard of the proposed sale wrote to the defendant giving him notice of the right of shooting, and warning him that the proposed sale would interfere with it. The defendant replied that by the particulars the sale was expressly subject to the right of shooting.

The sale was fixed for the 1st of April, 1874. On the 27th of March, 1874, the plaintiff filed a bill against the defendant, stating that the defendant had purchased the property for the purpose of a building speculation, and that the proposed sale was made with the object of furthering this speculation. It also contained the following allegation—"The defendant threatens and intends, in order to assist his said building speculation, to grub up the hedgerows and plantations, and wholly to destroy the coverts which at present serve to preserve the game on the estate, and if he is allowed to carry out his designs, not only will the shooting over Carylls be wholly done away with, but the shooting over Kilnwood Farm will be materially injured thereby and rendered of little or no value."

The bill prayed that the defendant might be restrained from offering Carylls "for sale for building purposes, or from grubbing up the hedgerows or plantations thereon, or from proceeding with the construction of the said intended road, or from otherwise dealing with estate so as to interfere with or prejudice the plaintiff's right of shooting over the same."

The plaintiff filed an affidavit echoing the statements in the bill, and before the sale was held obtained an interim order *ex parte* to restrain it, on the usual undertaking as to damages.

A motion for an interlocutory injunction was made which was turned into a motion for decree and now came on for hearing.

It appeared that the proposed road had not been metalled, but had been staked out, and two hedges had been cut through for the purpose. The proposed road ran across the farm.

It did not appear that the defendant intended to do anything further for the

purpose of the sale calculated to damage the right of shooting.

Mr. Fry and *Mr. Cookson*, for the plaintiff.—It is clear from the particulars that the intention is to divide the property into thirteen building lots for the purpose of erecting villa residences, therefore the proposed sale must result in the destruction of the plaintiff's right of shooting.

[THE MASTER OF THE ROLLS referred to *Haines v. Taylor*, 10 Beav. 75; s. c. 2 Ph. 209;

The Emperor of Austria v. Day, 3 De Gex, F. & J. 217; s. c. 2 Giff. 628; s. c. 30 Law J. Rep. (N.S.) Chanc. 690.]

At any rate the making of the proposed road must *pro tanto* injure the right, and therefore the plaintiff is entitled to an injunction. The defendant is violating an express covenant (the covenant for quiet enjoyment), and therefore the question of the amount of damage is immaterial—

Tipping v. Eckersley, 2 Kay & J. 264,

which doctrine was applied to a covenant for quiet enjoyment in the case of

Leech v. Schweder, Law Journal, Weekly Notes, April 25, 1874, p. 61.

Mr. Southgate and *Mr. North*, for the defendant, were not called on.

THE MASTER OF THE ROLLS.—I do not think I can give the relief that the plaintiff asks. I have a strong notion that the defendant would have done something wrong if the plaintiff had not written him a letter, but the answer to the letter was, "Look at my particulars;" and I must look at the particulars. The plaintiff says this in substance—"I have a right of shooting over some land, with a covenant for quiet enjoyment." It was not actually demised, but it was an agreement by letter which in this Court amounts to a demise. He is coming here now for an injunction in effect, though not in terms, to restrain the defendant from interfering with his rights. The injunction he actually prays for is a most singular one; it is an injunction "from offering the estate for sale for building purposes, or from grubbing up the hedgerows or plantations thereon"—which the defendant has not the slightest intention of

doing—or from “proceeding with the construction of the said intended road”—which road the defendant has already constructed substantially—“or otherwise dealing with the said estate so as to interfere with or prejudice the due exercise and enjoyment by the plaintiff of his right of shooting over the same.” Now the latter words must govern the whole.

[*Mr. Southgate.*—With this exception that there is that clause “or otherwise dealing with the said estate,” that is the injunction they persuaded your Honour to grant them.]

THE MASTER OF THE ROLLS.—Yes, but I granted that injunction on an assertion in an affidavit that the defendant was going to grub up and destroy the plantations. If the facts proved had been anything like the facts stated and verified by affidavit on which I granted an interim order, I should have stopped the defendant from doing them. But the facts now are wholly different, because all the destruction that the defendant has committed is limited to this, that he has made a small road across the farm and cut through two hedges. Nobody pretends now that that will interfere with the birds in any way or with the shooting in any way; therefore the point really does not arise. What the defendant is actually doing is this, he is putting up the property for sale in lots, I think thirteen, under particulars of sale which inside say nothing about building; outside they state this, that it is a valuable freehold estate, with excellent farm house, various enclosures and so on, “suitable for agricultural or building purposes.” When I said inside I did not mean the front sheet, which I call the outside also—it states this: “Several plots of accommodation and building land, delightfully situate and suitable for the erection of villas or residences,” and that is all I can find about building in the particulars. Then there comes the title “Observations”—I must do the defendant the justice of saying it is in large letters—the second of them is, “The tenant of the Kilnwood Farm (adjoining Carylla) is during his tenancy entitled to the shooting (except rabbits) over the whole or the greater portion of the lots, and all the lots affected

by such right will be sold subject thereto.” Then it goes on to say that the purchasers of certain lots are “to maintain and keep in repair the new road about to be made by the vendor;” he has made it—

[*Mr. Southgate.*—We have only staked it out; removed the hedges and staked it out.]

THE MASTER OF THE ROLLS.—I do not mean to say he has metalled it, but he has made it, he has staked it out, and taken down the boundaries, so as to make the road—“until such road shall be dedicated to the public or taken to by the parish, in proportion to the respective frontages of such lots to such road.” Those things are equivalent; the parish cannot take to the road unless there is a dedication to the public. That is all; there is not another word that I can find to shew any representation as to any particular portion being building ground or as to any particular quantity, the only representation is that there are several plots of accommodation and building land, and lot 6 is described as “Well situated for the erection of a house;” it is only “well situated;” it does not say that it is building land; it is “well situated;” there is nothing more in it. The fact is the defendant carefully abstained, no doubt, having received the plaintiff’s letter, from representing that any bit of the land is immediately available for building purposes. If a man sells land in that way, and tells the purchaser, “Mind, during the tenancy another party has the right of shooting,” and if it turns out that you cannot build without interference with the right of shooting, he tells the purchaser this,—“Recollect, you must make some arrangement with the person holding the right of shooting before you can build, that is all; it is ‘well situated for building,’ admirably situated for the erection of a house; only before you erect your house you must either get the leave of the person entitled to the right of shooting, or wait till the expiration of the lease of the shooting.” There is nothing at all to tell him that he has an immediate right of building irrespective of that right.

Now what are the principles upon which this Court interferes? I take it

that in order to grant an injunction at the suit of a plaintiff who complains not of an act being an actual violation of the right, but that if a threat or intention is carried into effect it will be a violation of the right, he must shew that is the inevitable result. It will not do to say it may be, he must shew that the threat is the inevitable result. Now on that point there are some well known authorities. The case usually cited is a decision of Lord Cottenham in *Haines v. Taylor* (*ubi supra*), and there it was laid down pretty well in the way I have put it, that is, that if the act threatened to be done could by any possibility be done in such a way as not to prejudice the right, it would not be restrained; it is not sufficient to say that it probably will prejudice the right. In that case it is said, "The Court refuses the motion, not because it has formed an opinion as to the legality of what it is alleged the defendants are about to do, but simply because the plaintiff has not brought before it circumstances which enable it to interfere between the parties." That is the real point. The principle is that if you say the defendant is going to do an unlawful act, you must prove it is necessarily unlawful, it is not enough to say it may be unlawful. Now the same principle was laid down in the case of *The Emperor of Austria v. Day*, as to the grounds on which an injunction ought to be granted. In the report in 3 De Gex, F. & J. 240, the passage occurs—"I consider this Court has jurisdiction by injunction to protect property from an act threatened which if completed would give a right of action. I by no means say that in every such case an injunction may be demanded as of right; but if the party applying is free from blame and promptly applies for relief, and shews that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted." Then in *Typing v. Eckersley* (*ubi supra*), which I hold at present to be still law, it is laid down that if there is an express covenant of which a breach is threatened, or a covenant for quiet enjoyment, then it is not necessary to shew damage; it is sufficient to shew there is a breach of the express covenant; but at

all events you must shew the breach. All these observations would apply if the defendant were actually threatening to erect villas; it does not by any means follow as of necessity that the erection of one or two villas will injure the right of shooting; it depends upon the part of the farm on which the villas are built, the number of the villas and the size of them, &c. It may or may not be that the erection will injure the right. I should hesitate long before I granted an injunction against a defendant over whose estate there existed a right of shooting, to prevent his building a single house. Of course it would depend somewhat on the extent of the property, and the nature of the coverts and so on, but I should hesitate very long, I should require to be satisfied according to the authorities that the erection of a house or even two houses, if it was a large estate, would necessarily produce injury inevitably—not in the sense of there being no possibility the other way, because I think Courts of Justice must always act upon a theory of very great probability as being sufficient—I do not mean absolutely necessary, but such a great probability that in the view of ordinary men using ordinary sense, the injury would follow. But in this case the defendant is not going to do anything of the kind; all he is going to do is what he has an undoubted right to do—to sell the estate, and he may sell it in several lots or in one lot as he thinks fit, and he may tell the purchaser anything he likes in praise of the estate,—that it is beautifully situate, that it is well adapted for building;—he would not tell the purchaser, "You may build upon it forthwith, and you will not injure the right of shooting;" he does not do that; all he says is, "There are some plots,—one of which in particular is pointed out,—very eligible for building purposes, but recollect there is a right of shooting over all the plots, and you take subject to that right, therefore if it turns out that you cannot build in the way you would like to do you must wait till the right is at an end, or you must be careful and not make such an erection as will interfere with this right of shooting." That is the effect of the particulars. No cautious man who understood the parti-

culars would buy that land for immediate building; he would see the difficulty which he would get into with regard to the owner of the right of shooting. Then it is said, "What is the owner of the right of shooting to do if you cut up an estate in a great number of lots? Is he to sue the owner of each lot?" That is his misfortune. He has no contract with the landlord not to sell his estate in lots. If it was desirable not to accept a grant of the right of shooting except on those terms he should have stipulated for them. I know of nothing that prevents a landlord who has granted the right of shooting over his estate from afterwards selling his estate in lots. You may have fifty lots or five hundred lots. It might be very inconvenient for the owner of the right of shooting if he had to sue a great many parties and bring a great many actions, but still I take it his right of shooting is not necessarily interfered with by the mere division of the estate into lots. Then is it interfered with by the purchaser of the lots being told, "Some of the lots are very well situate for building," but they are told at the same time, "It is subject to the right of shooting?" I cannot hold it is. The mere telling them what is the fact, that these are eligible building sites, though not immediately available on account of the right of shooting is not an interference with the right of shooting in any way. And I cannot see how the plaintiff has a right to come to this Court for relief, and under those circumstances as I cannot give any relief, and as my rule is to make the costs follow the result, except in a very extraordinary case, which I do not think this is, I shall dismiss the bill with costs, and direct an enquiry as to the damages caused by the injunction to restrain the sale.

Solicitors—Messrs. Nickinson, Prall & Nickinson, for plaintiff; Messrs. Ashurst, Morris & Co., for defendant.

HALL, V.C. }
1874. }
March 23. }

BRAND v. BLOW.

Practice—Interpleader Suit—Interim Order—Injunction—Payment of Money into Court in "Urgent Cases"—Chancery Funds Act, 1872, rule 12.

In urgent cases, and especially in injunction suits, parties should now proceed under the Chancery Funds Act and Rules, 1872, rule 12, and thereby obviate all unnecessary delay in obtaining their orders.

Motion.

This was an interpleader suit, and it came on upon an *ex parte* motion for an injunction to restrain an action at law upon payment of the money into Court.

Mr. F. O. J. Millar was for the plaintiff in the suit.

HALL, V.C., in granting the injunction, said that it was desirable that the profession should know that if, in such cases as these, the parties lodged the money at the Bank of England in the mode provided by the Chancery Funds Rules, 1872, rule 12, and produced the receipt to the registrar on drawing up the order, there need be no delay in issuing the injunction.

Solicitors—Messrs. Waltons, Bubb & Walton.

NOTE.—See *Field and Dunn's Practice under the Chancery Funds Act, 1872*, pp. 12, 17; see also *Field and Dunn's Practice under the Chancery Funds Act, 1872*, Forms p. 95, Form 22, "Application to lodge money at the bank in an urgent case;" and 22a, "Order for injunction where money has been lodged in Court;" and 23, "Paymaster-general's certificate of payment into Court of money lodged in an urgent case."

By rule 10 of the same rules, money and securities may be paid or transferred into or deposited in Court, and be placed in the books of the Chancery Pay Office to the credit of a cause or matter on a direction to be obtained from the paymaster-general upon the written request of the person desirous of so paying, transferring or depositing, or of his solicitor, "without an order."

LORDS JUSTICES. } In re HOYLAKÉ RAILWAY
 1874. } COMPANY.
 Feb. 25. } LITLEDALÉ'S CASE.

Companies Clauses Act, 1845, section 16—Transfer—Calls Due—Contributory—Unsuccessful Appeal by Official Liquidator—Costs.

A transfer of shares in a company subject to the provisions of the Companies Act, 1845, which is made with the sanction of the directors whilst calls are due and is duly registered, is not invalid under the 16th section of the Act, and the transferee is not liable as a contributory.

The restriction placed by the 16th section upon the transfer of shares on which calls are due was enacted for the protection of the company, and may be waived by them.

The respondent's costs of an unsuccessful appeal by the official liquidator ordered to be paid by the liquidator.

This was an appeal from an order of Vice-Chancellor Malins removing Mr. Littledale's name from the list of shareholders of the Hoylake Railway Company.

The Company was incorporated in 1863 by a special Act of Parliament, incorporating the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16).

Mr. Littledale, who was named in the special Act as one of the directors, applied for, and had allotted to him, one hundred shares of 10*l.* each, upon which 1*l.* was paid up.

In January, 1865, an agreement was made between the company and a contractor named Piercey, by which Piercey agreed to purchase the land and complete the railway and works for a certain sum, to be paid to him partly in money and partly in shares and debentures of the company, to be considered as fully paid up. In August, 1866, Mr. Littledale, who was then chairman of the board, was dissatisfied with the manner in which the affairs of the company were being carried on, and an arrangement was made that he should retire from the direction and should transfer to Piercey his one hundred shares, upon which calls to the amount of 3*l.* per share, in all 300*l.*, had been made, and were then actually due, and upon which there was a further

liability of 600*l.* In return for these one hundred shares Piercey was to transfer to Littledale one hundred fully paid up shares out of those which had been allotted to him under his agreement with the company. The said arrangement was carried out by mutual transfers by Littledale and Piercey, duly made and registered, on the 8th of August, 1866.

Littledale thereupon resigned his seat at the board. The one hundred shares so transferred to Piercey were under a resolution of the directors, passed the 24th of August, 1866, credited by the company in the running account which existed between them and Piercey with the amount unpaid thereon, and were entered on the register as fully paid up shares.

In 1872 a special Act was passed for the winding up of the company and the sale of the undertaking, under the provisions of the Companies Act, 1862.

In the winding up the official liquidator treated the above-mentioned transaction as invalid, and placed Mr. Littledale on the list of contributories for one hundred shares, with only 1*l.* paid thereon. The Vice-Chancellor refused to settle him upon the list of contributories, and the official liquidator appealed.

The 16th section of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), enacts that "no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him."

Mr. Jackson and *Mr. Westlake* appeared in support of the appeal.—The transaction between Piercey and Littledale could not stand; it was a mere scheme for getting rid of a troublesome director. No valid transfer could be made of shares on which calls were due. (Section 16 of the Companies Clauses Consolidation Act.) Nothing was due to Piercey, and the company had no right as against creditors to treat these shares as fully paid up.

Mr. Higgins and *Mr. Bardswell*, for Littledale, were not called upon.

LORD JUSTICE JAMES said he was of opinion that the order of the Vice-Chancellor ought to be affirmed. The

transfer of these shares by Littledale to Piercey had been duly registered, and Littledale was not a shareholder on the register in respect of them. Why should he be put upon the register? It was said that the bargain between him and Piercey was not proper as regarded the company, but that could not make him a shareholder or a contributory. Then it was said that section 16 of the Companies Clauses Act, 1845, made it impossible for Mr. Littledale to transfer his shares whilst there was a call due upon them. The provisions of that section in themselves shewed that they were intended for the protection of the company, and to give the company a lien upon all shares of any shareholder in respect of any calls due from him. That was a provision which might be waived by the company, and did not make the transfer void. It did not say that the shares should remain the shares of the transferor, notwithstanding his transfer of them. If there had been any breach of duty on the part of the directors in assenting to the transfer, that might be a ground for a special action or suit against them for damages sustained through their breach of trust. Then it was said that the calls on these shares ought not to have been entered as paid. If that were so there might be a right of action against Mr. Littledale for the amount of the calls which were made whilst he was holder of the shares, and which became due from him; but that was no ground for putting him on the list of contributories. He was merely a debtor to the company, and a mere debtor to a company could not be made a contributory, as had been argued, under the 200th section of the Companies Act, 1862, because the money coming from him might be used for the purpose of discharging the liabilities of the company. The appeal must be dismissed with costs.

LORD JUSTICE MELLISH was of the same opinion. The only real question was, whether the 16th section of the Companies Clauses Act, 1845, prevented the transfer when registered from passing the property in shares upon which a call was due, and he was of opinion that it did not. The fact that the section applied not only

to the shares in respect of which a call was due, but to all other shares of the shareholder, shewed that the object of it was merely to give the company a right over the shares. If the effect of the section were to make the transfer void, the result would be that if the company should permit the shares on which the call was due, or any other shares of the same shareholder, to be transferred, the purchaser of such shares, and everybody claiming under him, would have no title to them.

Then it was said the object of the section was to benefit the creditors of the company. There was nothing in the section to shew that the Legislature, in passing it, had the creditors in view, nor was it certain that it would be beneficial to the creditors to hold the transfer void. The 36th section of the Act provided that a creditor failing to obtain satisfaction of his debt out of the assets of the company, might have execution against any of the shareholders to the extent of their shares not paid up. It seemed clear that the creditor could not issue execution against two shareholders in respect of the same shares. Then the question would be, under circumstances of this kind, whether he should proceed against the transferor or the transferee, and it seemed quite as much or more for his benefit to proceed against the latter as against the former. It appeared, therefore, that the directors, having assented to a transfer, the property in the shares passed. That being so, whatever other remedy there might be, Mr. Littledale could not be a contributory in respect of those shares. He could not be so unless he was liable to be put on the register in respect of the shares. His Lordship was of opinion that he was not the person whose name ought to be upon the register as the holder of them, and the appeal must be dismissed. The costs must be paid by the official liquidator.

Solicitors—Messrs. Ashurst, Morris & Co., for the official liquidator; Messrs. Chester, Urquhart & Co., agents for Laces, Banner & Co., Liverpool, for Mr. Littledale.

LORDS JUSTICES. } *In re* THE UNITED PORTS
 1874. } COMPANY.
 March 11. } BECK'S CASE.

Company—Contributory—Agreement for Amalgamation—Application for Shares—Allotment on Different Terms—Acquiescence—Costs.

An amalgamation between two companies was agreed upon, on the terms that the shareholders in the selling company should receive in exchange for their shares in that company shares credited with an equal amount in the purchasing company. In pursuance of this arrangement B., a shareholder in the selling company, applied for two hundred shares in the purchasing company. The shares were allotted upon different terms, only an unascertained amount, proportionate to the assets of the selling company, being credited thereon. Notice of allotment upon these terms was sent to B., and his name was placed on the register in August. B. thereupon wrote for the share certificates. These were never sent to him, although repeatedly asked for. The company was wound up in November. The amalgamation was afterwards held to have been altogether void:—Held, that owing to the variation in the terms of the allotment from those of the application for shares, there never was any contract between B. and the company to take these shares, and under the circumstances there had been no acquiescence by B. in the allotment, and that his name must therefore be removed from the list of contributories.

The appeal of an official liquidator of a company seeking to settle a respondent upon the list of contributories being dismissed with costs, the respondent's costs will, as a rule, be ordered to be paid by the official liquidator and not out of the estate.

This was an appeal by the official liquidator of the above named company from a decision of Vice-Chancellor Bacon refusing to settle the name of Mr. Beck upon the register of shareholders.

The question in this case arose out of transactions consequent upon the intended amalgamation of the Progress Assurance Company with the United Ports Insurance Company. The circumstances relating to

that intended amalgamation are stated in the report of *Wynne's Case*, ante, p. 138.

Mr. Beck was the holder of forty shares of 5*l.* each in the Progress Company, and on the 24th of July, 1869, with a view to the proposed amalgamation being effected, he filled up and forwarded, through the Progress Company, to the secretary of the United Ports Company, an application, in the same form as that set out in *Wynne's Case* (*ubi supra*), for two hundred shares in that company, in exchange for his shares in the Progress Company.

On the 3rd of August, 1869, two hundred shares in the United Ports Company were accordingly allotted to him, and his name was placed on the share register in respect of such shares.

On the 5th of August notice of such allotment was forwarded to him in a letter signed by Mr. Leyland, of the United Ports Company, in the same terms as the letter of allotment set out in *Wynne's Case* (*ubi supra*).

On the 10th of August, and again on the 8th of November, Beck wrote for certificates of the shares thus allotted to him. From the last of these two letters, having mentioned two previous applications, it appeared that he had also written an intermediate letter for the same purpose, but no further evidence of such an application could be adduced. The share certificates were never sent to him. On the 9th of November, 1869, an order, founded on a petition presented on the 7th of October, was made for winding up the United Ports Company. In the winding up the Vice-Chancellor made the order appealed from, refusing an application on the part of the official liquidator to have Mr. Beck's name settled upon the list of contributories. The official liquidator appealed.

Mr. Eddis and *Mr. Brooksbank*, for the official liquidator, in support of the appeal.—There was a valid contract on Mr. Beck's part to take these shares.

[LORD JUSTICE JAMES.—We decided in *Wynne's Case* (*ubi supra*) that the amalgamation was void, and that the application for shares on the footing of the amalgamation and the allotment of shares on different terms did not constitute a contract to take shares. The only ques-

tion is, whether Mr. Beck adopted the act of the directors of the United Ports Company in putting him upon the register so that he is bound by an implied contract to accept the shares upon the terms on which they were allotted.]

Hare's Case, Law Rep. 4 Chanc. 503; and

Addison's Case, 39 Law J. Rep. (N.S.) Chanc. 558; s. c. Law Rep. 5 Chanc. 294;

shewed that Mr. Beck was bound. There was acquiescence on his part.

[LORD JUSTICE JAMES.—“Acquiescence” means quiescence under such circumstances as induces the company to imply consent.]

For three months before the winding up he remained on the register with his knowledge, and took no steps to have his name removed. His application for the certificates was, in itself, an acknowledgment that he was a shareholder—

Kincaid's Case, 36 Law J. Rep. (N.S.) Chanc. 499; s. c. Law Rep. 2 Chanc. 412;

Laurence's Case, 36 Law J. Rep. (N.S.) Chanc. 490; s. c. Law Rep. 2 Chanc. 412.

Upon the share register being looked at, it now appeared that Beck was not credited therein with anything in respect of the shares in question, the space in which the amount paid up thereon ought to have appeared being left blank.

Mr. H. M. Jackson and Mr. Graham Hastings, for Mr. Beck, were not called upon.

LORD JUSTICE JAMES.—I am of opinion that this appeal ought not to have been brought. This gentleman's name was put upon the register without any authority from him. The placing it there was a perfectly void act. The sole question to be decided is, whether by his subsequent conduct he did anything to ratify the act, so that the ratification is to be held as giving an authority for it. He had been told there was to be an amalgamation of the two companies, and that he was to be credited with something in the United Ports Company in exchange for his shares in the Progress Company. When he has notice of the allotment to

him of shares in the United Ports Company, he writes for the certificates of those shares. They are never sent to him. But his name is left on the register. It now appears that on the register he is not credited with anything in respect of the shares so allotted. It would be a monstrous injustice if he were to be left on the register credited with nothing. He applied for shares in the United Ports Company, on which he should be credited with the same amount as on the shares in the Progress Company which he surrendered. That was never done. There never was any contract to take shares, and Mr. Beck is entitled to have his name removed from the register. The appeal must be dismissed with costs.

LORD JUSTICE MELLISH.—I am of the same opinion. I think the Vice-Chancellor's judgment was right on the ground on which he put it. It is not necessary now to decide the point as to the authorities upon the question of acquiescence. But I must not be taken to say that Mr. Beck would not be entitled to have his name removed from the register in conformity with those authorities, if the question had to be decided on that ground. But I think Beck never had any intention to accept the terms in the company's letter giving him notice of the allotment to him. That letter first stated that the United Ports Company had allotted him shares in accordance with the arrangement for amalgamation, and then went on to state that he had been credited with an amount on such shares, to be ascertained on a basis altogether different from the terms of the amalgamation. Beck, in return, asked that the certificates of the shares should be sent to him. If he had received the certificates and found himself not credited with five shillings upon the shares, he might have sent the certificates back. There was no agreement made between him and the company as to the terms upon which he should become a shareholder. Consequently, there never was a contract by him to take these shares, and the appeal must be dismissed with costs.

Mr. Eddis asked that the costs might be directed to come out of the estate.

Mr. Jackson, on the other side, sub-

mitted that the costs of the respondent, Mr. Beck, ought to be paid by the official liquidator.

THE LORDS JUSTICES, following the rule they had recently laid down (see *Littledale's Case*), ordered that the respondent's costs should be paid by the official liquidator, who should take them, together with his own costs, out of the estate.

Solicitors—Mr A Pulbrooke, for the official liquidator; Mr. S. A. Beck, for the respondent.

LORDS JUSTICES.

1874.

April 28.

May 5.

WARD v. THE SITTINGBOURNE
RAILWAY COMPANY.

Railway Company—Dissolution by Act of Parliament—Winding up—Demurrer ore tenus—Costs—Consol. Ord. xiv. r. 1.

Under an agreement sanctioned by Act of Parliament a railway company was sold and transferred to another railway company, who were to issue 155,000*l.* rent-charge stock at the selling company's request (the dividends to be paid out of a perpetual rent-charge of 7,000*l.*, payable by the purchasing company), and the proceeds of the stock and of the sale of certain surplus lands and other reserved assets were to be applied by the selling company in payment of certain vendors' debts, charges and costs, and the surplus to be divided between the preferential shareholders and creditors of the selling company in proportion to the amount of their shares and debts. The agreement further provided for the issue by the purchasing company to the ordinary shareholders of the selling company of ordinary stock in the purchasing company. The agreement provided that when the company's affairs had been wound up as above, notice was to be advertised in the "*London Gazette*," and thereupon the selling company was to be dissolved.

The agreement was sanctioned in 1866. In 1874 a creditor and ordinary shareholder of the company filed a bill on behalf of himself and all other the creditors and

shareholders of the selling company against that company, alleging (amongst other things) wilful delay in winding up the company, default in payment of debts, and refusal or neglect to deliver to the plaintiff the ordinary stock to which he was entitled, and praying a winding up and other consequential relief.

On demurrer to the bill for want of equity,—Held (affirming the decision of MALINS, V.C.), that on the allegations the plaintiff was entitled to some relief as a creditor, and the demurrer was not sustainable for want of equity; but held, also, that the plaintiff's claim as an ordinary shareholder made the bill demurrable for multifariousness and misjoinder, and on this ground the demurrer was allowed, but with liberty to amend.

The demurrer being sustained only on the grounds alleged ore tenus, the plaintiff was allowed his costs under Consol. Ord. xiv. rule 1.

This was an appeal from an order of Vice-Chancellor Malins overruling a demurrer.

The Sittingbourne and Sheerness Railway Company were incorporated by Act of Parliament in 1856 for the construction of the railway therein mentioned. According to the allegations of the bill they duly completed their railway within the time limited by the Act, and it was from 1859 leased to the London, Chatham and Dover Railway Company under an Act passed in that year.

By the London, Chatham and Dover Railway Company (various powers) Act, 1866, ratifying an agreement between the two companies, the undertaking and property of the Sheerness Company (with the exception of certain surplus lands and other specified property) were vested in the Chatham and Dover Company (subject to the charges therein mentioned) in consideration of a perpetual rent-charge of 7,000*l.* And the Chatham and Dover Company were authorised to create and issue 155,556*l.* Sheerness rent-charge $4\frac{1}{2}$ per cent. stock, of which the dividends were to be paid out of the rent-charge; and also to create and issue fully paid-up ordinary stock to, the amount of 25,000*l.* for the purposes of the agree-

ment. And the Act further provided that when the affairs of the Sheerness Company were wound up, and notice thereof was advertised in the *London Gazette*, as was provided for by the 16th of those heads of agreement, the Sheerness Company were thereby dissolved, and should thenceforth wholly cease to exist.

The agreement, which was scheduled to the Act, provided, amongst other things:

9 and 10. That the Sheerness Company might dispose of the 155,556*l.* stock, which the Chatham and Dover Company were to issue according to their direction.

11. The Sheerness Company to dispose of the portions of the stock which they did not sell, and the net proceeds of the sales of the portions thereof which they sold for the purposes and in the order of priority following—

First, in payment of landowners' claims as therein mentioned; secondly, in discharge of a mortgage debt for 39,000*l.*; thirdly, in payment of certain costs, &c.; "fourthly, the surplus to be divided between, and disposed of or paid to the Sheerness Company's preferential shareholders and creditors other than mortgagees in rateable proportion to the respective amounts of their preferential shares and the debts, whether secured or unsecured, due to them from the Sheerness Company."

12. The Dover Company to create and issue gratis to the ordinary shareholders of the Sheerness Company to the extent of 4,805*l.* fully paid-up 10*l.* shares ordinary stock of the Dover Company, at the rate of 50*l.* stock for every 100*l.* paid on the shares.

15. The Sheerness Company to dispose of their surplus lands and other property not vested in the Dover Company, and apply the proceeds in like manner as expressed under heads 3 and 4 of clause 11.

16. "When the stock and the net proceeds of sale thereof are fully disposed of under the 11th head, and the ordinary stock is issued under the 12th head, and the surplus lands and other property, and the net proceeds thereof, are disposed of under the 15th head, and their affairs are wound up, notice thereof to be advertised by the Sheerness Company in the *London*

Gazette, and thereupon the Sheerness Company to be absolutely dissolved."

The bill alleged that since the passing of the Act the defendants, the Sheerness Company, had ceased to carry on business, and were not then a railway company incorporated by Act of Parliament within the meaning of section 199 of the Companies Act, 1862.

That the defendant company had not held any general meeting of shareholders since 1871, and had not issued any statement of accounts since the 31st of December, 1870, and that there was no properly constituted board of directors; that none of the six nominal directors possessed the proper share qualification, and the winding up of the affairs of the company had been grievously neglected and mismanaged, and that the dissolution of the company, although in effect the same had long since taken place, had never been advertised in the *London Gazette*.

That the defendant company alleged that its affairs were not wound up, but the plaintiff charged that they ought to have been; that there had been ample time for the winding up, but that it was wilfully delayed by the company, its directors, officers and servants.

That the plaintiff was solicitor to the company until May, 1872, and was creditor for a bill of costs; and further, that there were accounts on which a large balance was due to him; that the company was also indebted to divers other persons, and was, in fact, unable to pay its debts.

That the plaintiff was also a shareholder of the company to the extent of 300 shares, and was entitled under the agreement to receive shares in the Chatham Company, but the defendant company refused or neglected to deliver such shares to the plaintiff.

That the alleged directors were not competent to act in the affairs of the company, and there was no person legally entitled to get in the assets, which were in danger of being lost.

That the defendant company was, in fact, dissolved, and it was just and equitable that the company should be wound up.

The bill was filed by the plaintiff, James Ward, on behalf of himself and all other the creditors and shareholders of the company against the company, and it prayed that the company might be wound up by the order of the Court, and that the plaintiff might be at liberty to use the name of the company to collect and get in the assets of the company, &c.—in effect giving him the ordinary powers of a liquidator. The bill also prayed the appointment of a receiver and an injunction to restrain the company, its directors, officers and agents, from dealing with the assets.

The plaintiff moved for an injunction and receiver, but the defendants demurred to the bill for want of equity.

The Vice-Chancellor overruled the demurrer, and the defendant company appealed.

Mr. Glasse and Mr. Bevir, for the appellants.—This is a matter of internal arrangement. The plaintiff is a shareholder, and should call a meeting of the shareholders. Till he has tried all means in his power, the Court will not interfere—

Foss v. Harbottle, 2 Hare, 461.

[LORD JUSTICE JAMES.—But as a creditor he could not call a meeting? And are there now any shareholders?]

The Court will not try the qualification of the directors on such a bill—

Moxley v. Alston, 1 Ph. 790; s. c. 16

Law J. Rep. (n.s.) Chanc. 217.

The Act set out itself provides how the winding up is to be effected. The Court has no jurisdiction to wind up a railway company under the Companies Act, 1862 (section 199).

THE LORDS JUSTICES called on counsel for the plaintiff to shew that the bill was not demurrable for misjoinder of plaintiff and multifariousness.

Mr. Gill (with *Mr. Higgins*), for the plaintiff.—Apart from the Act of 1862, the Court can order a winding up under its general jurisdiction—

Jones v. Charlemont, 16 Sim. 271.

The plaintiff was not bound to make a preference shareholder a party—

Clements v. Bowes, 17 Sim. 167; s. c.

21 Law J. Rep. (n.s.) Chanc. 306.

[LORD JUSTICE MELLISH.—As to your

rights as a shareholder, might not each shareholder have a *mandamus* to get the shares in the Chatham Company to which he was entitled?]

There might be (and, as a matter of fact, there probably will be) a surplus after paying the creditors and preference shareholders in full, and in this the ordinary shareholders might have a right to participate.

[LORD JUSTICE JAMES.—That seems to make your bill still more demurrable.]

LORD JUSTICE JAMES.—I am of opinion that there is a ground of equity alleged by the bill sufficient to sustain some bill, for some purpose, in this Court. The Act of Parliament has provided for the Dover Company absorbing the Sheerness Company, and has imposed upon the Sheerness Company a clear trust as to its assets. They were to receive a certain sum from the Dover Company, and then, when it is received, they are to make a certain application of it, and to give the surplus between the company's preferential shareholders and the creditors, that is to say, the preferential shareholders *pari passu* with the creditors. It was the duty of the company to receive that money and divide it. There was the relation of trustee and *cestuis que trust* existing by force of the Act of Parliament between the company and that class, and the bill alleges that the company has neglected its duty, and has taken no step to do it. In that respect relief may be given at the hearing as regards the assets, which have not been distributed among that class. At the same time the plaintiff has not contented himself with filing a bill on behalf of himself and the preferential shareholders, but on behalf of himself and the ordinary shareholders, who are dealt with in a totally different way by Act of Parliament, and who are to have from the Dover Company, and not from the Sheerness Company, certain shares. It has been alleged by counsel in favour of the bill that there may be a question if, when the preferential shareholders and the creditors are paid, there should be still a surplus, whether the ordinary shareholders may be entitled to get that surplus. That is an entirely adverse claim,

A man cannot file a bill for two adverse sets of claimants to have relief. In one case the creditors and preferential shareholders would be entitled to get the whole; and it is possible that the ordinary shareholders—although I do not see exactly how—may be entitled to some part of that surplus instead of its going entirely among the others. That is an entirely adverse claim to the claim of the preferential shareholders. I think the Vice-Chancellor was right in overruling the demurrer for want of equity; but as the demurrer is now taken for multifariousness and misjoinder, that must be allowed. As, however, that is not the ground taken by the written demurrer, it must be allowed without costs, and there will be no costs of the appeal. The plaintiffs will have liberty to amend.

LORD JUSTICE MELLISH.—I am of the same opinion.

The matter was mentioned again (on May 5) on behalf of the plaintiff in the presence of the defendants' counsel, the plaintiff claiming under order xiv. of the Consolidated Orders, rule 1, that he was entitled to his costs of the demurrer as if it had been overruled.

LORD JUSTICE JAMES.—We overruled the demurrer for the reason alleged in the written demurrer, but we allowed the demurrer for the reasons alleged *ore tenus*, and whatever is the proper order under these circumstances ought to be made. The defendants must pay the costs of the demurrer.

Demurrer for want of equity overruled with costs, but demurrer allowed for multifariousness and misjoinder, with liberty to amend.

Solicitors—Mr. A. S. Lawson, for the appellants; Messrs. Jas. Taylor, Mason & Taylor, for the plaintiff.

MALINS, V.C. }

1874.

April 27, 28. }

MATTHAEI v. GALITZIN.

Jurisdiction—Foreign Contract—Foreign Parties and Subject-matter—Stakeholder within the Jurisdiction—Demurrer.

The Court of Chancery will not entertain a suit in respect of a foreign contract, in which the parties are foreign subjects and the subject-matter is in a foreign country, although the plaintiff's claim is in respect of moneys in the possession of a second defendant as stakeholder, and who is within the jurisdiction.

Demurrer.

The suit was instituted by Julie Matthaei, described in the bill as "of the Charing Cross Hotel, Charing Cross, in the county of Middlesex, and of Antwerp, in the kingdom of Belgium, widow (administratrix in England of Carl Friedrich Matthaei, formerly of Hanover, but a naturalised British subject, and now dead)," against the Princess Anna Demitriyevna Galitzin, of Russia, and the Russian (Vyksounsky) Iron Works Company (limited), under the following circumstances—

In the year 1863 two brothers of the name of Chepeleff, who were the owners of certain mineral property in Russia, generally known as the works of Vicksa, entered into an agreement with Carl Friedrich Matthaei, then a merchant of Hanover, whereby he was authorised to form a company for the purpose of developing and working such property, and was to be paid a commission of ten per cent. upon all moneys which should be received by the brothers Chepeleff during the period of such working.

The bill then stated that Matthaei ultimately succeeded in establishing the defendant company, which was "incorporated" (the bill not stating whether in this country or in Russia) in the year 1865, and that the company then obtained a lease for the working of the property for a term of thirty-seven years, upon the terms that two-fifths of the profits should belong to the company, and the other three-fifths to the brothers Chepeleff. The Chepeleffs subsequently died, whereupon

their interest in the property became vested in the Princess Galitzin, and the bill alleged that she accordingly received considerable sums of money on account of her share in the profits. Matthæi died in 1868, and administration to his estate was taken out in this country by the plaintiff, his widow.

The bill then alleged that the plaintiff, as her deceased husband's representative, had made repeated applications to the Princess Galitzin, who was resident in Russia, for an account of the moneys she had received from the company in respect of her three-fifths of the profits of the working of the said property, and also to pay to the plaintiff the ten per cent. commission upon the moneys so received by her, but that the princess had neglected to give any answer to such applications; that in addition to the sums already paid by the company to the princess, there was a large sum then due to her in respect of her three-fifth shares; and that the company intended, without regard to the plaintiff's rights, to remit to Russia to the princess the amount so due to her, but that the plaintiff had no means of knowing the actual amount of the sums paid and due by the company to the princess, and that the company ought to set forth the amounts paid by them to her; also that the company, having full notice of the plaintiff's claim, ought to be restrained from parting with the moneys payable to the princess without providing for the plaintiff's claims against her, and that the princess ought to be restrained from receiving the same moneys, and to be ordered to account to the plaintiff for the moneys received by her from the company, and to pay the plaintiff ten per cent. upon the amount which, upon taking such account, should appear to have been received by the princess from the company.

The bill then prayed for accounts and injunctions against the defendants accordingly. Both defendants demurred separately to the bill for want of equity.

Mr. Glasse, Mr. C. T. Simpson and Mr. Gill, for the demurrer of the company.—This is a suit in reality against the Princess Galitzin, but both she and the plaintiff are foreign subjects, and the pro-

perty in respect of which the disputes have arisen is in a foreign country. That being so, the Court has no jurisdiction to entertain the suit—

Blake v. Blake, 18 W. R. 944;

Cookney v. Anderson, 31 Beav. 452;

s. c. 1 De Gex, J. & S. 365; s. c.

32 Law J. Rep. (N.S.) Chanc. 427;

Norris v. Chambres, 29 Beav. 246;

s. c. 3 De Gex, F. & J. 583; s. c.

30 Law J. Rep. (N.S.) Chanc. 285.

Again, what right has the plaintiff, who represents the agent for the Chepeleffs, the lessors, to join the company, who are lessees, as defendants? It is just as if a house agent who has let a house for a lessor, sues the lessor for his commission and joins the lessee as a defendant! We submit that the allegation in the bill that the company are lessees is alone sufficient to put the bill out of Court.

Mr. Cotton and Mr. Kenyon Parker, for the demurrer of the Princess Galitzin, relied on the argument of want of jurisdiction, citing

The Mayor, &c., of London v. Cox,

36 Law J. Rep. (N.S.) Exch. 225;

s. c. Law Rep. 2 E. & Ir. App.

239.

Mr. Cottrell (Mr. Higgins with him), for the bill.—The Court has jurisdiction in this case, for the company is an English registered joint-stock company.

[MALINS, V.C.—The bill does not state that it is an English joint-stock company or that it was registered as such in England.]

It is sufficient that the title of the company shews it to be an English company—

In re The General Company for the

Promotion of Land Credit, 39 Law

J. Rep. (N.S.) Chanc. 737; s. c.

Law Rep. 5 Chanc. App. 363;

s. c. (H.L.) 40 Law J. Rep. (N.S.)

Chanc. 655; s. c. Law Rep. 5

E. & I. App. 177.

Moreover, Matthæi was a "naturalised British subject," the plaintiff being his administratrix in England: the Court can therefore direct the accounts to be taken, although the contract was to be carried out in Russia—

Maunder v. Lloyd, 2 Jo. & H. 719;

37.

Hendrick v. Wood, 9 W. R. 588; s. c.
30 Law J. Rep. (N.S.) Chanc. 583.
Mr. Cotton in reply.

MALINS, V.C., thought it perfectly clear on the face of the bill that there was no right against the company unless there was first a right against the princess, because the company were in the position of stakeholders as to her three-fifths, subject only to the liability of paying the ten per cent. commission. If the plaintiff's case failed against the princess, it must necessarily fail against the company. This, therefore, must be regarded as a bill against the princess. Now what were the facts? This was a case where the plaintiff's husband, a foreigner, had entered into a contract with another foreigner respecting property in a foreign country. What right, then, had the parties to sue in this country? Had the parties a right to sue in the Courts of this country when the property was foreign, the contract foreign, and the parties themselves foreign subjects? According to his view it was no part of the business of this Court to decide rights between, say, Frenchmen, Russians or Prussians. To justify the interference of this Court either the property must be here, or the persons must be here, or there must be something to bring the subject-matter within the cognisance of this Court. The plaintiff stated in her bill that she was residing at the Charing Cross Hotel, but she was in fact a foreign subject, and if he were to overrule the demurrer and allow her to proceed with the suit it would be useless. It would be a grievously hard case if, as here, a foreigner, residing in a foreign country and having property existing in that country, where there were tribunals in which the rights of subjects of that country could be asserted, might be dragged into the Courts of this country and be subjected to the annoyance of all the proceedings in these Courts. He should not sanction such a state of things unless there were an absolute necessity. Was, then, the plaintiff entitled to anything as against the princess? If not, she had no right against the company. Various cases had been cited shewing that no foreigner could be

sued in this country unless the parties were resident or the subject-matter situate in this country. He had himself already decided the point in *Blake v. Blake* (*ubi supra*), where he followed the authorities. That case had peculiar application to the present, for there the parties were resident, and the contract was entered into out of the jurisdiction of this Court. As he said in that case, so he said in this, that neither the plaintiff nor the defendant being resident here, nor the property being here, there was nothing with which this Court could have anything to do, and therefore these demurrers ought to be allowed. The cases which had been cited by the plaintiff's counsel had very little application to this case, but, so far as they went, were certainly no authorities in her favour. He was of opinion that a foreigner resident abroad could not bring another foreigner into this Court respecting property with which this country had nothing to do, and he therefore allowed the demurrers, as the Courts of this country ought not to be a vehicle for deciding disputes upon matters with which they had no concern.

Solicitors—Mr. J. R. Bailey, for plaintiff; Messrs. Rickards & Walker, for defendants.

MALINS, V.C. } *In re* THE LIMEHOUSE WORKS
1873. } COMPANY (LIMITED).
Dec. 11. } COATES' CASE.

Winding-up—Contributory—Paid up Shares—Sale in Consideration of—Memorandum of Association—Collateral Agreement—Payment in Money's Worth—Companies Act, 1867, s. 25.

A Company was formed with a capital of 7,500 l. shares for the purpose, as stated in the memorandum of association, of purchasing the business of C. C. subscribed the memorandum for 2,500 shares, and other persons subscribed it for 3,625 shares, making the total number of shares subscribed for 6,125. The articles, which bore the same date as the memorandum, stated that an agreement had been prepared for the purchase of C.'s business, and that the pur-

chase money was to be 5,000*l.*, half to be paid in cash and half in fully paid up shares. The articles also authorised the company by special resolution to create new shares. Two days afterwards the agreement between C. and the company was executed, and it contained the same provisions as to the payment of the purchase money, but did not in terms state that the 2,500 shares for which C. had subscribed were the 2,500 fully paid up shares he was to receive in part payment. This agreement was duly registered as a compliance with the 25th section of the Companies Act of 1867, and 2,500 shares were subsequently allotted to C. as the shares for which he had subscribed the memorandum and articles of association, and C. was treated by the company and appeared on the register as the holder of 2,500 fully paid up shares only:—

Held, in the winding up of the company, that the 2,500 shares for which C. had subscribed were the 2,500 fully paid up shares which he was to receive in part payment, and that having given money's worth for them, he had in fact paid for them in "cash" within the meaning of the 25th section, and was not liable to be placed on the list of contributories.

Observations upon Dent's Case (42 Law J. Rep. (n.s.) Chanc. 857; s. c. Law Rep. 8 Chanc. 768), *Spargo's Case* (42 Law J. Rep. (n.s.) Chanc. 488; s. c. Law Rep. 8 Chanc. 407), and other authorities.

This was a motion on behalf of the liquidator of the above named company that the name of Mr. Coates might be placed upon the list of contributories in respect of 2,500 shares.

The company was formed with the object, as stated in the memorandum of association, of purchasing and carrying on certain businesses theretofore carried on by Mr. Coates at the Limehouse Works, and the capital of the company was fixed at 7,600*l.* in a like number of shares of 1*l.* each. The memorandum bore date September 28, 1870, and was signed in the usual way by seven persons who subscribed for an aggregate number of 6,265 shares, Mr. Coates, who was one of them, signing as a subscriber for 2,500 shares.

The articles of association were dated the same day, and in clause 4, after stating

that an agreement had been prepared between Mr. Coates and the company for the purchase of his businesses, provided for the payment of the purchase money as follows—"The purchase money payable to the said E. J. Coates for the said businesses and plant under the said agreement is 5,000*l.*, of which one moiety is to be paid in cash, and the other moiety in fully paid up shares of the company." By the 5th clause a written application for shares was to be deemed acceptance of such as should be allotted, and with that exception no person should be deemed to have accepted shares except by writing under his hand; and by the 6th clause "the deposit to be paid on subscribing or applying for any shares in the company (other than the shares to be allotted under the agreement between the said E. J. Coates and the company)" was to be 5*s.*, and 15*s.* was to be paid on allotment, and on the inscription of the allottee's name in the register of members the said sum was to become a debt due from him to the company.

The memorandum and articles of association were both registered on the 29th of September, and the agreement between Mr. Coates and the company referred to in the articles was dated the 30th of September. It provided in its 2nd clause as follows—

"The aggregate consideration or purchase money to be paid or given by the company for the said businesses and premises hereinbefore contracted to be sold shall be 5,000*l.*, whereof one moiety or 2,500*l.* shall be paid to the vendor in cash," by instalments on specified days, "and the other moiety or sum of 2,500*l.* shall be paid or given to the vendor in 2,500 fully paid up shares of 1*l.* each in the company, and the company shall forthwith, upon the execution of these presents, allot to the vendor the said number of fully paid up shares in the company, and the vendor shall accept the same in satisfaction of the said moiety of the consideration or purchase money."

The various subscribers to the memorandum of association, with the exception of Mr. Coates, made application in writing for their shares, and at a meeting of the directors held on the 30th of September, 1870, the shares so applied for were

allotted, and the agreement between the company and Mr. Coates was approved of, and that agreement was filed with the Registrar of Joint Stock Companies on the following 6th of October. On the 10th of October the directors passed a resolution in the following terms—"That 2,500 fully paid up shares be and the same are hereby allotted to the said E. J. Coates, in pursuance of the contract between the said E. J. Coates and the company, bearing date the 30th of September, 1870, the said shares being the same for which the said E. J. Coates subscribed the memorandum and articles of association."

On the 23rd of January 750 more shares were taken by one of the original subscribers, raising the total number of shares allotted to 7,015, and leaving unallotted 485 shares, which number remained unallotted when the company was wound up. The capital account of the company up to the 30th of June, 1872, credited Mr. Coates with 2,500*l.* cash on the 10th of October; while the cash account credited him with 5,000*l.*; the purchase moneys of his business, and debited him on the 11th of October with the value of the 2,500 shares, thus—"To 2,500 fully paid up shares 2,500*l.*;" and the account also debited him with the amounts of cash paid by instalments to date, and brought out the balance in his favour.

The company being now in process of liquidation, the liquidator placed Mr. Coates upon the list of contributories in respect of the 2,500 shares for which he signed the memorandum of association, which were the only shares allotted to him.

Mr. Glasse and *Mr. W. F. Robinson* now moved on behalf of the official liquidator that the name of Mr. Coates might be placed upon the list accordingly.—They contended that Mr. Coates had entered into two separate and distinct contracts. The one an ordinary contract, constituted by his signing the memorandum of association, to take and pay for the 2,500 shares for which he subscribed, a liability from which he could not escape—

Re Anglo-Moravian, &c., Company;
Dent's Case, 42 Law J. Rep. (N.S.)
Chanc. 474; s. c. 15 Eq. 407; s. c.

on app. 42 Law J. Rep. (N.S.)
Chanc. 857; s. c. Law Rep. 8
Chanc. 768;

Re Pen'allt, &c., Company; Fothergill's
Case, 42 Law J. Rep. (N.S.) Chanc.
481; s. c. Law Rep. 8 Chanc. 270;

the other, a subsequent agreement to sell certain property for shares and cash; and it was only on signing the latter agreement on the 30th of September that he became entitled to the allotment of the purchase shares. Moreover, by the 25th section of the Companies Act of 1867, every share in a company must be deemed to have been issued subject to the obligation of paying the amount thereof in cash, unless it shall have been otherwise determined by a contract in writing registered before the issue of the shares; and the provisions of this section had not been duly complied with. It was true that there were not 2,500 shares of the original number unallotted, but there was power in the articles of association to make a fresh issue, and Mr. Coates could have compelled the company to make use of the power in his favour. They also referred to

Evans's Case, 36 Law J. Rep. (N.S.)
Chanc. 501; s. c. Law Rep. 2
Chanc. 427.

Mr. Cotton, *Mr. Higgins* and *Mr. Methold*, for Mr. Coates.—It is plain that the 2,500 shares, as a subscriber for which Mr. Coates signed the memorandum of association, were the 2,500 fully paid up shares which, by the agreement recited in the articles, he was to receive in part payment of the purchase money for his businesses. There never were two separate contracts, and upon the face of the registered documents the whole thing was one transaction. This takes the case out of the principle of the decision in

Re Pen'allt Silver Lead Mining Company; Fothergill's Case (*ubi supra*), where there was no connection between the shares which were to be allotted as the consideration of the purchase, and the shares for which the memorandum of association was signed, and brings it within the decision in

Re Harmony and Montagu Tin and
Copper Mining Company; Spargo's
Case, 42 Law J. Rep. (N.S.) Chanc.
488; s. c. Law Rep. 8 Chanc. 407,

which is an authority in our favour. There never were 2,500 shares besides those subscribed for by the memorandum unallotted, and the capital could not be increased except by special resolution. Moreover the shares for which Mr. Coates signed the memorandum have always been treated as paid up shares. Then with regard to the argument that Mr. Coates was bound to pay in cash for the shares for which he subscribed, it has always been the law that shares may be paid for "in meal or in malt," in money or, what is the same thing, in money's worth—

Sichell's Case, 36 Law J. Rep. (N.S.)
Chanc. 814; s. c. on app. Law
Rep. 3 Chanc. 119; s. c. 37 Law
J. Rep. (N.S.) Chanc. 373;

Schroeder's Case, 40 Law J. Rep.
(N.S.) Chanc. 130; s. c. Law Rep.
11 Eq. 131;

Cleland's Case, 41 Law J. Rep. (N.S.)
Chanc. 652; s. c. Law Rep. 14 Eq.
387;

Re Baglan Hall Colliery Company,
39 Law J. Rep. (N.S.) Chanc. 591;
s. c. Law Rep. 5 Chanc. 346;

Re Jones's Case, 40 Law J. Rep. (N.S.)
Chanc. 133; s. c. Law Rep. 6
Chanc. 48;

and this rule has not been altered by the
25th section of the Act of 1867—

Re Matlock Old Bath, &c., Company;
Maynard's Case, 43 Law J. Rep.
(N.S.) Chanc. 146; s. c. Law Rep.
9 Chanc. 60.

Mr. Glasse in reply.

MALINS, V.C.—This case is by no means free from difficulty, but upon the whole I have come to a conclusion upon it. The company was a 'small company, formed to work the businesses formerly carried on by Mr. Coates, and by the terms of the agreement for purchase, purchasers were to pay one-half of the purchase money in shares. That was an arrangement entered into before the memorandum of association had been executed. Of that there can be no question, because the articles of association were executed and registered at the same time, and they recite that arrangement and the fact that such an agreement had been prepared. Mr.

Coates signed the memorandum of association for 2,500 shares, and other persons signed it for other shares, the total so signed for amounting altogether to 6,125. The memorandum of association provided that the capital should consist of 7,500*l.*, divided into the same number of shares of 1*l.* each. Then what was the intention of Mr. Coates in signing the memorandum, and what was the understanding of the parties to the transaction? It has never been and cannot be denied that it was the intention of the parties that the shares for which Mr. Coates subscribed were to be fully paid up shares. But then comes the question, whether the Companies Act, 1867, has been complied with, for it is of the highest importance that the Act should be very strictly complied with. Now, the memorandum so signed being perfectly silent as to whether the shares are fully paid up or not, Mr. Coates must be taken to be liable to pay them up in full, unless he brings himself under the protection of the 25th section. [His Honour here read that section.] It is, therefore, perfectly competent for a person to sign a memorandum of association apparently for shares liable to payment, provided that before the shares are issued, a document in writing is executed providing that the shares shall not be paid up in full, and such document is registered before the issue of the shares.

Now I quite agree with the argument of the respondents here as to the intention of complying with the Act of Parliament. On the 6th of October the document which had been executed on the 30th of September is duly registered. [His Honour here read the 2nd clause of the agreement as stated above.] It has been argued, on the part of Mr. Coates, that the Act of 1867 has been strictly complied with, because the document containing this clause was duly registered before the allotment of the 2,500 shares for which he had subscribed, which did not take place until the 10th of October. I quite agree that that is the object, but I must observe that the document fails in the precision of language requisite to point out and designate that which was done by a subsequent part of the proceeding, namely, that the 2,500

shares which were to be allotted to him as free shares, were the same shares for which he had signed the memorandum of association. It has been conceded that if those words had been added, all possibility of doubt would have been removed. Those words, however, were not added.

But it is said that on various grounds the same shares must have been intended; that if the same shares were not intended, there were not 2,500 shares left to be allotted. To this argument Mr. Glasse, for the liquidator, replied that it need not have been the same shares, for the directors were at liberty to issue more shares. But although they were at liberty to issue more shares, *prima facie* it was to be presumed they were to be allotted to other shareholders. I think, therefore, that meets the difficulty that there might have been other shares.

Now, therefore, although I am satisfied as to the intention of the parties; if that had been the only argument which could have been brought forward in favour of Mr. Coates, I think I should probably have felt bound to come to the conclusion, as a matter of strict right, that, inasmuch as every subscriber to the memorandum of association of a company must pay for every share for which he subscribes, unless he can strictly and literally bring himself within the protection of the 25th section of the Companies Act, 1867, Mr. Coates has not brought himself within that protection, and these must be considered shares for which he was liable to pay.

But there is another ground upon which the case has been argued, namely, that, assuming him bound to pay for these shares, then in point of fact he has done so. To this it is replied that all the cases where payment "in meal or malt," as it is called, has been held to be good payment, were decided before the Act of 1867, or with reference to companies to which that Act did not apply, and that what might have been a good payment formerly will not be good now. I confess I do not so understand the matter. I quite see the stringency of the provisions with regard to the liability on shares subscribed for, but I do not understand that the Act of 1867 has made any alteration

whatever with regard to what shall be good payment for shares which have been admittedly subscribed for. If a man subscribes, as in this case Mr. Coates did, for 2,500 shares, he thereby incurs the liability to pay some sum of money, say 2,500*l.*, and if in payment of this sum he hands over to the company goods which they want for the purpose of their business, nobody would, I think, say that ought not to be considered as payment, or that any case has occurred which so decides; and I take it to be perfectly clear from all the authorities cited that payment may be made otherwise than by cash.

Now, Mr. Glasse in his argument very much urged *Fothergill's Case* (*ubi supra*) and *Dent's Case* (*ubi supra*). In *Dent's Case* the Lord Chancellor considered that there was a liability, but he says, at page 775 of Law Rep. 8 Chanc., that he could find no trace of anything equivalent to actual payment; and there are other passages in his judgment all going to this, that although there must be payment for shares, it is quite open to the person who subscribed for them to shew that there is payment, or that which the Lord Chancellor says is equivalent to payment, not necessarily in money, but in money's worth.

Then there is *Spargo's Case* (*ubi supra*), in which the Lords Justices gave their decisions the day after the judgment in *Fothergill's Case*, in which they had taken part. Spargo signed the memorandum of association for thirty-one shares, and he was in consequence liable to pay 1,550*l.* It does not require the Act of 1867 to shew that such a person is liable for the amount for which he subscribes, and payment in money he had not made. The Vice-Warden of the Stannaries Court had put Spargo on the list of contributories because he considered that the liability incurred by signing the memorandum of association, could only be discharged by payment in cash. But Spargo had agreed to sell to the company the lease of a mine for 2,776*l.*, and in a settled account they gave him credit for the 2,776*l.* as against the price of his shares. That was treated by the Court of Appeal as a good payment. The

lease of the mine was the thing with which the company was trading, and for that they gave him credit; and so here, Mr. Coates was to have 5,000*l.* for the business, of which 2,500*l.* was to be paid in cash, and the other half in fully paid up shares, and he treats himself as being fully paid up, and if he is not fully paid up under this transaction, he remains a creditor for the 2,500*l.*

But Mr. Glasse says that the account settled is of a very different character from that in *Spargo's Case* (*ubi supra*), which is this—"To share capital, thirty-one shares, signed for in memorandum, 1,550*l.*; ditto, twenty, taken at meeting, 1,000*l.*" Now I think I should be putting a very illiberal and unjustifiable construction on the account settled by Coates, if I were not to say that in result it is precisely the same. Mr. Coates's account begins—"2,500 fully paid up shares." He is then charged with the 2,500*l.*, and then there are the instalments, and so forth. Then he is credited with the 5,000*l.* for the sale of the business, and he is debited with the 2,500 fully paid up shares, equal to 2,500*l.* Then there is the other payment in cash, and after debiting him with the 2,500*l.* and all the amounts he received, he remains a creditor for the balance, namely, 1,500*l.* I say that it would be a very short-sighted, illiberal and unjustifiable view of that account, to hold that the 2,500 shares there mentioned did not mean the 2,500 for which he subscribed, and which most undoubtedly all the surrounding transactions shew were intended to be (although it was not so expressed in the memorandum) shares which were to be fully paid up, and the shares which he was to take in part payment for his business.

I am well aware that questions as to what makes a man liable, and what relieves him from liability in reference to joint stock companies have become most puzzling, and I do not think that this branch of the law is in a very creditable state. In many cases common sense and propriety are utterly set aside on merely technical considerations, but I am bound to see what the real transaction between these parties was, and what was their inten-

tion. It is argued that there are here creditors to be protected; but these are transactions by which no creditor can possibly be deceived. Because, although a creditor may originally look at the memorandum of association, what he really ought to rely on is the register of shareholders, kept in the office of the company. And, as has been pointed out, Mr. Coates is entered in the register as holding only shares fully paid up. They are not stated in so many words to be paid up in full, but the form of the register is such that any person looking at it will see that they are fully paid up shares, and that Mr. Coates is not liable to any further call upon them.

Now *Spargo's Case* is the latest, but there is also the case of *In re the Baglan Hall Colliery Company* (*ubi supra*) in which I took a rather more strict view. I did not think there was anything which amounted to payment. But the Lord Justice Giffard differed from me, and I must take the law from him. That case decided that where a person signed a memorandum of association for a certain number of shares, and never paid a penny for them, but gave property which was to be the means of obtaining money, the giving money's worth was as good as giving money, and therefore the parties were discharged from liability. In *Schroeder's Case* (*ubi supra*) I held that shares taken in a company were well paid for by giving Confederate bonds, taking them at the market price of the day, and entering them in the account. It was giving them that which they might have sold again. I held also in the same case that the delivery of tea, which was an article required by the company, was a good payment. Those cases were before the Act of 1867, but I hold that the Act made no alteration as to what was good payment for shares admittedly taken, and upon which there is a liability. So I find Lords Justices James and Mellish held in *Spargo's Case* the Lord Justice James, exactly agreeing with the judgment of the Lord Chancellor in *Fothergill's Case*, namely, that if there had been anything which could fairly be called payment, the Act of 1867 would not apply. [The Vice-Chancellor then read the commencement of the judg-

ment of Lord Justice James at pp. 411 and 412 of Law Rep. 8 Chanc., in which his Lordship said that he and Lord Justice Mellish entirely concurred with the Lord Chancellor that it would not be right to put any construction on the 25th section which would lead to the absurd result that an exchange of cheques, or an order on a banker to transfer money from the account of a man to the account of a company, would not be a payment in cash, and continued.] Applying that, it is perfectly clear that in this case the company had entered into a contract which would have justified their paying Mr. Coates 2,500*l.* in cash. If they had fulfilled that contract they would have handed him bank notes or a cheque, and he would have handed the money back again in discharge of the 2,500 shares for which he had signed the memorandum of association. Could anything be more plain, sensible and reasonable than such a view of the case? Then Lord Justice Mellish took the same view, holding that if the circumstances relied on would, in an action for the money due on the shares support a plea of payment, the 25th section would not prevent them being a good defence, and that as a general rule of law the form and ceremony of handing the money backwards and forwards need not in such a case be gone through.

I am, therefore, of opinion that the transaction by which credit was given to Mr. Coates for the value of his business, is precisely the same as giving Spargo credit for the value of his lease. It was settled in account, and they would have been justified in handing the money to him, and then he would have handed it back to them in payment of the calls on the shares for which he had subscribed the memorandum of association. The result is precisely the same by setting the value of the one sum against the other. On these grounds, therefore, I think that Mr. Coates is not liable to pay anything upon these shares; and when I look at the facts and find that by the resolution of the 10th of October, 1870, the company state that the 2,500 shares are the same for which he signed the memorandum of association, that this has been acted upon ever since, and that there has been before the creditors for a

period of between two and three years a register shewing that Mr. Coates is not liable, I am satisfied that there are no equitable considerations which give the creditors the right to raise this question. The application must be refused, and both parties will have their costs out of the estate.

Solicitors—Messrs. Wood & Hare, for the liquidator; Messrs. Bevan & Whitting, for Mr. Coates.

JESSEL, M.R. } *In re* THE MAREZZO MARBLE
1874. } COMPANY (LIMITED).
Jan. 16. }

*Winding-up—Informal Advertisement—
Petition to stand over—Companies Acts,
1862 and 1867.*

*The advertisements of a winding-up
petition must be strictly in accordance with
the first rule of General Orders of 21st
of March, 1868.*

This was a petition for winding up the company.

The petition was correctly intitled in the matter of the Companies Acts of 1862 and 1867, but the advertisement omitted the words "and 1867."

The first rule of the Order of 21st March, 1868, is as follows—

"Every petition which shall after this order comes into operation be presented for the winding up of any company by the Court, or subject to the supervision of the Court, and all notices, affidavits, and other proceedings under such petition, shall be intitled in the matter of the Companies Acts, 1862 and 1867, and of the company to which such petition shall relate."

Mr. Cooper, for the petition.

Mr. Crossley, for the company, did not oppose.

THE MASTER OF THE ROLLS said that the advertisements were not in the proper form, and the petition must stand over to be duly advertised.

Solicitors—Messrs. Tucker, New & Langdale.

HALL, V.C. }
1874. }
April 24. }

Re BEST'S SETTLEMENT
TRUSTS.

Settlement—Construction.

Under a limitation in a marriage settlement of the wife's property, in default of her appointment "to such person or persons as should be her personal representative or representatives," the wife's "administrators" held entitled.

Petition.

The petition in this matter was presented by two gentlemen, who were the legal personal representatives of Mrs. Charlotte Willis Best, and also the executors of her husband, Mr. Samuel Best. The petition stated the marriage settlement dated the 18th of April, 1826, of Mr. and Mrs. Best. The settlement recited—

That Mrs. Best was entitled to a moiety of three sums of 830*l.* 3*l.* per cent. Consolidated Bank Annuities, 600*l.* 3*l.* per cent. Reduced Bank Annuities and 200*l.* 3*l.* per cent. annuities of the year 1726, under the will of her mother; that she was also entitled to the sum of 500*l.* 3*l.* per cent. Consolidated Annuities; that under the settlement made on the marriage of her father, Sir James Burrough, Mrs. Best was also entitled to a moiety of certain freehold hereditaments in Yorkshire (subject to her father's life interest therein), and also to one moiety of the several sums (subject to her father's life interest therein) of 6,802*l.* 12*s.* Bank 3*l.* per cent. Consolidated Annuities; 5,411*l.* 5*s.* Bank 3*l.* per cent. Reduced Annuities; 1,250*l.* Bank 3*l.* 10*s.* per cent. Reduced Annuities; 367*l.* 10*s.* New 4*l.* per cent. Annuities; and a sum of 500*l.* on a mortgage; that it had been agreed that the said hereditaments and premises should be settled in manner hereinafter appearing, and that in consideration thereof Lord Wynford (the father of Mr. Best), should enter into the covenant hereinafter contained for settling the sum of 5,000*l.* in manner therein mentioned. The settlement then witnessed that, in pursuance and part performance of the agreement on the part and behalf of Sir J. Burrough and Mrs. Best, she conveyed and as-

sured the moiety of the said hereditaments and premises (subject to the life interest of Sir James Burrough therein) to the trustees of the settlement, their heirs and assigns to the use of Mrs. Best and her heirs until the marriage:—And from and after the solemnisation thereof to the use of the trustees, their heirs and assigns, to the use of Mr. Best and his assigns for his life without impeachment of waste; and from and after his decease, to the use of Mrs. Best, and her assigns for her life without impeachment of waste; and from and after the decease of the survivor of Mr. and Mrs. Best, to the use of the children of the marriage as therein mentioned; and in default of such issue, to the use of Mrs. Best, her heirs and assigns absolutely, and for ever:—And the settlement further witnessed that Mrs. Best assigned to the trustees the sum of 500*l.* 3*l.* per cent. Consolidated Annuities; and also the moiety of the several sums of 830*l.* Bank 3*l.* per cent. Consolidated Annuities, 600*l.* Bank 3*l.* per cent. Reduced Annuities, 200*l.* Bank 3*l.* per cent annuities of the year 1726; and also the moiety of the several sums of 6,802*l.* 12*s.* Bank 3*l.* per cent. Consolidated Annuities, 5,411*l.* 5*s.* Bank 3*l.* per cent. Reduced Annuities, 1,250*l.* Bank 3*l.* 10*s.* per cent. Reduced Annuities, and 367*l.* 10*s.* New 4*l.* per cent. Bank Annuities, and of the sum of 500*l.* on mortgage, and all benefit and advantage of the moiety or half part of and in the said sums respectively:—And all her estate, right, title, interest, property, claim and demand whatsoever, both at law and in equity, of, in, to or out of the said several and respective premises thereby expressed and intended to be thereby assigned (subject to the life interest of Sir James Burrough therein), to hold, receive and take the said thereby assigned or expressed, and intended to be thereby assigned parts or shares, moneys and premises unto them, the trustees, upon trust for Mrs. Best, her executors and administrators, until the marriage; and from and after the solemnisation thereof:—Upon trust after the decease of Sir James Burrough to pay the interest, dividends and annual produce of the premises as and when the same should become due and payable to Mr.

Best and his assigns, during his life, for his and their own use and benefit; and from and after his decease upon trust to pay the same to Mrs. Best, if she should survive Mr. Best, and her assigns, during her life for her and their proper use and benefit; and from and after the decease of the survivor of them the said Mr. and Mrs. Best, then upon trust to pay, transfer, assign and dispose of the moiety of the several sums of 830*l.* Bank 3*l.* per cent. Consolidated Annuities, 600*l.* Bank 3*l.* per cent. Reduced Annuities, and 200*l.* 3*l.* per cent. annuities of the year 1726, and the 500*l.* 3*l.* per cent. Consols, to which Mrs. Best was entitled under the will of her mother (part of the aforesaid trust funds) to such person or persons in such manner and form as Mrs. Best should by any deed or will duly executed notwithstanding her coverture direct or appoint; and in default of such direction and appointment, "*to such person or persons as should be her personal representative or representatives.*"—And that the trustees should pay, transfer, assign and dispose of the remainder of the trust funds, moneys and premises unto or amongst all and every the children of that marriage in such manner as Mr. and Mrs. Best should jointly or as the survivor of them should in manner therein-mentioned appoint; and in default of such appointment then upon trust for all the children of the marriage equally, or for an only child absolutely, and to become a vested interest or vested interests, at the age of 21 or (in the case of daughters) on marriage. The settlement then provided that in case there should be but one such child of that marriage it should be lawful for the survivor of Mr. and Mrs. Best, in the event of his or her marrying again, to settle and appoint one moiety of such trust funds to or in favour of a second wife or husband (as the case might be), and the issue of such second marriage by any deed or instrument to be duly executed for that purpose; and that thereupon the trustees should transfer and set over one moiety of the trust funds to such person or persons as the survivor of Mr. and Mrs. Best should on such his or her second marriage direct or appoint to be

trustees for that purpose:—And also that if there should be no child of that marriage who should live to acquire a vested interest in the trust funds, then (subject to the life interest of Mr. Best), the trust funds should be held upon trust to and for such person or persons as Mrs. Best should give or appoint the same by her last will or testament in writing (which she was thereby empowered to make notwithstanding her coverture):—And in default of such last mentioned appointment, then "*upon trust to pay and transfer the said trust funds to such person or persons as would be the personal representative of Mrs. Best.*"

The marriage of Mr. and Mrs. Best was solemnised soon after the execution of the settlement. There was issue of the marriage one child only, which died an infant and unmarried in the lifetime of Mrs. Best, and therefore without having attained a vested interest in the trust funds.

Mrs. Best died in the month of September, 1833, intestate, and without having executed or concurred in executing any of the powers of appointment contained in the settlement. She left her husband, her father, an only sister of the whole blood, and an only sister of the half blood her surviving.

Mr. Best died on the 20th of June, 1873, also without having executed or concurred in executing any of the powers of appointment contained in the settlement; and having by his will, dated the 27th of October, 1866, appointed the petitioners his executors. The petitioners proved the will on the 11th of March, 1873.

The petitioners had since taken out letters of administration to the estate and effects of Mrs. Best, and they were now her legal personal representatives.

The petitioners claimed to be entitled to the trust funds.

The funds were, however, also claimed—First, by James Burrough Fenwick, as the personal representative of Sir James Burrough (who died on the 25th of March, 1837), and who was the sole next of kin of Mrs. Best living at the time of her death; and 2ndly, by James Burrough Fenwick, Thomas Howard

Fenwick the younger, and Ann Sarah Paynter (or her husband as the trustee of her settlement), as the next of kin of Mrs. Best living at the death of Mr. Best.

On the 28th of January, 1874, the trustees of the funds transferred and paid into Court to the credit of an account entitled—"In the matter of the trusts of the settlement made on the marriage of the Hon. and Rev. Samuel Best and Charlotte Willis Burrough," the following sums—viz. 180*l.* 7*s.* 6*d.* cash; 4,167*l.* 7*s.* 3*d.* Bank 3*l.* per cent. Consolidated Annuities; 2,705*l.* 12*s.* 6*d.* Reduced 3*l.* per cent. annuities; and 808*l.* 15*s.* New 3*l.* per cent. annuities.

The petition prayed that the costs of the petitioners and of all other proper parties appearing on the petition might be taxed:—And that the costs when so taxed, and also the succession duty payable on the trust funds might be raised and paid by the sale of a competent part of the sum of 4,167*l.* 7*s.* 3*d.* Bank 3*l.* per cent. Consolidated Annuities; and that the residue of that sum, and also the sums of 2,705*l.* 12*s.* 6*d.* Reduced 3*l.* per cent. annuities; 808*l.* 15*s.* New 3*l.* per cent. annuities; 180*l.* 7*s.* 6*d.* cash, and any other sums of stock or cash standing to the credit of the above matter might be transferred and paid to the petitioners, or be otherwise distributed in accordance with the rights of the parties.

Mr. Lindley and *Mr. B. B. Rogers*, for the petitioners.—The words, "representative or representatives," mean, *prima facie*, "executors or administrators;" and equally so whether they occur in deeds or in wills. The *onus* of proof to the contrary lies on those who dispute that construction—

Hawkins on Wills, 106 and 107, and the cases there collected.

No doubt the words "legal representatives" and "personal representatives" have in some cases been held to mean "next of kin." But such cases are clearly distinguishable from the present one—

2. *Jarman on Wills*, Last Ed. 98–102; *Briggs v. Upton*, 41 Law J. Rep. (N.S.) Chanc. 33; s. c. affirmed on

app. *ibid.* 519; and Law Rep. 7 Chanc. 376;

Re Turner, 2 Dr. & S. 501; s. c. 34 Law J. Rep. (N.S.) Chanc. 660;

Re Crawford, 2 Dr. & S. 230; s. c. 23 Law J. Rep. (N.S.) Chanc. 625;

Re Wyndham's Trusts, Law Rep. 1 Eq. 290;

Alger v. Parrott, Law Rep. 3 Eq. 328, confirm the rule as laid down by us.

We also claim as an argument in our favour that the word "personal" does not occur in the statute of distributions. The word there is "legal."

The frame of this settlement is very peculiar; but having regard to the trusts of the real estate, and the provisions for a second marriage, and on the whole of it, it shews that the intention of the parties was that this lady's property should ultimately, and in the events which have happened, be hers absolutely.

Mr. Dickinson and *Mr. C. Browne*, for the next of kin of Mrs. Best, living at her death.—Assuming the property to have been intended to be hers absolutely, then the next of kin whom we represent (and not her husband or his executors) are entitled to it.

There is no case in which the words "personal representative" or "personal representatives" or "representatives" have been held in a settlement to mean executors or administrators. There are several the other way.

Briggs v. Upton (*ubi supra*) is really in our favour. The difficulty arising from the fact of the instrument in which the words in question occur being a settlement and not a will, is this. Every marriage settlement does of itself exclude the marital right; unless, as in *Briggs v. Upton* (*ubi supra*), there is a limitation as to it. The settlement takes away from the husband that which, but for the settlement, would be his. It forces him to take the property (if at all) under the settlement. But words of limitation will not give the husband anything. He can only take under the settlement as "a purchaser." Here the words used are words of limitation, under which "next of kin" alone can take.

1 *Roper on Husband and Wife*, 329,

and

Bailey v. Wright, 18 Ves. 49; s. c. on app. 1 Swans. 39, there referred to.

No doubt this settlement is in many respects a peculiar one.

But the case of

Robinson v. Evans, ante, p. 82; s. c. 22 Weekly Rep. 199,

is consistent with our argument, and shews that when there is a settlement, the parties interested in the settled property must take under the settlement only, and not by virtue of any pre-existing rights; that is to say, they must take as "purchasers," and not by way of "limitation" or as claiming through or from some one else.

Mr. Methold, for Mrs. Best's next of kin living at her husband's death, did not argue the question.

Mr. Vaughan Hawkins was for the trustees of the settlement.

HALL, V.C.—I do not wish to hear a reply. Although the question in this case arises upon a marriage settlement, and those which have been referred to in the arguments are, with the exception of *Bailey v. Wright* (*ubi supra*), and *Briggs v. Upton* (*ubi supra*) cases on the construction of wills, I take it to be clear, that in construing the words, "such person or persons as shall be personal representative or representatives," I must read them according to their ordinary meaning; and that that ordinary and *prima facie* meaning is "executors or administrators." I must also assume that the fact of their being in a marriage settlement, as distinguished from a will, is not to be taken as diverting what would be the ordinary meaning of the words in any legal instrument. Their being, then, in a marriage settlement, and to be construed as meaning executors and administrators, unless there is something in the nature or context of the settlement to give them a different meaning, the question is whether, upon the construction of this particular instrument, there is anything to give the words any other than their ordinary signification? The settlement was made upon the marriage of a lady who had a considerable fortune. I think the

personal property alone was something like 15,000*l.* or 16,000*l.*; and she had also real estate. It was her own; and being about to marry, the settlement was to be made. The mode of settling the property, so far as it is referred to in the recitals of the settlement, does not assist us in construing the instrument itself. The trusts which are declared of the different properties are, as to the real estate, for husband and wife and children, with an ultimate trust for the use of the wife. The ultimate trust, therefore, of that property was one revesting in her the dominion and control over it, subject to the particular trusts created for the husband and wife and the children. That, according to one case which has been referred to upon the question, might indicate that that was of a general character; and that under the settlement which was to be made of all the lady's property, she was to get back—and remain the owner of—that property, subject to the particular provision as to it. That is not an unreasonable view to take of a marriage settlement, the object of which was to provide life interests for the wife—probably a life interest for the husband, and proper provisions for the issue of the marriage. Subject to that, it is not unreasonable to say, that the parties did not mean to go any further. They had no collateral relations; at all events, none in contemplation, for they did not settle the property on any other persons than the husband, the wife and the children. Where the settled property is the property of the wife, it is not unreasonable to hold that some provisions would be made as to it, but subject to particular trusts for the husband and wife and children. Those provisions are commonly such as would give the wife powers of disposition over her property in the event of her dying in the lifetime of her husband. The power is ordinarily a testamentary power, not a power by deed or will. That is the ordinary mode of giving to the wife her disposition if she dies in the lifetime of her husband. If she survives the husband, the ordinary thing is to give it back to her. If she survives the husband, she is enabled, when the property is given back to her, to make a settlement of it

upon the occasion of another marriage: that is, supposing there is a failure of the trusts for the children of the contemplated and particular marriage. The settlement in the present case provided for the case of a second marriage, either of the husband or the wife. It also provided for that, which I do not think I ever saw in a settlement before—that the husband (or the wife in just the same manner) should, in the case of there being one child, and one child only of the marriage, have power to appoint and settle, upon a second marriage, half the capital of the wife's property. That was a very liberal provision for the husband in that respect. But there was no provision as to settling anything on a future marriage, in the case of there being no child of the marriage! Anything more improbable than that the wife (she was adult when she was married) should, in making a settlement of her own property, have put this considerable personal estate entirely out of her control, in the event, which might have happened, of her husband dying very shortly after the marriage, and should have tied that property up in favour of persons who might answer the descriptions of her next of kin at the time of her death, without the power of making any provision whatever on the occasion of a second marriage—anything, I say, more improbable than that—one cannot conceive! I think it is not unreasonable, in construing this settlement, to give weight and consideration to that circumstance, and to what I have said as to the general object and purpose of settlements made upon marriage. We know that such considerations have had weight in other cases as to the construction of marriage settlements, particularly with reference to the time of the vesting of portions, and so forth. The Court has there construed the settlements with reference to the known and general views of the persons making the settlements. This property is settled upon the husband and wife successively. Then, as regards a portion of the funds, the wife has a general power of appointment over it, by deed, or will. In other words, nothing seems to turn much upon that. It is merely this—that having a considerable

fortune, subject in effect to those two life interests, she had a general power of disposition over that portion of the property, even as against any issue of the marriage. The bulk of her property was settled in the ordinary way, upon the children of the marriage; and, failing those, upon that ultimate trust which is now to be construed—viz., “Upon trust, to transfer the funds to such person or persons who would be the personal representative of Charlotte Willis Burrough.” The same words create an ultimate trust of the small fund which I have mentioned before, and over which she had the general power of appointment, as against the children of the marriage, with this exception, that the words there are, “personal representative or representatives,” and in the other case the words are only “personal representative.” But there is no difference in reality as to the construction of the words, because we must bear in mind that the words “to such person or persons” occur in both cases. The construction, therefore, of the two clauses must be the same. Then it is said that the context of the settlement in this case shews that these words ought to be construed, not according to their *prima facie* or ordinary meaning, but in such a way as to exclude the husband from taking; and that you can only do that by construing them as words of purchase, or as meaning the persons who shall answer the description of the next of kin of the settlor, i.e. this lady. I have already observed upon the limitations of the real estate, and the form in which that is made. It was said, as regarded the husband's property, that the ultimate limitation of it was to him, his executors and administrators. It was also said that the trust of the lady's fortune for her till the marriage was in trust for her executors, administrators and assigns. That there is, therefore, a distinction drawn by the settlement between the words which are used in the two ultimate trusts, and the trusts for the executors and administrators; and, therefore, that something different was meant in each case. That is a very fair observation, but, after all, not a very cogent one; because, if those words do, according to their settled *prima*

facie construction, mean the same thing, there is no reason why persons should not use a different form of expression in one part of an instrument to that which they have in another; knowing that, *prima facie*, the meaning of the words is exactly the same in both cases. Then we must try and find out something in some other part of the instrument, as it seems to me, to enforce that argument; for that argument alone will not suffice. But if it would suffice in any given case, then of course we must have regard to the whole of the context of the instrument, and, as I have already said, to the probability of parties making such a settlement as this. Looking at the form of this settlement—looking at that special power to make a settlement on a second marriage, which was to take away the funds from the persons who were made objects of this settlement, and to settle it on the second marriage—looking at that, and considering that if it was intended to make a settlement as against the children of this intended marriage, it could not have been meant that the wife should be in a worse position, because she did not happen to have one child of this first marriage, that she should not then be able to make a settlement upon the second marriage! Anything more absurd than that I cannot possibly conceive! Therefore if in this case it is necessary to resort to the context of the settlement, the context seems to me, in itself, to shew that in this particular instance, whatever might be the construction in that of another settlement, but in this instance we are not to depart from the *prima facie* meaning of the words, “the personal representative of Charlotte Willis Burrough;” or take the object of this settlement to have been to exclude the marital right, or whatever interest the husband might acquire through the law, entitling him as legal personal representative of his wife. I cannot take that to have been the meaning of this settlement, it not being so expressed. To construe the words in the way I think they ought to be construed, viz., as “executors or administrators,” would have effected a double object. It would have entitled the wife, if she had happened to be the survivor, to the property, so

bringing it back to her, and enabling her to demand possession of it; and if there was no child (she being the survivor), to make a settlement of it upon a future marriage. This construction would, at the same time, have entitled the husband (being the survivor) to take—not by contract or provision—something which was not provided for at all, but which was to be left to be settled in the ordinary way, according to legal rights. We must also bear in mind this—that if it were, or could be taken to be, an object or purpose of every such settlement to exclude the marital right; then, in this case, there is that which enables the wife, whenever she thinks proper, to exclude that right; because, as regards both portions of the funds, she can exclude the right by the exercise of the two powers which are vested in her: the one, a general power of appointment over a small portion of the fund; and the other, a testamentary power of appointment, by the exercise of which she could have equally excluded her husband.

Nothing, therefore, is gained as a step towards the true construction of this settlement, by considering that the marital right was intended to be excluded by it; even if, indeed, such a consideration be, for the purpose in view, a sufficient or proper one.

I think it unnecessary to examine all the authorities which have been referred to in the arguments. I may, however, advert to one or two of them. In the case of *Robinson v. Evans (ubi supra)* the Master of the Rolls proceeded very much upon special circumstances, which induced him to consider that in that particular case the words were not to receive their ordinary construction. That case, therefore, rests upon its own circumstances; and, indeed, the Master of the Rolls seemed to consider that all these cases do so depend, rather than upon any particular authorities. He observed that, no doubt, the framer of the settlement knew how to use the words if he desired to do so, but he did not attach any great weight to that.

Then, with regard to the case of *Bailey v. Wright (ubi supra)*. There, of course, the particular case is no authority, be-

cause the words are totally different. In that case the ultimate trust was for "the next of kin or personal representative of the wife." The decision turned very much upon that which was the real contest, namely, what was the meaning of the words, "next of kin," associated with the words, "personal representative?" Sir William Grant, in giving judgment in the case, winds up thus—"Whatever these words might mean, standing by themselves, they cannot, as here used, take from the first words the sense they properly bear, and were, in this case, obviously intended to bear." Then *Briggs v. Upton* (*ubi supra*) was referred to. There the words were different. The Lord Chancellor made some observations, to which my attention was called, rather indicative of the consideration that the object of the settlement might be taken to be to exclude the marital right. But, for the reasons I have mentioned, I think those observations cannot be applied to the case now before me. They are considerations of general application, as to which I say nothing.

Therefore, upon the whole, it seems to me that these funds must be transferred.

Mr. Dickinson.—Transferred to whom?

Mr. Lindley.—To the petitioners. They are the legal personal representatives of Mrs. Best, and also the executors of her husband. The order will be according to the prayer of the petition. "Ordered as prayed:"—costs of all parties out of the fund, and to be taxed as between solicitor and client.

Mr. Dickinson.—But I want to know in which character the petitioners will get the funds?

HALL, V.C.—As the legal personal representatives of the wife.

Mr. Lindley.—Then the succession duty must be raised and paid out of the funds in Court, and the residue of the funds transferred to the petitioners, as the legal personal representatives of Mrs. Best.

Solicitors—Messrs. Beacheroff & Thompson, for petitioners; Mr. P. J. Bishop, for the next of kin.

JESSEL, M.R. }
1874.
April 25. }

LACEY v. HILL.
CROWLEY'S CLAIM.

Principal and Agent — Stockbroker — Insolvency of Principal — Indemnity — Actual Losses and Liabilities — Agent compounding with his Creditors.

In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent.

O., broker for H., entered into contracts for purchase of stock for the next settling day, 15th of July, 1870. The contracts were in the usual form, subject to the "rules and usages of the Stock Exchange," and the broker's notes from time to time sent to H., also had these words. When that day arrived, O., by request of H., and relying on a promise of H. to settle on that day the amount then due to O. for brokerage and losses, "continued" the contracts till next settling day.

H. did not settle his account on the 15th. On the 16th the Norwich Bank, in which he was partner, stopped payment, and H. became in fact insolvent. O. was thereupon declared defaulter on the Exchange. According to the rules, all his transactions were immediately closed. No loss accrued to the principal by the closing of the transactions before the next settling day. Subsequently O. was re-admitted to the Stock Exchange, on payment of a composition, but not the full amount of his debts. After such re-admission, members of the Stock Exchange were in effect forbidden by the rules of the Exchange to sue him for the balance of previous losses without the leave of the committee, which was rarely, if ever, granted, but no legal release was given to him. In a creditor's suit instituted for administering the estate of H., O. claimed for the whole amount shewn to be due to him for brokerage and losses, by an account made up on the footing of all transactions being closed on the day of the insolvency of H. The amount of claim being calculated on the full amount of the liabilities of O. in respect of the contracts for stocks, and not on the amount that he had actually paid on those contracts,—Held, first, that on the insolvency of H., the transactions might be closed according to the rules of

the *Stock Exchange*, without affecting the right of C. to an indemnity from H.

Secondly, that C. not having had a legal release from claims under the contracts, but being still liable in law for the full amount, was entitled to claim against the estate of H. for the full amount of losses on the contract, including not only what he had actually paid, but also the amount for which he was legally liable.

This was a stockbroker's claim against the estate of Sir Robert Harvey, in the suit of *Lacey v. Hill*, which was instituted for the administration of his estate. Messrs. Crowley, as brokers for Sir R. Harvey, had, previously to the 12th of July, 1870, entered into contracts for purchase of large quantities of Spanish and other stocks, in the usual manner, to be completed on the next settling day, which was the 15th of July. Owing to the dispute between France and Germany as to the Hohenzollern candidature, the stocks had fallen considerably in value, and on the 12th of July Messrs. Crowley wrote to Sir R. Harvey as follows—

"The position is simply this — We depend entirely on you. If you pay us in full on Friday we can face our other difficulties, but if you do not, we cannot stand. Hence the tone of our last two or three letters.

"If we had to succumb, it would necessitate the closing of your account at perhaps an unfortunate moment, and your name would be divulged, a thing we very much dread having to do.

"It is also necessary we should know to-morrow morning early how affairs are to go. If we are to continue we must do it boldly, and we cannot do that if we are in any doubt about being able to pay up differences on Friday.

"We look to you, therefore, to come or write, or telegraph an assurance to support, or directions to close, as the case may be. For your guidance we have gone through your account, and at to-night's closing prices the differences due from you would be about 20,000*l.*; to-morrow may alter that.

"We confess we do not see any reasonable hope that it will be less, especially

as outside the *Exchange* prices are still worse—Spanish, 24½, 5; Turks, 43½, 3; Italians, 50½, 1; and yet not so low as Paris. If we have to carry over, you must also give us power to sell, in case of need, because some things (as *Quick-silver*) it may be impossible to continue.

"We are, dear Sir,

"Yours truly,

"Crowley Bros."

"Sir Robt. Harvey, Bart."

Sir Robert Harvey replied by telegram on the 13th, "Do what suits you best. I will settle all you say on Friday morning (15th)." Messrs. Crowley accordingly, on the 13th, sold some of the stocks, and entered into arrangements for continuing the rest of the contracts to the settling day next after the 15th, and sent Sir Robert Harvey an account, shewing 15,912*l.* 12*s.* 1*d.* due to them for loss on stock and brokerage.

On the 15th they continued the contracts as to the greater part of the stock according to the usual practice of the *Stock Exchange*, which is to pay the difference between the contract price and the price on the settling day, and a small charge for not completing and enter into new contracts at their current price for the next settling day. The contracts were in the usual form "subject to the rules and usages of the *Stock Exchange*," and the broker's notes which had been sent from time to time to Sir R. Harvey had these words.

On the 15th, Sir R. Harvey did not settle his account, but shot himself, from the effects of which he died on the 19th.

On the 16th, the *Norwich Bank*, of which Sir R. Harvey was principal partner, stopped payment.

On the 16th also, Messrs. Crowley were declared defaulters on the *Stock Exchange*.

According to the rules of the *Stock Exchange* when a member fails to meet his engagements he is to be declared a defaulter and ceases to be a member, certain officers called official assignees examine his accounts and settle the prices at which his transactions are to be closed. By the 169th rule the prices are to be those current in the market immediately before the declaration.

Accordingly all Messrs. Crowley's contracts on the Stock Exchange were closed at the price current on the 16th, the day on which they were declared defaulters.

Sir R. Harvey's account so closed shewed 20,482*l.* 17*s.* 4*d.* as due to Messrs. Crowley for loss on stock and brokerage. It appeared that if the transactions had been continued to the next settling day the loss to Sir R. Harvey would have been equally great.

According to the rule of the Stock Exchange, a defaulter may be re-admitted on making such payment as the official assignees fix, such payment not to be less than 6*s.* 8*d.* in the pound.

Under this rule Messrs. Crowley were re-admitted to the Stock Exchange on payment of less than the full amount of their liabilities.

According to the evidence given by a stockbroker and not disputed, it appeared that when a defaulting stock broker is re-admitted to the Stock Exchange no actual release is given by his creditors, he in fact remains legally liable to the whole amount of his debts, but on the Stock Exchange his re-admission is considered as tantamount to a release. The official assignee sometimes asks defaulting members if they can make any further payment; if they can they are expected to do so. But no member of the Stock Exchange is allowed to sue for it without the sanction of the committee. The observance of this rule is enforced by dismissal in case of breach.

Messrs. Crowley had brought in a claim against Sir R. Harvey's estate for the whole 20,482*l.* 17*s.* 4*d.* which had been adjourned into Court.

Sir B. Bagge (Attorney-General) and *Mr. Dundas Gardiner*, for Messrs. Crowley.—There is no material difference between this and

Scrimgeour's Case, 42 Law J. Rep. (N.S.) Chanc. 657; s. c. Law Rep. 8 Chanc. 921.

[THE MASTER OF THE ROLLS.—There is this difference that in *Scrimgeour's Case* (*ubi supra*) the stocks had been purchased. They belonged to the client, and though deposited at the bankers by way of mortgage could be redeemed by the client any

day. Here, where the contracts are continued on the Stock Exchange, the property could not be acquired until the next settling day.]

That really makes no difference, for the contracts were subject to the rules of the Stock Exchange, and were closed according to those rules on the 16th. Besides, this very case was put by Mellish, L.J., in his judgment in *Scrimgeour's Case* (*ubi supra*).

Mr. Fry and *Mr. Cozens Hardy*, for the defendant in the suit.—We admit the liability as to the sum of 15,912*l.* 12*s.* 1*d.* due on the 15th, but dispute any further liability. This is a claim by Messrs. Crowley, as agents, for indemnity, but in fact the agents have not acted in accordance with the contract of agency. They were agents to purchase on the next settling day, they close the transaction a fortnight before, they are not therefore entitled to an indemnity for anything not due on the 15th, the last settlement of account—

Duncan v. Hill, 40 Law J. Rep. (N.S.) Exch. 137; s. c. Law Rep. 6 Exch. 255; s. c. on App. 42 Law J. Rep. (N.S.) Exch. 179; s. c. Law Rep. 8 Exch. 242.

At any rate as to the rest they are not entitled to an indemnity beyond the amount that they have actually paid. They have been re-admitted to the Stock Exchange on payment of a composition, so that in fact they have not suffered the whole loss for which they seek to charge Sir R. Harvey's estate. It must be remembered also that the case is different from an express covenant to indemnify. See judgment of Mellish, L.J., in

Parker v. Lewis, 43 Law J. Rep. (N.S.) Chanc. 281; s. c. Law Rep. 8 Chanc. App. 1035.

And further, though they rely on the rules as to closing the accounts in case of the insolvency of the principal, here they do not shew that Sir R. Harvey was insolvent.

Mr. Southgate and *Mr. Merevether*, for the plaintiff in the suit.—If the case is to be treated on the same footing as an action at law for the indemnity, then the limit of the claim is the amount actually paid. The agent cannot claim an indemnity

against liability before he has been compelled to pay—

Collings v. Heywood, 9 Ad. & E. 633;
s. c. 1 P. & D. 502; s. c. 8 Law J.
Rep. (N.S.) Q.B. 98.

THE MASTER OF THE ROLLS.—I must say that, assuming the claimants produce or verify their contracts which I think is a very material point in the case, they have made out their case.

The case is simply this—Messrs. Crowley were the brokers of Sir Robert Harvey. In that capacity they bought for him various stocks, Spanish stock amongst the rest, and from time to time according to his orders sold the stock. On a given day in July, we will say the 13th, he owed them some 15,000*l.* on balance, that is, taking the account as if they had sold at the then market price all the stock which they had bought for him. At this time they found that they were in this position that unless Sir Robert Harvey paid them they would be defaulters on the Stock Exchange, and therefore they wrote to him to say, "The settling day is Friday, the 15th of July, and unless you pay us on that day we shall be defaulters. But if you agree to pay us on that day we can go on with our business, and if you will promise to pay us on that day we will either then continue your account" (which is in fact entering into a new series of sales and purchases, that is, they contract to sell what stocks they hold, or they contract to buy equivalent quantities), "we will either continue your account or sell as you think best."

Sir R. Harvey in answer, telegraphed that they should sell part, and continue part or not as they pleased; "the selling part" is absolute, but as to the rest they were either to continue it or sell it as they pleased, at the same time stating that he would pay on the Friday. That of course was a representation on which they would act. They had told him that they could not continue as honest men; unless he paid they should be defaulters. He represented that he would pay, and on the strength of that representation they continued a portion of the stocks. He did not pay on the 15th, but made an at-

tempt at suicide. On this, on the 16th, they were declared defaulters, that is, they made default on the 15th, and on the 16th they were declared defaulters, and in the usual course their creditors by their authority, under the Stock Exchange rules closed their accounts, that is, sold all the stocks they had contracted to buy for Sir Robert Harvey. This, therefore, was a sale by the agents.

The first question I have to decide is, was such a sale authorized? Now it is said not to be an authorized sale for two reasons. It was said the only authority they had was to purchase for the next account day, the 30th, and they had no right therefore to sell before that day. Now granting that their right to sell before that day depends on some right other than the ordinary right of an agent who has contracted to buy for delivery on a future day, I think it is well warranted on both of two grounds, one is that they did not agree to continue except on the representation by Sir Robert Harvey that he would pay on the Friday. He left them to continue or not, knowing they could not continue unless they relied on that representation. He failed to come up by noon on Friday, accordingly they became entitled to sell. I admit they must sell soon afterwards, under that right. But they did so—the sale was the next morning. I agree entirely with Mr. Fry's observation that it would not have given them the right to sell at some future time; but in fact no time was really lost.

I think they had also a right to sell on another ground. By the Stock Exchange rules if the principal dies or becomes insolvent during the currency of the account, the broker has a right to sell immediately. It appears also that these rules were expressly made part of the contract, not only as between the brokers and jobbers from whom they purchase, but as between the brokers and Sir Robert Harvey, and I have no doubt in this particular instance were perfectly well known to them all. What is the meaning of the client becoming "insolvent" in the sense of the rules? Why it is the simple meaning of the word as it is understood between business men.

What happened was this, Sir Robert Harvey having attempted to commit suicide on the afternoon of Friday, being principal partner of the bank at Norwich, the bank puts up its shutters on the next morning, and does no more business. It is soon noised abroad that the bank is insolvent, and so the Stock Exchange people on enquiry were informed. This turns out to be the fact. I am asked to say that that is not "insolvency." Insolvency within the Stock Exchange rule of course must be inability to pay your debts in the ordinary commercial sense, and in the ordinary course of business. What should we say to a bank that puts up the shutters and does not pay? Is not that evidence of insolvency? I hardly know how a jury exercising the ordinary common sense which is to be attributed to juries could find anybody insolvent unless he came forward and showed that the whole amount of his assets was not equal to the whole amount of his liabilities. I think there was very good evidence of "insolvency," and such evidence as entitled the brokers to act upon it, and therefore they had the right to sell on the second ground also.

The third objection is this. It is said the brokers made default and that they have not paid for the stock they purchased for Sir Robert Harvey. But if he has had the stock sold for him, and is credited with the proceeds, what difference can it make to him whether the brokers paid for it, or whether the persons who sold it have chosen to give them credit for the amount? He has had it and he has had it sold for him; that is, he has been credited with the proceeds. It appears to me, looking at it as I do look at it, as a real transaction, it is exactly equivalent to a case where a man has bought a horse or a cargo of corn for his principal, and before the day of the delivery had sold it and credited him with the proceeds in account. The principal had not had the thing delivered, but he has had the benefit of the sale, and been credited with it in account. It appears to me that that is the true view of the transaction, and it is utterly immaterial whether the broker who has become personally liable for the amount has paid at all. But in addition

to this it appears to me the case of a defaulter on the Stock Exchange is not the case of a bankrupt. There is no discharge by the English laws from his debts. All that happens is this, unless he pays 6s. 8d. in the pound he is not admitted in the Stock Exchange again; if he remains outside he remains liable to an action. If he pays the 6s. 8d. then the Stock Exchange Committee will not allow any member of the Stock Exchange to sue him without their permission, meaning that his assets shall be fairly distributed, and as I understand it every year a man who has been a defaulter is called upon to shew whether he can pay any more, and if he can pay any more he does so till he liquidates the whole debt. So that in point of fact if these gentlemen recover in the suit they will actually have to distribute it amongst their creditors on the Stock Exchange, and will be in no wise released from the payment.

Then it is said if it is a liability to pay as distinguished from an actual payment made that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law, upon which I say nothing because it is not necessary, it is quite plain that in this Court the man has a right to be indemnified, has a right to have a sufficient sum set apart for that indemnity, either paid to him or paid direct over to the creditor. It is not very material to consider it because it has been actually decided that if the creditor is not a party you may have the money paid over to the person who is liable to the creditor. As for saying he may compromise for less, the answer is the person liable to indemnify can go to the creditor and set the matter right. It is his own fault that the liability remains. But he is certainly in equity liable to indemnity, and liable to indemnify to the extent of the liability incurred by the agent on his behalf, which is quite sufficient to substantiate the proof against the estate.

Therefore on these grounds I shall allow the whole proof. I think the contracts must be verified. If they cannot they must be produced, but I do not say that if they do not exist you cannot prove the contracts without them. The order

will be that, subject to the verification of the contracts, the whole proof is allowed.

Messrs. Crowley's costs, so far as caused by the adjournment into Court, to be allowed in full out of the estate; their other costs to be added to their claim and proved against the estate. The costs of the plaintiff and defendant to be costs in the cause.

Solicitors—Messrs. Travers, Smith & Co., for Messrs. Linklater & Co., for plaintiff; Messrs. Sharpe, Parker & Co., agents for Mr. J. B. Coaks, Norwich, for defendant.

HALL, V.C. 1874. March 18, 19, 20, 21.	}	HILL v. THE SOUTH STAFF- FORDSHIRE RAILWAY COMPANY.
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Railway Contractor—Account—Interest
8 & 4 Will. 4. c. 42. s. 28—Costs.

A contract between a railway company and their contractor, which contemplated that from time to time certain sums, ascertainable at the end of each month, would be paid over; and provided for monthly payments, was not considered to be one to pay sums at certain specified times, so as to carry interest. For payment of interest, there must be an express agreement; except in mercantile contracts, such as bills of exchange, and promissory notes, and some cases which are subject to special usage in trade. And interest can only be recovered under the 3 & 4 Will. 4. c. 42. s. 28, where there is a demand in writing of a sum certain payable at a certain time.

Mildmay v. Methuen (3 Drew. 91) and *Mackintosh v. The Great Western Railway Company* (4 Giff. 683) not followed.

Costs were allowed to the plaintiffs, though they failed in great part of their claim.

Further consideration.

The principal questions in this case were these—

First. Whether the plaintiffs, who were the executors of the surviving contractor for the defendant company's railway, were entitled to any and what interest on the balances of their testator's account, prior

to the Chief Clerk's certificate in the cause?

Second. Who should pay the costs of the suit?

With respect to the first question the facts were shortly these—

On the 6th of August, 1847, Thomas Hill and two others contracted with the defendant company for the construction of their railway, for the sum of 92,511*l.* 12*s.* 6*d.* The contract provided (*inter alia*) that the money payable under it was to be paid by monthly instalments, of such an amount (less 10*l.* per cent.), as the engineer of the company should at the end of each month duly certify. The contractors were to maintain all the permanent works for one year after their completion. The 10*l.* per cent was to be retained until that time; and the contract was to be concluded at the termination of that maintenance.

The railway was completed and opened for traffic on the 1st of May, 1850.

The last certificate of the company's engineer was dated March, 1852. The contractors received, under the certificates, the sum of 136,094*l.*; but they claimed 140,448*l.* 6*s.* 3*d.*, including two sums of 4,000*l.* and 2,000*l.* for bonuses. They also claimed other sums in respect of extra works, compensation and other matters. On the 25th of April, 1856, the solicitor of the contractors wrote to the defendants enclosing their final account, and demanding, as their due, a certain balance of 13,000*l.* odd; "with interest thereon, from the respective times when the money ought to have been certified and paid, to the times of payment." That demand was not complied with. Further difficulties arose, and ultimately on the 10th of August, 1857, Thomas Hill (the then surviving contractor) filed the bill in this suit against the defendants, the company, their chairman, their engineer and their secretary. The bill prayed a declaration that the plaintiff was entitled to the 4,000*l.* and 2,000*l.*, and to the sum of 13,000*l.*, and to have an account taken of what was due to him in respect of the contracts entered into by him; that the defendants might be charged with interest on the sums unpaid, which the plaintiff

was from time to time entitled to receive under the certificates; and also on the balance which might be found due from the defendants in taking the accounts; and that in taking the accounts certain allowances might be directed to be made for losses sustained by the plaintiff by reason of non-delivery of possession of land to him as contractor within the time limited by the contract.

The cause was heard before Stuart, V.C., on the 8th of March, 1864; when it was declared that the plaintiff was entitled to be allowed the sums of 4,000*l.* and 2,000*l.* bonuses; the sum of 1,800*l.* in respect of losses and damages sustained by delay in getting possession of certain land; and also the sum of 1,249*l.* 14*s.* claimed by him as a remuneration for expenses incurred by him in re-constructing works which had given way in consequence of a subsidence of the ground, occasioned by mining operations; and it was ordered that the defendants should, on or before the 30th of April, 1864, pay him those sums, making together 9,040*l.* 14*s.*, with interest at the rate of 5*l.* per cent. from the 25th of April, 1856, being the date of the letter of the plaintiff's solicitor, claiming interest to the day of payment. It was at the same time ordered that an account should be taken of what, if anything, remained due to the plaintiff in respect of the balance claimed by him in his final account; that the defendants should, within one calendar month after the Chief Clerk's certificate, pay to the plaintiff what should be certified to be due to him on taking the account, with interest thereon at 5*l.* per cent. from the 25th of April, 1856, to the day of payment; that the costs of the enquiry should be reserved to be dealt with as the Judge in chambers should direct; and that the defendants, the railway company, should pay to the plaintiff his costs of the cause, up to and including the decree. The bill as against the three other defendants was dismissed, without costs.

The defendants appealed from that decree; and by an order of the Lords Justices, dated the 21st of January, 1865, the decree was discharged without pre-

judice to any questions in the cause; and it was declared that the plaintiff was entitled to be allowed in the account thereafter directed the sums of 4,000*l.* and 2,000*l.* It was also declared that he was not entitled to be allowed the sum of 1,800*l.* or any part thereof, and was not entitled to any allowances in respect of any loss or damage sustained by delays in getting possession of lands; and it was ordered that an account should be taken of what (if anything) remained due to him in respect of the several works and matters included in the final account and in the accounts of daywork delivered by him to the company; and that in taking such account, any items in the accounts delivered which might be found to have been settled were not to be disturbed; that for the purposes of such account all such inquiries should be made as might be necessary for ascertaining to what (if anything) the plaintiff and his co-contractors, or he as the survivor of them, had become, or was then entitled, in respect of accidents or damages arising from mining operations; and what (if anything) he should be found to be entitled to in respect thereof was to be allowed him in taking the said account; that his bill should stand dismissed as against the defendant the secretary, with costs; that the amount of such costs should be paid by the plaintiff to that defendant, but such payment was to be without prejudice to any question as to the plaintiff being ultimately entitled to recover such costs against the company; that the bill should stand dismissed, without costs, as against the two other defendants; and all questions of interest, and also all other costs and further consideration were reserved. The plaintiff, Thomas Hill, died in February, 1867, during the prosecution of the accounts, having by his will appointed his wife and two other persons executors thereof; and they, on their petition in November, 1867, were allowed to revive the suit.

The defendants appealed to the House of Lords against the decree of the Lords Justices; and subsequently the plaintiffs also appealed in respect of the disallowance of the sum of 1,800*l.* The House of Lords, on the 29th of July, 1872,

ordered that the decree of the Lords Justices should be varied by directing an account to be taken of what (if anything) was due to the plaintiff on the footing of the several contracts in the pleadings mentioned in lieu of the account which was directed by the said decree; and that, subject to such variation, the said decree in other respects should be affirmed; that the appellants should pay to the respondents the cost incurred in respect of the appeal; that the cross appeal should be dismissed; that the appellants in the cross appeal should pay to the respondents therein their costs in respect of such cross appeal; and that the cause should be remitted back to the Court of Chancery.

The Chief Clerk, in July, 1873, certified, first, that there was due to the plaintiffs on the footing of the several contracts in the pleadings mentioned, including the two sums of 4,000*l.* and 2,000*l.*, and including also any sums allowed pursuant to the order of the 21st of January, 1865, in respect of accidents or damages arising from mining operations, the sum of 5,626*l.* 16*s.* 9*d.* The particulars of that sum were set forth in the first schedule to the certificate. The Chief Clerk stated that, for the purpose of taking the account, the final bill and accounts for daywork mentioned in the order of January, 1865, were produced; and that he had taken the account by reference to admitted copies thereof; and that such items as had been allowed and remained due to the plaintiffs in respect of the several contracts referred to were mentioned in such first schedule; and such of the items claimed by the plaintiffs to be due in respect of the said contracts as did not appear in the first schedule had been disallowed. The evidence produced before the Chief Clerk in taking the accounts was mentioned in the second schedule to the certificate. Of the above-mentioned sum of 5,626*l.* 16*s.* 9*d.*, the sum of 1,272*l.* 10*s.* 6*d.* was for "allowances on account of extra works mentioned in the accounts of daywork hereinbefore referred to."

The defendants, in August, 1873, took out a summons to vary the certificate. All the items objected to were, however,

allowed; and the summons was dismissed with costs.

Mr. Dickinson and Mr. T. A. Roberts, for the plaintiffs.—First. As to the interest—

We claim it from the time when the contract was completed; or if that is not allowed, then from the date of the letter demanding it, and at the rate of 5*l.* per cent.

Every contract to pay a certain sum carries interest on that sum. "*Id certum est quod certum reddi potest.*" Not only is there the letter requesting it, which is a demand in writing; but as the accounts have been taken, it is now clear what really is the amount due to the plaintiffs. That is a claim for interest on a certain sum. Then again it was the intention of the parties to this contract, that the debt should carry interest—

Alison's Case, 42 Law J. Rep. (N.S.) Chanc. 505; s. c. Law Rep. 15 Eq. 394; s. c. on App. 43 Law J. Rep. (N.S.) Chanc. 1; s. c. Law Rep. 9 Chanc. 1;

Jeffries v. The Agra and Masterman's Bank, 35 Law J. Rep. (N.S.) Chanc. 686; s. c. Law Rep. 2 Eq. 674;

Ashwell v. Staunton, 30 Beav. 52.

Second. As to the costs.

The plaintiffs having substantially succeeded in the litigation, which mainly arose from the course of dealing adopted by the defendants, the latter ought to pay the costs—

Jeffries v. The Agra and Masterman's Bank (*ubi supra*).

Mr. Lindley, Mr. Speed and Mr. F. C. J. Millar, for the defendants.—First. As to the interest—

The defendants can only get that in one of three ways: Either by contract; or under the provisions of the statute 3 & 4 Will. 4. c. 42. s. 28; or by mercantile usage.

Here the contract says nothing about interest; and there is not anything equivalent to a covenant for the payment of it.

Ashwell v. Staunton (*ubi supra*), was a different case from this. In that case there was a covenant, aided by a recital. But in

Thompson v. Drew, 20 Beav. 49,
a mortgage deed was held not to carry
interest.

[*HALL, V.C.*, referred to
*Mackintosh v. The Great Western
Railway (ubi supra)*.]

That case is not an authority for the
present one.

Then as to the statute.

The 28th section enacts "that upon all
debts or sums certain, payable at a cer-
tain time, or otherwise, the jury on the
trial of any issue or any inquisition of
damages, may, if they shall think fit,
allow interest to the creditor at a rate not
exceeding the current rate of interest
from the time when such debts or sums
certain were payable, if such debts or
sums be payable by virtue of some written
instrument at a certain time, or if payable
otherwise, then from the time when de-
mand of payment shall have been made
in writing, so as such demand shall give
notice to the debtor that interest will be
claimed from the date of such demand
until the term of payment, provided that
interest shall be payable in all cases in
which it is now payable by law."

Therefore it is plain upon this, that
three things are necessary. *a.* There
must be a debt or sum "certain;" *b.* It
must be payable at a certain time; *c.* The
demand must be a "certain" one in writ-
ing. Is there anything of the sort here?
If the sum in respect of which the in-
terest was ever a certain one within the
Act, when was it so? It is all very well
to say—"Id certum est quod certum reddi
potest;" but we submit that till the cer-
tificate was made nothing whatever was
certain about the matter. There plainly
was no definite time fixed by the con-
tract for the payment of the money, and
the letter demanding the interest on
it does not say a word about the amount
of that interest. It is altogether too
vague—

Annandale v. Pattison, 9 B. & C. 919;
s. c. 8 Law J. Rep. K.B. 66;

Re The State Fire Insurance Company,
2 H. & M. 722; s. c. 34 Law J.
Rep. (n.s.) Chanc. 58;

*Mackintosh v. The Great Western
Railway Company (ubi supra)*;

Oulton v. Bragg, 15 East 223;

Higgins v. Sargent, 2 B. & C. 348;
s. c. 3 D. & R. 613;

The Duchess of Marlborough v. Strong,
4 Bro. P.C. 539; s. c. 14 Vin. Abr.
458;

Mildmay v. Methuen (ubi supra);

Rhodes v. Rhodes, Johns. 653; s. c.
29 Law J. Rep. (n.s.) Chanc. 418;

May v. Biggenden, 24 Beav. 207.

[*HALL, V.C.*, referred to

Tew v. Lord Winterton, 1 Ves. 451;
s. c. 3 Bro. C.C. 489.]

Thirdly. As to mercantile usage. That
has no application to this case.

As to the costs of the suit. The de-
fendants have been successful in some re-
spects, and they ought not therefore to be
compelled to pay them.

Mr. Dickinson in reply cited, as to the
costs—

*Jeffryes v. The Agra and Masterman's
Bank (ubi supra)*.

HALL, V.C.—There are two questions
remaining to be disposed of in this case,
viz., the liability of the defendants to pay
interest to the plaintiffs on what has been
ascertained to be due to them, and the
costs of the suit; and both of them are
no doubt of considerable importance,
from the magnitude of the litigation and
the time which it has occupied. As to
the question of interest. The plaintiffs
have claimed to be entitled to interest,
and they have based their claim to it
upon this—that the contract provided
for payments monthly; and that it was
contemplated that from time to time cer-
tain sums, which would be ascertained at
the end of each month, would be paid
over, and that therefore the case ought
to be considered as one of contract to pay
sums at certain specified times, and that
interest follows from that. The answer
manifestly to that is that it is not ordi-
narily sufficient to make a liability to
interest under a contract to shew that
certain sums were to be paid at certain
times.

According to the contract, if it went
on that, there must be an express con-
tract for the payment of interest, except
in the cases of mercantile contracts—
bills of exchange and promissory notes,
and some cases which are subject to

special usage in trade. It must be in the contract itself, and no case here has been made out for interest in that view. A case of that kind was, I think, intended to be made by the bill—that, as regarded the liability to interest, the plaintiffs' certificates ought to have been made out from time to time—monthly; that there was a default in furnishing the certificates; and that being so, the plaintiffs are entitled not so much to interest, as to damages amounting to interest in respect of the non-payment monthly, in accordance with the contract. That really is more the shape of the bill than one on which is founded a claim to interest on any other ground. But viewed in that way as a claim for damages as distinguished from a direct claim for interest, it does not appear to me that under all the circumstances of the case any such claim can be maintained. There was unquestionably great irregularity in the mode of dealing under the contract, but I cannot attribute that irregularity solely and entirely to the defendants; and viewing it in that general way, it does not seem to me that the claim to interest is made out under the contract itself. The question of liability to pay interest, irrespective of the express provisions in the contract and of the statute, has been clearly settled by the cases which were referred to during the argument of Mr. Lindley. In one of those cases—*Higgins v. Sargent* (*ubi supra*)—the earlier cases were considered and reviewed, for there were earlier authorities in favour of the allowance of interest without express stipulation in the contract. But *Higgins v. Sargent* (*ubi supra*) clearly settled the law in that respect; namely, there being no express provision in the contract to pay interest, there was no liability to do so. And in another of those cases—*Rhodes v. Rhodes* (*ubi supra*)—the decision was to the same effect. To those two cases I will add one, *Foster v. Weston* (1). There the defendants bound themselves by deed to make payments at or on the days actually fixed, and it was held that the instrument did not carry interest. Those being the decisions at law, so far as

the contract itself is concerned, they must equally bind me in equity, unless there be decisions in equity entitled to equal consideration with those decisions at law; for this is a case in which the plaintiffs are asserting and claiming a legal right. They come here on the ground that the accounts could not be conveniently taken in a Court of law; and also on the particular ground that at law the defendants would have been in a situation to set up that which they would not be able to do here—the want of the certificates or the want of authority to execute the works in respect of which special relief was asked. But the plaintiffs coming here for relief in respect of that impediment at law, and this Court interfering and protecting the plaintiffs in that respect, when that impediment is removed, the plaintiffs' rights in this Court must be dealt with exactly the same as they would be at law, and if they could not get interest at law under the contract, they cannot get it in this Court under the contract. It has been contended that there have been decisions in this Court which shew that the plaintiffs are entitled to interest, and which I cannot disregard. One of the cases referred to is *Mildmay v. Methuen* (*ubi supra*). If that case had been, which it was not, so far as I can collect from the report, seriously argued, considered, and decided with reference to the authorities at law, I should have had some difficulty in dealing with it; but it does not appear that a single case was referred to, and what was relied on was the statute. That case, therefore, is no authority whatever in favour of the plaintiffs independently of the statute. The case of *Mackintosh v. The Great Western Railway Company* (*ubi supra*) would seem to be an authority independently of the statute. The Vice-Chancellor Stuart, however, did not in his judgment as to interest, refer to the cases which I have already mentioned, but he seems to have gone on some earlier authorities which, in the cases to which I referred, were reviewed and considered to be no longer applicable at law. Under all the circumstances of that case, and treating this question as one of legal right, I do not consider that that case is

(1) 6 Bing. 709; s. c. 4 M. & P. 589.

an authority in favour of the plaintiffs for the allowance of interest. I come now to consider the effect of the statute. There are two sections which relate to interest, but the 28th is the material one. In this case there was a "demand of payment" made by the letter which has been referred to. That demand was for a sum between 13,000*l.* and 14,000*l.* as being due to the plaintiffs; and it was contended that that was a demand in respect of which interest can be claimed under that section; although the demand succeeded to the extent only of less than half the amount demanded; and although the amount actually awarded and ascertained to be due ultimately, was not even altogether part, or simply part, of that sum. Without taking into account and dealing with other matters and items in the account, the balance was derived and ascertained after an investigation of a very long account, by no means confined to the 13,000*l.* odd and the other items composing it. Independently of any authority on the point, I should have said that this was not a case in which within the meaning of that section there had been a demand made in writing of a sum certain payable at a certain time. If there be an authority to the contrary, of course I am bound by it. But the case was referred to, namely, *Mildmay v. Methuen* (*ubi supra*), in which there was a demand for a sum of 10,000*l.* and odd, but from which a deduction of 1,500*l.* and odd was made on investigation of the accounts, and interest was allowed on the balance. The statute was referred to and was relied on as entitling the claimant to interest, but the argument seems to have been very curt and brief, and the statement of the case and the circumstances under which the reference was made to an architect to ascertain the amount, are not set forth with that amount of detail which would make the decision in the case satisfactory under any circumstances. No authority was referred to, and the judgment of the Vice-Chancellor is not a very full one. The impression on the Vice-Chancellor's mind seems to have been that it was a case of a debt or sum certain; and he declared that the claimant was entitled to interest at four per cent. from the date of

NEW SERIES, 43.—CHANC.

his demand. It does not appear from the report whether it was a debt certain or a sum certain payable at a certain day;—there is not a word about that in the argument. But the Vice-Chancellor appears to have been influenced by the consideration of the 29th section of the statute, which enables the jury on the trial of any issue or on any inquisition of damages, to give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, and over and above the money recoverable. But that is a special clause applicable to trespass and trover, and to policies of assurance; with reference to which last, interest had, in the older cases, been allowed. The Vice-Chancellor seems to have considered that the 29th section assisted him in coming to a conclusion upon the construction of the 28th section. But I am quite at a loss to understand the bearing of that in any way; for the 29th section does not deal with sums certain at all; except that sums assured may or may not be a sum certain. I do not consider that the decision in that case was satisfactory, or one which ought to guide me in coming to a conclusion in this case; if, independently of it, I should come to a different conclusion, which, under all the circumstances of this case, I certainly should come to. The circumstances of that case are not set forth, and there is nothing to explain what the nature of the deduction was; but even supposing that I could treat the present as a case within the 28th section, I do not find that that section is imperative. It merely empowers a jury, if "they shall think fit," to allow interest at a rate not exceeding a certain amount. Those words give a discretion to the jury to say whether the case is, under all the circumstances of it, one in which interest ought to be allowed or not. A new trial would not, I think, be granted, because the jury had not allowed interest under that section, in a case like the present. I do not believe that any twelve men dealing with and considering all the circumstances of this case, would say that interest ought to be allowed; and, acting as a jury in this case, it appears to me that I cannot allow interest except from

4 C

the date of the Chief Clerk's certificate; from which time it has been conceded that interest must be paid.

As to the costs of the suit. The plaintiffs have succeeded only to the extent of something less than one-half of their entire demand; but having regard to the nature and circumstances of the case, to the way in which the plaintiffs were met, to the contention on the part of the defendants that the plaintiffs were entitled to nothing, to the decisions in the case of *Jeffryes v. The Agra and Masterman's Bank* (*ubi supra*) and *May v. Biggenden* (*ubi supra*), and to the fact that the defendants have substantially been the cause of the litigation, I am of opinion that the defendants must pay the costs of the suit. The secretary of the company was made a defendant for the purpose of discovery under circumstances which entirely justified the plaintiffs in taking that course. The plaintiffs have been ordered to pay his costs, but with a reservation of the question of how they were ultimately to be borne. I shall now order that his costs be added to the costs of the plaintiffs, and that the defendants do pay them with the plaintiffs' other costs of the suit. Then as to the rate of interest to be paid from the date of the Chief Clerk's certificate. Vice-Chancellor Stuart thought that five per cent. ought to be allowed; and as I consider that this really is a case which ought to be dealt with according to the legal rights, and as I believe that at law it would be given, I shall order that five per cent. be now paid by the defendants from the date mentioned.

Solicitors—Mr. John Turner, agent for Mr. C. C. Lewis, Brentwood, for plaintiffs; Mr. J. B. Batten, for defendants.

LORDS JUSTICES.

1874.

June 2, 4.

COTTRELL v. FINNEY.

Mortgagor and Mortgagee—Redemption Suit—Amount chargeable against Estate—Transfer of Mortgage—Arrear of Interest paid by Transferree before Transfer—Conduct of Mortgagee—Costs—Costs of Appeal.

The interest on a mortgage being in arrear, the mortgagees in June, 1864, ordered it to be put up for sale under their power of sale. The mortgagor was a trustee, and he had committed a breach of trust in not keeping down the interest out of the rents of the property. He procured a person to take a transfer of the mortgage, who on the 14th of June, in order to stop the sale, paid the mortgagees 195*l.* for arrears of interest and costs. In September, 1864, he paid the mortgagees a further sum of 55*l.* for interest. The investigation of the title was not completed for some time, and the transfer of the mortgage was not executed until August, 1865, by which time further interest to the amount of 122*l.* had accrued due. The transfer deed recited that the principal debt, the 122*l.* interest and 45*l.* costs, were due to the mortgagees, and by it they assigned to the transferee the principal debt and the last mentioned sums for interest and costs, and conveyed the property, subject to the equity of redemption. Contemporaneously with the transfer another deed was executed, by which the mortgagor purported to capitalise the arrears of interest and costs, and to charge the amount of them, with interest thereon, upon the estate. The title to the property gave notice to the transferee of the breach of trust which had been committed. A redemption suit having been instituted by the *cestuis que trust* against the transferee and the trustee,—Held (reversing a decision of HALL, V.C., that the transferee was entitled to charge against the estate the sums which he had paid for interest and costs before the execution of the transfer.

Held also (reversing the Vice-Chancellor's decision), that there was no ground for depriving the transferee of the costs of the suit.

This was an appeal from a decision of Hall, V.C.

The suit was brought for the redemption of a mortgaged estate, and the questions raised were as to the amount which the mortgagees was entitled to charge against the estate, and as to the mortgagees's costs of the suit.

C. A. Tulk, by his will, dated the 23rd of September, 1848, devised the hereditaments comprised in seven schedules to his will to trustees in fee, upon trust out of the rents to raise 1,600*l.* a year, which was to be applied in keeping down the interest in respect of the mortgage debts which were charged on the devised estates, and the residue of the 1,600*l.* was to be invested and accumulated to form a fund to pay off the mortgage debts. And subject thereto, the testator devised the hereditaments comprised in the seventh schedule to his will, upon certain trusts for the benefit of his daughter Sophia Augusta Cottrell and her children. The testator died in January, 1849. In a suit of *Hart v. Tulk*, instituted for the administration of the trusts of his will, it was on the 29th of July, 1853, ordered that an apportionment should be made of his mortgage debts, amounting to 21,676*l.* 5*s.* 7*d.*, between the respective parties entitled under his will to the respective mortgaged hereditaments, and the sum of 2,819*l.* 8*s.* 8*d.* was ordered to be charged on the hereditaments comprised in the seventh schedule. And it was ordered that C. H. Cottrell and G. E. Cottrell should be appointed trustees of the hereditaments comprised in the seventh schedule (the trustees appointed by the will having disclaimed), and that those hereditaments should be conveyed to them by all proper parties, charged only with the 2,819*l.* 3*s.* 8*d.* and interest, upon the trusts declared by the will, but freed from the trusts for raising the 1,600*l.* a year. And it was ordered that C. H. Cottrell and G. E. Cottrell should set apart every year out of the rents of the hereditaments comprised in the seventh schedule a sum of 245*l.*, out of which the interest on the 2,819*l.* 3*s.* 8*d.* was to be paid, and the residue of the 245*l.* was to be accumulated to form a fund to pay off the 2,819*l.* 3*s.* 8*d.* On the 17th of January, 1854, the deeds necessary to carry out this order were executed, the then mortgagees con-

curring in the arrangement. The result was that the hereditaments comprised in the seventh schedule became thereupon subject only to a mortgage to secure 2,819*l.* 3*s.* 8*d.* and interest, at 4*l.* per cent., the mortgagees being W. T. Græme, T. Denne and C. J. Pearse. The net rents were more than enough to provide the annual sum of 245*l.* The trustees, however, committed breaches of trust with respect to the 245*l.*, and through their default the interest on the mortgage debt was frequently in arrear. In April, 1860, the mortgage debt and the security were transferred to C. J. Pearse, J. C. McNair, and G. R. Winter. C. H. Cottrell died in November, 1860. In June, 1864, there was a considerable sum due to the mortgagees for arrears of interest, and they had instructed an auctioneer to sell the property by public auction under their power of sale. G. E. Cottrell then applied to Messrs. Deane, Chubb & Co., solicitors, to find some one who would take a transfer of the mortgage, and Mr. Stephen Finney, a client of theirs, agreed to do so. The mortgagees declined to withdraw their instructions for sale unless the arrears of interest were at once paid. Accordingly on the 14th of June, 1864, Finney paid the mortgagees 195*l.* 8*s.* for arrears of interest and auctioneer's charges, and on the 19th of September, 1864, he paid them a further sum of 54*l.* 19*s.* 4*d.* for interest on the mortgage. Some time was occupied in the investigation of the title to the property, and the transfer to Finney was not executed until the 28th of August, 1865, by which time the further sum of 122*l.* 9*s.* 1*d.* was due to the mortgagees for interest. The deed of transfer, which was made between the mortgagees (Pearse, McNair and Winter) of the first part, G. E. Cottrell of the second part, and Finney of the third part, contained a recital that the principal sum of 2,819*l.* 3*s.* 8*d.* was still due to the mortgagees, and that there was due to them the sum of 167*l.* 3*s.* 9*d.* in respect of arrears of interest and costs (being the above 122*l.* 9*s.* 1*d.* arrears of interest, and 44*l.* 14*s.* 8*d.* for costs), and it was witnessed, that in consideration of 2,986*l.* 7*s.* 5*d.* (being the total of 2,819*l.* 3*s.* 8*d.*, and the 167*l.* 3*s.* 9*d.* interest and costs), the mort-

gagees assigned to Finney the mortgage debt and the interest and costs, and the benefit of all securities for the same, and also (with the concurrence of G. E. Cottrell) granted, and G. E. Cottrell confirmed to Finney the mortgaged premises in fee, subject to the equity of redemption. Another deed, also dated the 28th of August, 1865, was executed between G. E. Cottrell of the first part, Charles Furber of the second part, and Finney of the third part. This deed contained a recital of the contemporaneous deed and that there was then due from G. E. Cottrell to Finney the sum of 513*l.* 12*s.* 7*d.* for costs in respect of the contemporaneous deed, and of the deed now in statement, and for interest, and Cottrell granted the trust property (subject to the former mortgage) to Finney, by way of security for the repayment of the 513*l.* 12*s.* 7*d.* and the above-mentioned sum of 167*l.* 3*s.* 9*d.* (making together 680*l.* 16*s.* 4*d.*), with interest thereon at five per cent. The 513*l.* 12*s.* 7*d.* was made up thus—

Arrears of interest paid June 14, 1864	£105	8	0
Do. paid September 19, 1864	54	19	4
Finney's costs of transfer	117	4	6
Interest accrued on Finney's money up to transfer	146	0	9
Total	£513	12	7

The documents of title gave notice to Finney of the breach of trust which had been committed. This suit was instituted in 1878 by Mrs. Cottrell and her children, against Finney and G. E. Cottrell, for the redemption of the mortgaged hereditaments. The Vice-Chancellor decided that Finney was not entitled to charge against the estate the two sums of 195*l.* 8*s.* and 54*l.* 19*s.* 4*d.* which he had paid for arrears of interest and costs before the transfer, but that he could only charge the 167*l.* 3*s.* 9*d.* which he paid for interest and costs on the completion of the transfer. It was admitted that Cottrell had no power to capitalize the arrears of interest and charge the estate with them as he had affected to do by the second deed of the 28th of August, 1865. The Vice-Chancellor's judgment, however, was mainly based upon the fact of the execution of the

second deed which his Honour thought operated as a waiver of any right which Finney might have had independently to charge the arrears of interest against the estate. His Honour also held that Finney was disentitled to the costs of the redemption suit up to the hearing, because he had claimed more than was due to him. No tender, however, had been made to him. Finney appealed from the decision.

Mr. Greene and Mr. Graham Hastings, for the appellant.—On the true construction of the transfer deed Finney is entitled to charge these sums against the estate. At any rate he is entitled to do so, as being money paid by him in the nature of salvage, for if the sale had not been stopped by payment of the arrears of interest, the plaintiffs never could have redeemed their estate. The collateral deed, which is wholly inoperative, cannot deprive Finney of any right which he would have had independently of it.

As to costs, the mere circumstance that a mortgagee has claimed too much will not deprive him of his costs of a redemption suit—

Norton v. Cooper, 5 De Gex, M. & G. 728;

Cottrell v. Stratton, 42 Law J. Rep. (N.S.) Chanc. 417; s. c. Law Rep. 8 Chanc. 295.

Mr. Dickinson and Mr. J. P. Lake, for the plaintiffs.—The trustee who neglected his duty to keep down the interest, could not acquire or transfer a lien on the property for the interest, and Finney took the transfer with notice of the breach of trust—

Clack v. Holland, 19 Beav. 262; s. c. 24 Law J. Rep. (N.S.) Chanc. 13;

Lofthus v. Swift, 2 Sch. & Lef. 642.

The deed which affected to capitalize the arrears of interest may well be void as regard the beneficiaries and good for another purpose.

No reply was heard.

LORD JUSTICE JAMES.—Upon the first point I am unable to arrive at the same conclusion as the Vice-Chancellor. I am bound to say that if the decision of the Vice-Chancellor upon this point were affirmed by this Court, it would be a

most ruinous thing for mortgagors and mortgaged estates, that is, if we were to hold that no person could advance money by way of salvage to save a mortgaged estate from the ruinous consequence of a forced sale by mortgagees, and that nobody could, if the estate was a trust property, advance money *bona fide* and honestly for the purpose of the immediate saving it from an imminent misfortune of that kind without being fixed with a liability to answer for all breaches of trust that might have been committed by the trustee in respect of the non-payment of the previous interest upon the security. It has not been contended before us, and I understand it was not contended before the Vice-Chancellor, that the sums paid for interest and for costs upon that occasion could be converted into principal so as to bear interest. That this could not be done is apparently in accordance with the modern practice of the Court, although it certainly differs very much from some of the old cases in which it seems to have been held as a matter of course, that upon a reasonable transfer of a mortgage security to a transferee all sums paid by him were converted into principal. One particular case I have been struck with as having a bearing upon this matter. That is the case of *The Earl of Chesterfield v. Lady Cromwell* (1). It is to this effect—"J. S. mortgaged his estate to the plaintiff and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate, and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself (who was then near of age) signed it; and the account being admitted to be fair, it was held by my Lord Chancellor, that though regularly interest shall not carry interest, yet that in some cases, and upon some circumstances, it would be injustice if interest might not be made

principal, and the rather in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence." There seems to me to be a great deal of very good sense in that judgment, although it is not necessary to apply it to the present case having regard to what the rule of the Court now is. It has not been contended before us that a transferee can have the arrears of interest converted into principal in that way. He can only have what was actually paid by him without reference to interest upon it. What really did take place was this, whether through the default of Mr. Cottrell the trustee or not, or rather, as we must assume, through the default of Mr. Cottrell the trustee, the interest was allowed to fall into arrear; there is the fact that the interest was in arrear. I cannot distinguish it from the case of a leasehold estate with rent in arrear, and the landlord about to enter for a forfeiture. The interest was in arrear, the mortgagees were about to sell and had employed an auctioneer to sell the estate. It was advertised for sale, and the sale was coming off in a few days. The trustee goes to a solicitor whom he believes to have a moneyed client, and he says—you find somebody to take this mortgage and prevent the misfortune of a sale. A gentleman was found, who acted with great liberality, because, without waiting for a transfer of the mortgage, he immediately advanced the necessary money to stop the pending sale. That was done, and the sale was stopped, and the property was thereby saved, and I suppose, from its being now the subject of a redemption suit, that it is a valuable property, much more valuable than the amount secured on it. The property was saved, and then matters went on. The title was looked into; there was a long delay in completing the transfer, and in the meantime a further arrear of interest was paid by the transferee before the actual transfer. Then the transfer of the security was made, and in it rightly enough, as between the mortgagees and transferee, the mortgagees, having been paid the arrears of interest, would not assign anything except what was actually due to them. If

(1) 1 Eq. Cas. Abridged, 287.

they had assigned a larger sum than was due to them they would probably have exposed themselves to some risk under their covenant that they had done no act to incur what they had assigned. They would be liable upon that covenant, and it was therefore quite right that the assignment of the debt should be only of the sum actually due. But that was not intended to relieve the estate from the right which it appears to me (as it did also to the Vice-Chancellor) existed by reason of the mere payment by Mr. Finney. He paid the money on behalf of the estate to save it from being sold, and so acquired an interest in the equity of redemption, which would entitle him to redeem the estate and add what he had already paid, and have the estate transferred to him. The Vice-Chancellor was of that opinion up to that point, but he thought that the substance of the transaction was to be altered to the prejudice of Mr. Finney, by reason of the form which the contemporaneous deed assumed, that whereas the first deed only represents a certain sum to be due, the other sums are made the subject of a distinct charge by the second deed. It is admitted that the distinct charge *qua* charge cannot stand. If the charge cannot stand as it is, if the trustee could not make the charge which he intended to make for the benefit of Mr. Finney, converting the arrears of interest into principal and giving him security on the estate for that and interest on it at five per cent.; if the deed cannot take effect for the purpose for which and in the form in which it was executed, is a Court of Equity to say the deed is to have no effect so far as it was intended to create a benefit for Mr. Finney, but it is to have the effect of entirely destroying that right which Mr. Finney then had independently, viz., the right to have the arrears of interest paid to him on the redemption of the estate? That would, in my opinion, be to make the form destroy the substance, the letter kill the spirit, and to deprive Mr. Finney of that right against the estate which he never intended to give up, and as to which there was no equity as between Finney and the estate, that the estate should receive the benefit of it.

It was suggested that there was time given by the conversion of the interest into principal, as between Finney and Cottrell, and that that shewed that Cottrell was treated as the principal debtor. He was the debtor, so far as he was the person at whose request the money was paid; but he was not the debtor for whose benefit the credit was given, in exoneration or exclusion of the estate. No prejudice could have been caused to the estate, and no transaction of that kind, as between Mr. Finney and Mr. Cottrell, could have deprived the *cestui que trust* of their right to call Mr. Cottrell to account for all the arrears of money which were in his hands by a breach of trust, and for which he is liable at this moment. It appears to me there is no ground for the application of the rule in cases of principal and surety, viz., that, where one person is primarily and another person is secondarily liable, if you give time to the person who is primarily liable the other person is thereby released. I think there is no ground for the application of that rule. The case rests simply upon this—that the money was honestly paid by Mr. Finney for the benefit of the estate, for the safety of the estate, and the estate ought to bear it. I am of opinion that Mr. Finney is entitled to charge on the estate the sums of money which he has so paid.

MELLISH, L.J.—I am of the same opinion. The Vice-Chancellor, as I understand his judgment, appears to have thought that if these two sums of 195*l.* 8*s.* and 54*l.* 19*s.* 4*d.*, which were paid by Mr. Finney for interest and costs, had been included in the debts assigned to him by the mortgagees, then he would have been entitled to charge them as against the estate; but the Vice-Chancellor seems to have come to the conclusion that, because they were not included in that assignment, but were made the subject of a separate charge, therefore they cannot be charged against the estate. Now it appears to me, that that is going too far. The only consequence of their not being included in the assignment is that the deed itself does not prove that these sums were paid in anticipation of the transfer by the proposed transferee, for the pur-

pose of saving the estate from being sold. The consequence of their not being included in the deed is that that fact is not proved by the deed, but I can see no good reason why it should not be proved *aliunde*.

Upon the evidence of Mr. Deane and Mr. Finney, it is perfectly clear, as a matter of fact, that these two sums were paid on Mr. Finney's account, in anticipation of an intended transfer, and on the security of the estate, and not primarily on the personal security of Mr. Cottrell. That being so, I can see no good reason why they should not be a charge on the estate when the mortgage comes to be redeemed. It is a fallacy to say that the effect would be that the mortgagors would pay them twice over. The mortgagors have never paid them yet, because, although it is perfectly true that Mr. Cottrell had money in his hands, out of which he might and ought to have paid them, his having wrongly appropriated that money does not amount to a payment. In point of fact, they have not been paid at all, and they now come to be paid for the first time out of the estate.

Mr. Lake was then heard, as to the costs of the suit.

No reply was called for.

JAMES, L.J.—The main point which, in the Vice-Chancellor's view, he had to decide (I do not mean to say the main point originally in dispute between the parties) was decided by him one way, and has been decided by us the other way, and the main point being decided in favour of the mortgagee, the principal ground upon which the Vice-Chancellor proceeded in dealing with the costs of the suit seems to me to be removed. The only question is whether there is anything in this case to take it out of the general rule, there being a sum found due to the mortgagee payment of which the mortgagors resisted. The rule of the Court is that which was laid down in *Cotterell v. Stratton* (*ubi supra*), that is to say, that a mortgagee is entitled to his security as a security for principal, interest and costs—that is, the costs of a redemption suit, or of a foreclosure suit, if he files a bill for fore-

closure. The costs of a foreclosure suit or a redemption suit would be given, as a matter of course, as incident to his security, unless (that is the distinction) the mortgagee has refused to take when offered the full sum due to him, in which case he loses all subsequent interest, and all costs, and is made liable to pay costs; or, unless the Court sees that the conduct of the mortgagee has been oppressive, and that he has been availing himself of his powers to extort something which he ought not to have, or has been doing something which this Court regards as unconscientious. That does not apply to the case of a mortgagee claiming more than is really due to him upon some fair question of dispute between him and the mortgagor, and the point in dispute being not conceded, he simply saying, "I claim so much under such circumstances," and the other man saying, "You are not entitled to that; that is a thing which must be determined by the Court in the cheapest way." In this particular case the parties have shewn commendable economy in the mode of bringing the case to a hearing. These questions have been raised at a very small expense. It seems to me utterly impossible to say that there has been vexatious or improper conduct on the part of the mortgagee, which has led to any expense on the part of the mortgagor. It seems to me that the rule laid down in *Cotterell v. Stratton* (*ubi supra*) ought to be adhered to, and that the mortgagee is entitled, as of course, to his principal, interest and costs, as the price of giving up the estate. The Vice-Chancellor's order will, therefore, be varied in all the particulars to which the appeal is directed, and the mortgagee will add the costs of the appeal to his security.

MELLISH, L.J.—I am of the same opinion.

Solicitors—Messrs. Deane, Chubb & Co., for appellant; Mr. W. Ley, for plaintiffs.

LORDS JUSTICES. }

1874. }

March 10, 12. }

SAULL v. BROWNE.

Practice—Discovery—Answer—Exceptions—Suit for Recovery of Assets—Alleged Appropriation by late Partners—Accounts.

The executors of a wine merchant were authorised by his will to carry on his business. His executrix entered into partnership with B. and G., and carried on the business in partnership with them for fourteen years. At the end of that term the partnership was dissolved. Shortly afterwards the executrix having discovered that B. & F. were carrying on together the business of wine merchants in the neighbourhood of the old firm, filed her bill against B., F., G. and others, alleging that under a scheme concocted by B. and G. the goodwill and stock-in-trade and assets belonging to the old firm had been appropriated to and used in the business of B. & F., and claiming that the testator's estate was entitled to share in the profits made by B. & F. F. declined to answer an interrogatory asking what sums had been drawn out of the business of B. & F. by the several partners therein:—Held, on exceptions, that F. must answer this interrogatory.

This was an appeal by the defendant, J. G. Findlay, from a decision of the Master of the Rolls, allowing certain exceptions taken by the plaintiff to his answer.

This suit was one in connection with several others which had been instituted in relation to the estate of Thomas Saull, deceased. The plaintiff, who was the widow and executrix of the testator, filed this bill for the purpose of recovering certain assets belonging to the testator's estate, which she alleged had been appropriated by and used in the business carried on by the defendants, Browne and Findlay.

The testator, Thomas Saull, who was a wine and spirit merchant, carrying on business in Aldersgate Street, by his will empowered his executors and trustees to carry on his business and employ part of his estate therein. He died in October, 1855, and his will was proved by his widow, the plaintiff, and by the

defendant, William Saull, who were therein appointed executrix and executor. The testator's business was continued after his death under the provisions of his will. In September, 1858, the plaintiff, with the concurrence of William Saull, entered into an arrangement with the defendants, Godfrey, who had been a clerk in the business, and Browne, for carrying on the business in partnership with them, and appropriating part of the testator's estate to that purpose. Articles of partnership were executed in pursuance of such arrangement for carrying on the said business for fourteen years from the 1st of January, 1858, in the old premises in Aldersgate Street, under the firm of "Saull & Co." In August, 1864, a bill in *Saull v. Saull* was filed by some of the testator's children for the administration of his estate. In December, 1871, a bill in *Godfrey v. Saull* was filed in relation to the winding up of the business of the said partnership, which had determined on the 31st of December, 1871. In January, 1872, a bill in *Saull v. Godfrey* was filed by two of the testator's children, to impeach the arrangements of September, 1858. About July, 1872, it came to the plaintiff's knowledge that Godfrey & Browne were carrying on business as wine merchants in Worship Street, in the neighbourhood of Aldersgate Street, and soon afterwards she filed her original bill in this suit, and obtained an order appointing a receiver of the outstanding debts and assets of the partnership. By a decree made in *Saull v. Godfrey* and *Godfrey v. Saull*, the Court, on behalf of persons interested in the testator's estate, approved of the partnership constituted in September, 1858, but held that Godfrey & Browne had not any interest in any profits subsequent to the dissolution thereof, except so far as they had any capital employed therein. The bill stated that according to the allegations of Godfrey & Browne, the business in Worship Street was carried on by Browne alone down to October, 1872, when the defendant, Findlay, was admitted as a partner. The said partners traded under the style of "Browne & Co." The bill alleged that the said

Worship Street business was carried on in furtherance of a scheme arranged by Godfrey & Browne for transferring the testator's business and the goodwill thereof to the firm of Browne & Co., and by means of moneys and assets belonging to the Aldersgate business, which had been improperly transferred to Browne & Co.'s business, and the improper withdrawal of customers from and appropriation of the goodwill of the Aldersgate business.

The bill further charged specifically the removal of large quantities of the stock-in-trade, consisting of wines, spirits, &c., from the Aldersgate Street premises to the Worship Street premises; the receipt by Browne & Co. of debts owing to the Aldersgate Street business, and the making of fictitious entries in the books of the Aldersgate Street business to conceal these frauds. The bill further alleged that the defendant, Findlay, was a partner in the firm of Browne & Co., which firm had appropriated and traded with the goodwill and assets of the testator's business, and had realised large profits; and the plaintiff thereby claimed to be interested in the Worship Street business, and the profits and assets thereof, as belonging to the testator's said business, and prayed for a declaration that the goodwill of the Worship Street business, and part of the assets used therein, and the profits realised therefrom, belonged to the testator's estate; for enquiries as to the alleged appropriation and employment of the goodwill and assets and the realisation of profits and consequential accounts, and other relief.

Amongst other interrogatories filed for the examination of the defendants, was the following—

12. "Have the defendants, Brown, Godfrey and Findlay, or any of them jointly, or has any of them separately, drawn out of the said business, or out of the assets of the said partnership, any moneys whatever for their or his own account, either in respect of capital advanced, profits or otherwise howsoever? If yea, set forth the particulars of all moneys so drawn out, and when, by whom and by what means the same were respectively so drawn out, and distin-

guish such of the said moneys as were so drawn out in respect of profits."

The defendant, Findlay, to this interrogatory, answered as follows—

"I am advised that unless and until the plaintiff shall have established her right to a decree in this suit, I am not compellable to answer the 12th interrogatory relating to the moneys drawn by the partners respectively from the Worship Street business, or any part thereof, and I submit such questions to the judgment of the Court accordingly."

The plaintiff excepted, and the Master of the Rolls allowed the exception. The defendant appealed.

Mr. A. G. Marten and Mr. Russell Roberts for the appellant.—The discovery sought was immaterial to the hearing of the suit. It was obligatory upon the plaintiff to shew that profits had been realised by means of the trust property, and that she was interested in the business, before she could be entitled to an answer as to how the profits had been dealt with. Why should the defendant be obliged to answer as to what might never be in question? They cited

De la Rue v. Dickinson, 3 Kay & J. 388;

Elmer v. Creasy, 42 Law J. Rep. (N.S.) Chanc. 807; s. c. on app. 43 Law J. Rep. (N.S.) Chanc. 166; s. c. Law Rep. 9 Chanc. 69;

Carver v. Pinto Leite, 41 Law J. Rep. (N.S.) Chanc. 92; s. c. Law Rep. 7 Chanc. 90;

Kettlewell v. Barstow, 41 Law J. Rep. (N.S.) Chanc. 718; s. c. Law Rep. 7 Chanc. 686;

Turney v. Bayley, 33 Law J. Rep. (N.S.) Chanc. 499; s. c. 4 De Gex, J. & S., 332;

Wigram on Discovery, 170.

Mr. Locock Webb, in support of the exceptions, was not called upon.

LORD JUSTICE JAMES said he was of opinion that this exception must be allowed. The rule was quite clear that a person answering was bound to answer fully, unless he could make out that it was an exceptional case, and that the discovery sought was frivolous, vexatious or oppressive. The Court might be

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trusted, as was said in *Elmer v. Creasy* (*ubi supra*), to exercise a proper control in every case in which it was satisfied that any kind of discovery was required vexatiously or oppressively. In this case he was satisfied the discovery sought was not immaterial nor vexatious or oppressive. On the contrary, it might be very material to the relief prayed. The plaintiff said she was interested in the business, on the ground that the assets of her business had been improperly used in it. That was a question for the hearing, but if she was interested, she was entitled to know what moneys had been drawn out of the business, or what had been done with the assets. She had asked what sums had been drawn out by two partners. There was nothing oppressive or vexatious in that, and it might be very material at the hearing, for the purpose of shewing whether the plaintiff was entitled to call upon Findlay to account for his share of the profits in the business.

LORD JUSTICE MELLISH concurred.

Solicitors—Mr. W. R. Stopher, for appellant;
Messrs. Miller & Miller, for respondent.

BACON, V.C. }
1874. } LANCEFIELD v. IGGULDEN.
March 11. }

Administration — Residuary Devise — Wills Act, ss. 24, 25.

Residuary devised estates are subject to payment of debts before specifically devised estates.

This was an administration suit, the personal estate was insufficient, some real estate had been devised to the plaintiff, and there was a residuary devise. One question in the suit was whether the residuary devised estate was to bear the whole of the debts not satisfied by the personal estate, or whether the specifically devised estate was to contribute.

Mr. Kay and Mr. Collins, for the plaintiff, contended that since the Wills Act a residuary devise ceased to be specific, and that, therefore, the testator must be considered to have expressed a primary intention that the devisee to whom he had given particular property, was to enjoy that property in its entirety in preference to the residuary devisee. The case was within the principle of

Tombs v. Rocha, 2 Col. C.C. 490.

Mr. A. E. Miller and Mr. Ince, for the residuary devisee, said there had formerly been a conflict of authority on the subject—

Eddels v. Johnson, 1 Giff. 22; s. c.

27 Law J. Rep. (N.S.) Chanc. 302;

Pearmain v. Twiss, 2 Giff. 130; s. c.

29 Law J. Rep. (N.S.) Chanc. 802;

Clark v. Clark, 34 Law J. Rep. (N.S.)

Chanc. 477;

were authorities that the rule was not altered by the Wills Act.

Dady v. Hartridge, 1 Dr. & S. 236;

Rotherham v. Rotherham, 26 Beav.

468,

were authorities the other way, but the matter had been settled by the Court of Appeal in

Hensman v. Fryer, 37 Law J. Rep.

(N.S.) Chanc. 97; s. c. Law Rep.

3 Chanc. 420,

that the residuary and specific devisees still stood on the same footing with respect to contribution. This decision had been followed in

Gibbins v. Eyden, 38 Law J. Rep.

(N.S.) Chanc. 377; s. c. Law Rep.

7. Eq. 371,

though it was true that on another point it had not been followed in

Dugdale v. Dugdale, 41 Law J. Rep.

(N.S.) Chanc. 565; s. c. Law Rep.

14 Eq. 234;

Collins v. Lewis, Law Rep. 8 Eq. 708.

Mr. Kay in reply referred to

Brownson v. Lawrence, 37 Law J. Rep.

(N.S.) Chanc. 351; s. c. Law Rep.

6 Eq. 1;

Sackville v. Smyth, ante, p. 494; s. c.

Law Rep. 17 Eq. 153.

BACON, V.C., said — The only serious question was as to the liability of specifically devised estates to contribute. There

appeared to be a sort of conflict of authority which was capable of being harmonised. It appeared to him that the real rule was stated in the case of *Tombs v. Roche* (*ubi supra*), that the payment of debts should be, as far as possible, so arranged as not to disappoint any of the gifts made by the will, unless the instrument discloses a different intention. A testator by making a specific devise thereby expresses his intention that the devisee shall enjoy that specific portion of his property. It would be contrary to justice and all the cases cited to hold that specific and residuary devisees are to contribute rateably. The specific devisees are entitled to hold their gifts without being called upon to pay debts till the residuary estate has been exhausted.

Solicitors—Messrs. Monckton, Long & Co., agents for Messrs. Sankey, Son & Flint, Canterbury, for plaintiff; Mr. J. H. Jones, for defendant.

BACON, V.C. }
 1874. }
 March 18. } PAGET v. EDE.

Mortgage—Foreclosure—Jurisdiction.

The Court has jurisdiction to make a foreclosure decree in respect of lands situate out of the jurisdiction.

This was a foreclosure suit relating to property in the island of Nevis, in the West Indies. The mortgage was made in 1845, to secure advances for the purpose of cultivating the estate. The parties were all domiciled in England. Eleanor Mary Ede and Charlotte Ede, ladies who had each a charge on the property, joined in the mortgage in order to postpone their charges. The principal question of law in the suit was whether the Court had jurisdiction to make a decree for foreclosure in respect of lands situate out of the jurisdiction.

Mr. Kay and Mr. G. W. Lawrance, for the plaintiffs (the representatives in bankruptcy of the original mortgagees), con-

tended that the Court had jurisdiction to make a decree for foreclosure against persons within the jurisdiction inasmuch as it was a personal decree—

Toller v. Carteret, 2 Vern. 494, where a plea to the jurisdiction in a foreclosure suit in respect of the island of Sark was overruled because it was served on the defendant here.

In many other cases decrees had been made in respect of contracts relating to real property situated out of the jurisdiction, particularly in the West Indies.

Lord Eldon said there is no doubt about the jurisdiction as to contracts relating to land in the West Indies—

Jackson v. Petrie, 10 Ves. 164.

Specific performance of an agreement to settle boundaries between two American provinces was decreed in

Penn v. Lord Baltimore, 1 Ves. sen. 444—

Relief against a fraudulent conveyance of land in Ireland was granted.

Arglasse v. Muschamp, 1 Vern. 75—
 Sequestration against a defendant in Ireland was granted.

Fryer v. Bernard, 2 P. Wms. 261—
 A purchase by a creditor on his own execution of land in the West Indies was set aside as fraudulent.

Cranstown v. Johnston, 3 Ves. 170—
 A foreign partnership was wound up in England.

Maunder v. Lloyd, 2 Jo. & H. 719—
 Receivers of real estate abroad were constantly appointed by this Court.

Seton on Decrees, 1007.

Mr. Chitty and Mr. Caldecott, for the Misses Ede, and Mr. H. M. Jackson and Mr. Caldecott, for the heir of the principal mortgager, contended that the decree sought was in rem, and could only be made in the Courts of Nevis where the law as to mortgages might be entirely different from that of this country, rendering it impossible to work a foreclosure decree.

The Court refused to enforce a lien on real property—

Norris v. Chambres, 29 Beav. 246; s. c. 30 Law J. Rep. (N.S.) Chanc. 285; 3 De Gex, F. & J. 583.

It was held the Court had no jurisdiction over land in St. Christopher—

Roberdeau v. Rous, 1 Atk. 543.

A demurrer to a bill for partition of lands in Ireland was allowed—

Carteret v. Petty, 2 Swanst. 323 n.

A bill for relief in respect of trust of land in Ireland was dismissed—

The Earl of Kildare v. Eustace, 1 Vern. 405.

A bill to try the validity of a will disposing of land in Pennsylvania was dismissed—

Pike v. Hoare, 2 Eden 182.

An equity of redemption was not a mere personal interest—

Burton's Compendium;

1 *Fisher on Mortgages*, 263;

The Dover Act, 3 & 4 Will. IV. c. 105, s. 2;

Jones v. Jones, 4 Kay & J. 361.

A receiver might well be appointed without making any decree to affect the land. The Court in Ireland held that this Court could not order tenants in Ireland to attorn to a receiver—

Re Trant, Seton on Decrees, 1007;

Portarlington v. Soulby, 3 Myl. & K. 104,

was also referred to.

Mr. Brodrick appeared for trustees of a term.

Mr. Kay, in reply, referred to

Westlake on Private International Law, pp. 56, 57, 58, 59.

In

Norris v. Chambres (ubi supra), the Court refused to interfere simply because there was a foreign winding up in which the lien which was claimed was properly under adjudication.

BACON, V.C., said—Two points and two only have been argued earnestly upon this occasion, one of them is as to the jurisdiction of the Court. It is said that because no instances are referred to of a decree for foreclosure of land in one of the colonies, that therefore the Court has not jurisdiction. One instance is referred to, and if I were to refer to my own recollection, which is very likely imperfect, I should have said that there have been many such decrees, but whether there have or have not been any decrees since the *Sark* case up to the present time, I cannot for a moment doubt the juris-

diction of the Court, and the right of the plaintiff to the relief he asks for, in the exercise of that jurisdiction.

Now what is the case? It is the plainest and simplest that can be conceived. The owner of an estate in Nevis subject to a certain charge or incumbrance, together with the persons entitled to that charge or incumbrance, agree to make a security by way of mortgage. The deed is executed, the legal estate passes to the mortgagee, the formalities which the law of Nevis requires in the way of registration are complied with, and the legal estate is clearly and plainly in Mr. Adam—he has become bankrupt, and his assignees are the present plaintiffs. Then what remains? The equity of redemption. It is said that that is an estate. It is by a figure of speech only that it can be called an estate. It may be in some instances that a husband may have a title by courtesy, and that gavelkind and borough English may apply to it. All these are necessary consequences of the law which recognises the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest, they do not create an estate, and in my opinion it is a misapplication of words to call an equity of redemption an estate in the proper technical, legal sense. That it is a right is beyond all doubt, a right which may be enforced in this Court and which is recognised by the record in this case. I am then threatened with this, that I know nothing about the law of Nevis (which is quite true, nothing judicially), and that I cannot make this decree because it may lead to inconvenient consequences, and to some conflict of law in Nevis. I do not conceive the possibility of any such thing happening. If there were any foundation for the suggestion it ought to have appeared in the pleadings. The decision of the Court ought to be asked upon the subject, and there is no trace of any such thing in the pleadings, but only a vague suggestion that this Court has not jurisdiction. As I am satisfied that it is a jurisdiction which has been very frequently employed in the case of appointing receivers of mortgaged estates in the colonies, and as I cannot entertain any doubt that the

Court has a right as between the English mortgagor and the English mortgagee to enforce that personal contract between them, although one of the consequences of it is to vest in the plaintiffs the absolute interest in the mortgaged estate which at present is qualified only by the existence of the equity of redemption, I cannot hesitate for a moment in saying that the suit is properly brought into this Court; that it is brought for the purpose of having the account taken, of realising the estate if it should be necessary, and giving to the mortgagor the opportunity of redeeming it if he thinks fit to do so. Upon the point of jurisdiction there is in my opinion no reason whatever for doubt.

The Vice-Chancellor then decided that on the construction of the mortgage, it was made to secure a current account. After some discussion on the form of the decree he said—

I was going to say one word upon the subject of jurisdiction which I had forgotten to say when I was speaking of the construction of the deed upon this personal contract, that there can be no doubt that if the Misses Ede or John Bulkeley Ede had thought fit to file a bill to redeem, they would be entitled to do it, yet I am asked to hold that the mortgagor cannot file a bill against them to foreclose which is one of the incidents of a mortgage security.

Solicitors—Messrs. Lawrance, Plews, Boyer & Baker, for plaintiffs; Messrs. Shum & Crossman, agents for Messrs. Green & Moberley, Southampton; Messrs. Green & Julius, for defendants.

JAMES, L.J. }
1874. } COTTERELL v. STRATTON.
April 29. }

Costs—Taxation—Higher or Lower Scale—Redemption Suit—Mortgage under 1,000l.—Regulations as to Fees, 1860, Regulation II. Rule I. s. 3.

A building society made an advance on mortgage of 900l., to be repaid with interest by 120 monthly payments. These payments, as well as the payment of certain

fines, were, under the rules of the society, secured by the mortgage deed. A sum of 300l. became due to the Society for such fines beyond the amount due for principal. The sum due to the society was found on taking the accounts to be about 517l. The taxing master allowed costs on the lower scale only, and MALINS, V.C., refused to vary the certificate. Upon appeal:—Held, that the taxing master was right.

This was an appeal by the defendants who were the trustees of a building society from an order of Malins, V.C., refusing to vary the taxing master's certificate.

In 1858, the plaintiff applied to the Borough of Lambeth Permanent Building Society for a loan of 900l., which they agreed to advance on condition of his becoming a member of the society, and subscribing for shares to the amount of the loan; and by an indenture of mortgage dated the 4th of December, 1858, in consideration of the advance of 900l. the plaintiff subdemised certain leasehold houses to the defendants for the residue wanting the last day, of the several terms for which the same were holden, for securing to the society the repayment of the money advanced, with interest, by 120 monthly instalments of 10l. 12s. 6d. each, and the payment of all fines and other sums of money, if any, which might become payable under the rules of the society, and power was given to the trustees, in case of default in payment of any instalment, fine or other sum, for three calendar months, to enter into possession or receipts of the rents and profits of the mortgaged premises, and there was also a power of sale in case the rents and profits should be insufficient to satisfy the instalments and other sums due to the society.

In 1861, the plaintiff being in arrear with the instalments, the society entered into possession of the mortgaged premises.

In 1868, the plaintiff being desirous of redeeming the mortgage and being unable to obtain a satisfactory account of the amount due filed his bill for redemption.

A decree was made directing accounts against the defendants as mortgagees in possession, and an enquiry as to the amount

due from the plaintiff to the society. The amount found to be due from the plaintiff was 517*l.* 9*s.* 5*d.* only. An order having been made by the Appeal Court allowing the defendants their costs as mortgagees [see 42 Law J. Rep. (N.S.) Chanc. 417; s. c. Law Rep. 8 Chanc. 295], the taxing master taxed such costs on the lower scale instead of the higher scale of charges. Upon a summons taken out by the defendants to vary the taxing master's certificate, Malins, V.C., held that inasmuch as there was nothing to be done in this suit but ascertain the amount due from the plaintiff, and that amount was only 517*l.*, the case came within the rule laid down in the Regulations as to fees, &c., 1860 (Morgan Chanc. Acts, App. xxxiii.). Regulation II. Rule I. section 3, which provided that "In all suits for foreclosure or redemption, &c., in which the mortgage whereon the suit is founded shall be under 1,000*l.*, solicitors shall be entitled to charge and be allowed fees only according to the lower scale of charges," and dismissed the summons with costs. The defendants appealed from this order.

Mr. Cotton and *Mr. H. J. M. Williams*, for the appellants.—The regulation as to allowing the lower scale of fees does not apply in this case. The amount or value of the mortgage mentioned in the rule does not mean the sum advanced, nor the amount due, but the value of the security at the date of the instrument. If a mortgage deed provides that the mortgagee shall be at liberty to insure and to add any money so expended to the debt, that is equivalent to a further charge, and must be considered as part of the "amount or value," so here the fines and premium, amounting to over 300*l.*, being collaterally secured by the mortgage deed formed part of its "amount or value," and when those are added to the 900*l.* the amount or value of the mortgage becomes above 1,000*l.*, and the higher scale of charges will apply. We admit that interest is not to be counted in the value of the mortgage. They referred to—

The Earl of Stamford v. Dawson, 36 Law J. Rep. (N.S.) Chanc. 749; s. c. Law Rep. 4 Eq. 352;

Grimes v. Harrison, 28 Law J. Rep. (N.S.) Chanc. 828; s. c. 27 Beav. 198;

Judd v. Plumm, 30 Law J. Rep. (N.S.) Chanc. 94; s. c. 29 Beav. 21.

Mr. Bristowe and *Mr. T. A. Roberts*, for the respondent.—The debt in dispute and nothing more is what is meant by the "amount or value." The stamp is only paid on the principal sum; fines, premium and interest are not chargeable with the *ad valorem* duty. They cited—

Gibbs v. Gibbs, 27 Law J. Rep. (N.S.) Chanc. 577;

Reade v. Bentley, 27 Law J. Rep. (N.S.) Chanc. 254; s. c. 4 Kay & J. 656;

Flockton v. Peake, 12 W.R. 464; s. c. 4 N.R. 456;

and

In re Reece's Estate, 35 Law J. Rep. (N.S.) Chanc. 794; s. c. Law Rep. 2 Eq. 609.

Mr. Cotton replied.

JAMES, L.J.—I am of opinion that the Vice-Chancellor was right, though I am unable to concur in his reason, or the taxing master's for arriving at that conclusion. Where a mortgagor files a bill for redemption he cannot be reduced to the lower scale of fees, because the whole debt may have been repaid before the bill was filed, and when, therefore, the subject of the suit is not to enforce a lien or charge, but to obtain a reconveyance of the property. This mortgage was made upon an advance of 900*l.* It has been properly admitted that the interest could not be counted towards the amount or value of the mortgage. But then the mortgage is to secure also fines and premium, and this it is contended increases the amount or value. Now are these really any thing more than a mortgagee has always a right to have and add to his security? I think not; they are all collateral incidents arising out of and connected with the original security, but, in my opinion, they do not make any difference as to the amount or value in the sense contended for. We must consider the origin of these rules, which was that, although there may be as much dishonesty and as much diffi-

culty in a small matter as in a large one, yet the costs in litigation ought to be lighter, on a smaller scale, in the former case. That was the principle on which the rules were drawn up, and in mortgages, more particularly, it was thought monstrous to have the same luxurious expense in a small matter, as might be justified in a larger one, so the line was drawn at 1,000*l.* This was a mortgage for 900*l.* only. Upon that ground, I think that it does come within the words and the meaning of the rule, and the appeal must therefore be dismissed with costs.

Solicitors—Messrs. Wyatt, Hoskins & Hooker, for appellants; Mr. George Downman Cooke, for respondent.

LORDS JUSTICES. { THE POWELL DUFFRYN
1874. STEAM COAL COMPANY v.
Feb. 19, 21. THE TAFF VALE RAILWAY
COMPANY.

Injunction—Performance of continuous Act—Railways Clauses Consolidation Act, 1845 (Stat. 8 Vict. c. 20), s. 92—Use of Railway—Working of Points and Signals.

The plaintiffs, a colliery company, having sidings which connected their collieries with a railway, gave notice to the railway company of their desire to run engines and carriages over the railway, pursuant to the provisions of the 92nd section of the Railways Companies Clauses Act, 1845. The railway company declined to give effect to the notice, and obstructed the passage of the plaintiffs' trains over their line. The plaintiffs filed a bill to restrain the railway company from interfering with their use of the railway:—Held, that although the plaintiffs were entitled, under the above section, to the use of the railway, the Court could not compel the railway company to employ their servants in working the points and signals on the line, or to entrust the working of them to the plaintiffs' servants; and, since it was impossible for the plaintiffs to exercise their

rights without the use of the points and signals, their bill must be dismissed, but without costs.

This was an appeal on behalf of the plaintiffs from an order made by Hall, V.C., dismissing their bill with costs.

The plaintiffs, a limited company, incorporated in 1864 under the Companies Act, 1862, were colliery proprietors, having three large collieries at Aberaman and Abergwaur, connected by two sidings with the Treaman station, on a line of railway called the Aberdare Railway. The Aberdare Railway is a railway running from the Taff Vale Railway, near a place called Ynys Meyrick to Aberdare. It was made under a special Act of Parliament passed in 1845, and incorporating (amongst other Acts), the Railways Clauses Consolidation Act, 1845. Under the provisions of another special Act, passed in 1848, the Aberdare Railway was leased to the defendants, the Taff Vale Railway Company, for a term of 999 years, and was held and worked by them as part of their undertaking. By the said leasing Act it was enacted that the lease of the railway should entitle the lessees to the free use and enjoyment of the leased line and works, and of such of the tolls to be taken on the said railway as should be demised by such lease and that during any such lease, the powers, privileges and authorities which, at the time of making such lease, should be used, held, exercised and enjoyed by the Aberdare Railway Company, or the directors, &c., thereof (excepting such as should be by the lease expressly reserved), should in like manner, and to the same extent in all respects, apply to, and be held, exercised, used and enjoyed by the lessees, and their directors, officers, agents and servants, under the same restrictions and regulations to which the Aberdare Railway Company would be liable in the exercise of such powers, privileges and authorities.

At a place called the Mountain Ash station, distant between two and three miles from, and on the Cardiff side of the Treaman station, there was a junction connecting the Aberdare Railway with the Great Western Railway.

The defendants' line of railway coming from Aberdare, after passing Treaman and Mountain Ash stations, ran on direct to Cardiff. The plaintiffs, who were in the habit of raising from their collieries as much as 1,500 tons of coal per day, had formerly been accustomed to send a large quantity of their coal by the defendants' line of railway, but in their own carriages from Treaman station to Cardiff. But a short time before the notice given by them to the defendant company, as hereinafter stated, the plaintiffs made arrangements with the Rhymney Railway Company, which had running powers over this part of the Great Western line, for the conveyance of their traffic by the Rhymney Company from Mountain Ash Junction to Cardiff. The Rhymney Company and the defendant company were competing companies, and, after making this arrangement, the plaintiffs had reason to complain of the delay of the defendants in forwarding their waggons from Mountain Ash. Under these circumstances, on the 6th of December, 1871, the secretary of the plaintiff company wrote to the secretary of the defendant company, informing him that the plaintiff company were desirous of working their own traffic, on the terms of the Railways Clauses Consolidation Act, 1845, from Abergwaur to Mountain Ash, and on the 12th of December a formal notice to the same effect was given by the plaintiff company to the defendant company. The notice stated that, pursuant to the provisions of the Railways Clauses Consolidation Act, 1845, and particularly of the 92nd section of that Act, the plaintiff company desired forthwith to use, with the engine and carriages therein after referred to, so much of the Aberdare Railway as extended from Abergwaur to Mountain Ash, for the purpose of working their coal and mineral traffic over the same, in accordance with the terms of the said Act, and of any special Act, and the byelaws and regulations affecting or controlling the same. The notice then went on to specify the name of the engine proposed to be used, and the place where the same might be inspected, and also the waggons of the plaintiffs proposed to be used, which were those then in use and

running over the Aberdare Railway. And the plaintiffs requested that the engine and carriages might be examined and certified, and arrangements made for the exercise of such user at as early a date as possible. The plaintiffs subsequently substituted certain engines belonging to the Rhymney Company, which had been already approved of by the defendant company for that mentioned in their first notice.

On the 3rd of January, 1872, the plaintiffs forwarded to the defendant company for approval, a list of the times at which they proposed running their trains over the Aberdare Railway, between the Mountain Ash Junction to their sidings at Aberaman and Abergwaur. From the time tables, it appeared that the plaintiffs proposed to run five trains daily each way, and that the run from Mountain Ash to Abergwaur and Aberaman would occupy nine minutes, and that in the other direction thirteen minutes for each train. No reply having been received to these notices, the plaintiffs, on the 23rd of January, 1872, gave a further notice to the defendant company that on the 1st of February, 1872, they would begin running trains, in accordance with their previous notices.

On the 31st of January the secretary of the defendant company wrote to the plaintiffs, stating that his company protested against the plaintiff's proposed arrangement, for giving (in effect) the Rhymney Company running powers over the defendant company's railway, to and from the plaintiffs' collieries; that no notice had been received by the defendant company pursuant to the 115th section of the Railways Clauses Consolidation Act, 1845, of the engines proposed to be used, and that the defendant company would not allow the trains to run, as proposed by the plaintiffs. Nevertheless, on the 1st of February the plaintiffs sent their colliery engineer with some of the Rhymney Company's men, to bring one of the Rhymney Company's engines with a train of empty waggons from the Mountain Ash station to the plaintiffs' sidings, but he found the defendant company's gates at Mountain Ash station, leading to the Aberdare Railway, locked, so as to pre-

vent his bringing the train on to that line. Thereupon, he applied to the traffic superintendent of the defendant company for leave to proceed, but the latter stated that the defendant company's men should not move the signals for the plaintiffs' trains, and declined to allow the train to proceed.

The plaintiffs then, on the 8th of February, 1872, filed their bill in this suit, praying for an injunction to restrain the defendants, their servants and agents, from "locking the said gates of their said railway, or permitting the same to be locked, and from keeping or permitting the same to be kept locked, and from making or permitting any other obstruction, or doing or permitting any other thing, so as to prevent or interfere with the said proposed use by the plaintiffs of the said railway." The plaintiffs moved for an injunction in the terms of this prayer before the late Vice-Chancellor Wickens, on the 7th of March, 1872, when the Vice-Chancellor, although he expressed it to be his strongest impression that the plaintiffs were only asserting a right which the legislature intended to give them, declined to make any order upon the motion, on the ground that he could not bind the defendant company to allow to the plaintiffs' workmen the control of their signals, still less could he hold the defendants bound to keep their own workmen to work these signals, and that, without the use of the signals, the plaintiffs could not practically avail themselves of the running powers which they claimed. The plaintiffs then amended their bill, by adding statements to the effect—that, "With regard to any signals put up by the defendants, the defendants' tolls included their remuneration for all charges for such signals, for the use of the points, and for signalmen and pointsmen, and all other expenses incidental to the ordinary working and use of their line by engines and carriages not belonging to the defendants. That the defendants were not entitled to have or use any signals or points in such a manner as to obstruct the use by the plaintiffs of the said railway, as proposed by them, and were bound to make and permit, as an incident to such user by the plaintiffs, a proper use of the defendants' signals and

points. That there was no practical difficulty arising from signals, points, or any other causes, in giving effect to the said right of user by the plaintiffs, as proposed by them; and, in fact, similar rights of user were daily exercised over various other railways in the kingdom."

The prayer of the bill was also amended, by insertion of the words italicised below, so as to pray for an injunction against the defendants from "permitting any other thing, or from omitting to work the signals and points, so as to prevent the proposed user by the plaintiffs of the said railway."

Hall, V.C., upon the hearing, on motion for a decree, although he considered that the plaintiffs had a statutory right to the user of the defendants' railway, dismissed their bill, upon the ground before taken by Wickens, V.C., viz., that the obligation, although statutory, could not be enforced against the defendant company, since it involved the use of the signals and points.

The plaintiffs appealed.

Mr. Green, Mr. A. G. Marten and Mr. G. P. Bidder (of the Common Law Bar), for the appellants.—The legislature, by the 92nd section of the Railways Clauses Act, 1845 (8 Vict. c. 20), intended to give to any one the right to use a railway, subject only to the regulations duly made by the railway company (1).

That this was the intention of the Act was clear from the 76th section, which empowered owners or occupiers of lands adjoining to the railway to make private branch railways communicating with the railway. This clause would be futile if the company could refuse to allow such owners to use the railway. There was, in fact, no obligation on a railway com-

(1) The 92nd section of the Railways Clauses Act provides that—"Upon payment of the tolls, from time to time demandable, all companies and persons shall be entitled to use the railway with engines and carriages properly constructed, as by this and the special Act directed, subject, nevertheless, to the provisions and restrictions of the said Act of the 6th year of Her present Majesty, intituled 'An Act for the better regulation of Railways, and for the Conveyance of Troops,' and to the regulations to be from time to time made by the company, by virtue of the powers in that behalf hereby and by the special Act conferred upon them."

pany to act as carriers at all—they might simply construct their line, and then give the public running powers over it. The 92nd section was, in fact, in operation all over the country, and there was no practical difficulty in carrying out its provisions. The public had as much right to use the line, subject to the provisions of the 92nd section, as the railway company had themselves.

[MELLISH, L.J.—There is nothing in the Act to shew that other parties than the company were intended to have the use of the company's servants for the purpose of working the signals and points.]

The following cases were cited—

Bell v. The Midland Railway Company, 3 De Gex & J. 673; s. c. 30 Law J. Rep. (N.S.) C.P. 273; s. c. 10 Com. B. Rep. N.S. 287;

Oxlade v. The North Eastern Railway Company, 1 Com. B. Rep. N.S. 454; s. c. 26 Law J. Rep. (N.S.) C.P. 129;

Greene v. The West Cheshire Railway Company, 41 Law J. Rep. (N.S.) Chanc. 17; s. c. Law Rep. 13 Eq. 44;

The Midland Railway Company v. The Ambergate Railway Company, 10 Hare, 359.

Sections 115 and 116 of the Railways Clauses Act. Section 2 of the Railway and Canal Traffic Act, 1854 (Stat. 17 & 18 Vict. c. 31), and the provisions of "The Regulation of Railways Act, 1873" (Stat. 36 & 37 Vict. c. 48), were also referred to.

Mr. Lindley and Mr. Cracknall, for the defendants, were heard upon the question of costs only.

JAMES, L.J.—I am of opinion that, in this case, the order of the Vice-Chancellor must be affirmed. True it is, that the plaintiffs have a right to use the railroad of the defendant company, but it would be impossible for them to exercise this right without a continuous user of the points and signals required for working the line. It is impossible to say that the railway company can be compelled to trust the points and signals to any other persons than their own servants. Nor can it be compelled to keep servants to work the points and signals for the use of

the plaintiffs. It is not the habit of the Court to compel a man to do a continuous act, requiring the continuous employment of servants. It will restrain a singer from acting in violation of a contract to sing only at a particular theatre by singing at any other theatre, but it cannot compel him to sing at the particular theatre, in performance of the contract. It can restrain an author from writing a book for any but particular publishers, but it cannot compel him to write for those publishers, and so on. My experience in these cases agrees with that of the Vice-Chancellor, that such an injunction as here prayed for could not be granted. It seems to me, however, that the plaintiffs have come here to enforce a right which the Railways Clauses Act intended to give them, and, although they have failed in their object, they have not failed on the merits, but because this Court is not able to compel the railway company to give effect to the rights. Their bill must be dismissed without costs.

MELLISH, L.J., concurred.

Solicitors—Messrs. Bircham & Co., for appellants; Messrs. Field, Roscoe & Co., agents for Mr. B. Matthews, Cardiff, for respondents.

LOARDS JUSTICES.
1874.
Nov. 22, 25.

{ In re THE COUNTY PALATINE
LOAN AND DISCOUNT COM-
PANY.
TEASDALE'S CASE.

Company—Surrender of Shares—Redistribution of Capital—Issue of New Shares with different Amount paid thereon—Alteration of Articles—Contributory.

A company not authorised by its original articles of association to accept surrenders of shares, by special resolutions altered their articles so as to authorise the cancellation of existing shares, and the issue of new shares in lieu thereof under an arrangement which varied the liability of the respective shareholders, diminishing the liability of some of them on their shares, and increasing that of others, but which in the ultimate result materially increased the amount of

capital raiseable on all the shares collectively:—Held, that the alteration was intra vires and effectual, and that a surrender of the old shares under the altered articles was valid.

This was an appeal from a decision of the Vice-Chancellor of the county palatine of Lancaster, ordering the name of Henry Teasdale to be taken off the list of contributors to the above named County Palatine Loan and Discount Company Limited.

The company in 1863 was incorporated as a limited company, and took over the assets and liabilities of a former company called the County Palatine Loan and Investment Company, Limited, which had been in existence for five or six years previously. 2,000 shares of 10*l.* each, which were existing in the former company at the time when the new company was formed, were taken over by the new company with the same amount credited thereon as they had been credited with in the former company. The shares thus taken over by the new company were 901 fully paid up 10*l.* shares (called the X shares), and 1,099 shares of 10*l.* upon which 1*l.* 10*s.* per share had then been paid (called the A shares). Shortly after the formation of the new company a call of 1*l.* per share was made on the A shares, making the amount paid thereon 2*l.* 10*s.* per share. In the month of February, 1865, the directors of the company recommended to the shareholders that all the X and A shares respectively should be cancelled, and that two shares of 10*l.* each, with 5*l.* per share paid thereon, should be given in lieu of each X share, and one share of 10*l.* with 5*l.* per share paid thereon, should be given in lieu of every two of the A shares. Accordingly an extraordinary general meeting of the shareholders of the company was held on the 28th of February, 1865, for the purpose of carrying out this recommendation. At such meeting the following resolutions were duly passed. First. That the present shares of the company on which the sum of 10*l.* each has been paid be cancelled, and that two shares of 10*l.* each, with 5*l.* per share paid thereon, shall be given in lieu of each

share on which the sum of 10*l.* has been paid. Second. That the present shares on which the sum of 2*l.* 10*s.* each has been called, shall be cancelled, and that one share of 10*l.* with 5*l.* paid thereon, shall be given in lieu of two of the before mentioned shares of 10*l.* on which 2*l.* 10*s.* per share has been called. Third. That 1,650 shares or the nearest number thereto that may be required to make the before mentioned shares into 4,000, be issued at a premium of not less than 1*l.* 10*s.* per share, to such persons as the directors think fit. These resolutions were duly confirmed at a subsequent extraordinary general meeting of the company held on the 14th of March, 1865, and the first and second of the said resolutions were duly registered with the registrar of joint stock companies.

In conformity with the said resolutions the holders of the said 901 fully paid up or X shares, gave up their scrip for such shares to the company, and the same were cancelled and retained by the company. In exchange for such shares 1,802 new shares (called the B shares), with 5*l.* per share paid up thereon, were issued and allotted to the holders of the 901 X shares. The holders of the 1,099 A shares also gave up their scrip for such shares to the company, and the same were cancelled and retained by the company, and in exchange for the same 549½ additional B shares, with 5*l.* per share paid thereon, were issued and allotted to the holders of the said 1,099 A shares.

The result of these dealings with the shares was as follows. Previously thereto the uncalled capital of the company was 7*l.* 10*s.* upon each of the 1,099 A shares, in all 8,242*l.* 10*s.* Subsequently thereto the uncalled capital of the company was 5*l.* per share, 9,010*l.* altogether on the 1,802 B shares, and 5*l.* per share, 2,747*l.* 10*s.* altogether, on the 549½ B shares, making the total uncalled capital on all the shares, 11,757*l.* 10*s.*

In pursuance of the third of the above resolutions 449½ shares (called C shares), were issued by the company at a premium of 1*l.* 10*s.*; upon these 5*l.* per share was paid up before October, 1872, when an additional sum of 1*l.* per share was called up upon all the shares.

At the date of the above mentioned resolutions Teasdale was the holder of 10 A shares on which 2*l.* 10*s.* per share was paid up. Pursuant to the resolutions, five B shares were allotted to him in lieu thereof. In August, 1865, he sold and transferred his said five B shares through the manager of the company to James Pickles, and thereupon he gave up to the manager his scrip for the 10 A shares held by him. The transfer carrying out the sale was duly made and registered. From that date he received no notice from the company. It appeared that the books of the company had been kept with great irregularity, and that Teasdale's name and the names of other shareholders who had surrendered their A shares, had not been removed from the register of shareholders in respect of those shares. But Pickles' name was on the registrar in respect of the five B shares allotted to Teasdale and transferred by him to Pickles, and Teasdale's name was not after the transfer ever included in the annual list of shareholders sent to the registrar of joint stock companies.

The company was ordered to be wound up in October, 1872, and the official liquidator settled upon the list of contributories all the persons who were holders of A shares which had been surrendered in pursuance of the resolutions. Accordingly he placed Teasdale's name upon the list in respect of 10 A shares. Teasdale moved to have his name removed from the list. The Vice-Chancellor granted his application, and the liquidator appealed from this decision.

Mr. Higgins and Mr. North, in support of the appeal.—The attempted alteration of the articles by the resolutions was invalid and *ultra vires*. The effect of the alterations was to prejudice the rights of creditors. This the shareholders could not do. They referred to and distinguished—

In re The Financial Corporation, Feiling's and Rimington's Case, 36 Law J. Rep. (N.S.) Chanc. 695; s. c. Law Rep. 2 Chanc. 714.

The transaction being originally invalid, could not be confirmed by lapse of time—

Addison's Case, 39 Law J. Rep. (N.S.)

Chanc. 558; s. c. Law Rep. 5 Chanc. 294.

Mr. H. M. Jackson and Mr. Robinson, for Teasdale.—A surrender of shares authorised by the articles was valid—

Snell's Case, Law Rep. 5 Chanc. 22;

Thomas' Case, 41 Law J. Rep. (N.S.) Chanc. 365; s. c. Law Rep. 13 Eq. 487;

Campbell's Case, 42 Law J. Rep. (N.S.) Chanc. 505; s. c. Law Rep. 15 Eq. 394; s. c. on app. *ante*, p. 1; s. c. Law Rep. 9 Chanc. 1.

The articles as altered by the special resolutions authorised the surrender and cancellation of the old shares. The creditors were not prejudiced, for the result of the whole transaction was to make a larger sum available as uncalled up capital.

Mr. North, in reply.—There was no proper consideration for the cancellation of the old shares. The appellant's contention that he was to be released because other persons had given a benefit to the company could not be sustained.

LORD JUSTICE JAMES.—The decision of the Vice-Chancellor must be affirmed. The liquidator seeks to put on the list of contributories a gentleman who many years ago was taken off the register by virtue of resolutions duly passed with the intention of altering the articles of association, and duly registered as required by law. As the articles stood after these alterations the directors had power to deal with two sets of shares in different ways. One set consisted of 10*l.* shares fully paid up, the other of shares on which 2*l.* 10*s.* only had been paid. The holders of the first set were minded to have half the number of shares, with 5*l.* paid up on each, the holders of the other set to have double the number of shares, with 5*l.* paid up on each. If these resolutions were passed honestly and *bona fide* and not with a view to enable the shareholders to escape from liability or any other improper or fraudulent view, there was nothing in them illegal or to prevent their being carried into effect. There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel certi-

ificates of shares. It is said that the second resolution diminishes the capital, and in some sense it does, but only in the sense in which capital is diminished when a company buys its own shares. The amount of capital raiseable on the two sets of shares taken together was materially increased by the arrangement, so that the creditors of the company appear to have been benefited by it. Under these circumstances, unless there has been some violation of law in what has been done, the transaction must stand. If a fair construction is given to the resolutions, not as intended to effect a compulsory conversion of the shares of all the shareholders, but as giving the directors power to convert the shares of those shareholders who wished it, the case comes within the principle of *Campbell's Case* (*ubi supra*). Teasdale accepted shares in exchange for his old shares according to the resolutions. He sold his new shares some years ago, and in my opinion he is free. The transaction was a *bona fide* one which must be supported.

LORD JUSTICE MELLISH.—I am of the same opinion. *Snell's Case* (*ubi supra*) and *Campbell's Case* (*ubi supra*), are direct authorities that a surrender of shares authorised by the articles is valid when made *bona fide* with a view to the benefit of the company. Then was a surrender authorised by the articles in this case? The articles originally contained no provision for a surrender of shares, and the question depends upon the effect of the resolutions. If the resolutions were to be construed literally as by their own force, without the consent of the shareholders, converting the old shares into the new shares, then I think they would be *ultra vires* and void. But if they be construed reasonably according to the principle applicable to all documents, "*Ut res magis valeat quam pereat*," they must I think be construed as only giving to the directors power to accept surrenders of old shares, and issue new shares in their stead. An article to that effect would have been valid. Teasdale acted on the resolutions and gave up the certificates of his old shares, had new shares allotted to him and transferred those new shares. I think that there-

upon he ceased to be a member of the company. It is said he was kept on the register of shareholders. The books of the company are in such confusion that it is difficult to say whether that is so or not. But if so, it was merely through a blunder. The company did not intend to hold him out as a member, and he never assented to being held out as such. He cannot be prejudiced by the careless way in which the register was kept.

Solicitors—Mr. Wynne, agent for Mr. A. S. Mather, of Liverpool, for Mr. Teasdale; Messrs. Sharpe, Parkers & Co., agents for Mr. J. H. E. Gill, Liverpool, for the liquidator.

HALL, V.C. } In re THE DROITWICH SALT
1874. } COMPANY (LIMITED).
June 5.

Companies Act, 1867, s. 25—Shares Issued without filing of Contract—Rectification of Register.

A new company was formed under the *Companies Acts, 1862 and 1867*, for purchasing the assets, and carrying on the business of an old one. The members of the two companies were the same persons. The transaction was to be effected, and the purchase money satisfied, by fully paid up shares. The shares were issued by the new to the old company; but no contract in writing was filed, as required by the *Companies Act, 1867, s. 25*. The question, therefore, was whether, under that section, the shares could be considered as fully paid up? A motion was made by the new company to rectify its register by striking out the names of all the allottees in order to file the contract, and then replace the names:—

Held, that the register might be rectified accordingly.

Motion.

This was a motion by the Droitwich Salt Company (Limited) (hereinafter called the new company), for an order that the register of shareholders might be rectified by striking out the names of all the

allottees of shares allotted in payment for the property, assets and goodwill of the Droitwich Patent Salt Company (Limited) (hereinafter called the old company), and that the directors of the new company might be at liberty when the contract for the sale of that property, assets and goodwill, had been duly registered, to allot to each of the allottees the same number of shares for which such allottee was now registered, or for such other order as might be proper. The facts of the case were these—A company called the Droitwich Patent Salt Company, was formed in 1826 with a capital of 125,000*l.* in 5,000 shares of 25*l.* each, the full amount of which was paid up. In 1863, that company had a nominal capital of 250,000*l.*, and a real one of 160,000*l.* In 1864, it was registered under the companies Act of 1862, as the Droitwich Patent Salt Company (Limited), with a nominal capital of 250,000*l.* in 10,000 shares of 25*l.* each, and all taken up. In 1866 the company purported by special resolutions passed at extraordinary meetings, to reduce its capital to 100,000*l.* in 10,000 fully paid up shares of 10*l.* each. In 1866 the capital was by a similar resolution increased to 125,000*l.* by the issue of 2,500 new shares of the nominal value of 10*l.* each. The registrar of joint-stock companies refused to register that increase, on the ground that the company's former reduction of its capital was illegal. In November, 1867, the Court of Exchequer in the case of *The Droitwich Patent Salt Company (Limited) v. Curzon*, 37 Law J. Rep. (N.S.) Exch. 2; s. c. Law Rep. 3 Exch. 35, decided, that the proviso at the end of the 196th section of the Companies Act, 1862, had not the effect of preserving to a company in existence at the date of the Act, and afterwards registered under it as a limited company, a power to reduce the amount of its capital originally fixed by its deed of settlement; but that after registration under the Act with limited liability, such power was gone. Under those circumstances the directors of the old company determined to get it wound up voluntarily, and to form the new one with a capital of 125,000*l.*, of which 10,000*l.* were to be in ordinary 10*l.* shares, and 25,000*l.* in preference shares

of the same amount. The object of the directors was to purchase the stock in trade and goodwill of the old company, and to carry on the business. The purchase money was to be the shares of the new company, which were to be allotted to the shareholders of the old one. Due notices of the intended arrangement and of proposed meetings to carry it out were sent to the shareholders in the old company, together with a form of assent for them to fill up. On the 29th of May, 1868, a resolution was passed at a general meeting of that company confirming the arrangement; and Mr. G. Woodyatt Hastings and Mr. Green were appointed the liquidators. On the 6th of July, 1868, the new company was registered under the Companies Acts of 1862 and 1867, with a capital of 125,000*l.* in 10,000 shares of 5*l.* each, and 2,500*l.* preference shares of 10*l.* each. On the 23rd of July, 1868, the liquidators of the old company offered to sell, and the directors of the new one to purchase, with an exchange of shares, the assets of the old company. The transaction was so far carried out that all the shares in the old company were exchanged by the members of it for shares in the new one; but no contract affecting the shares in the new one was registered as required by the 25th section of the Companies Act, 1867. The liquidators considered that notwithstanding the language of that section the issue of the shares was equivalent to the payment in cash; and that all the requirements of the Act had been observed. They therefore took no steps to register any contract. On the 17th of September, 1868, the usual resolution of the final winding up of the old company was duly filed. No member of the new company (with the exception of Mr. George Woodyatt Hastings and Mr. Clay, the secretary) knew that no contract had been registered when the shares were issued by it. In consequence of the doubts which existed as to the true construction of the 25th section of the Act of 1867, the new company on the 20th April, 1874, held a meeting at Wood's Hotel, in Furnival's Inn, and passed resolutions authorising their directors to apply to this Court at the expense of the

company for the purpose of removing any doubt as to the shares issued by the new company to the members of the old one, being fully paid up shares. The company was solvent. The present motion was therefore made for the above mentioned purpose.

Mr. Lindley and Mr. Fellows, for the company, referred to the Companies Act, 1867, s. 25, and

Re The Metropolitan Public Carriage and Depository Company (Limited), *Cleland's Case*, 41 Law J. Rep. (N.S.) Chanc. 652; s. c. Law Rep. 14 Eq. 387;

and

Re The New Zealand Kapanga Gold Mining Company (Limited), 42 Law J. Rep. (N.S.) Chanc. 781.

Mr. Graham Hastings was for shareholders who were respondents.

HALL, V.C., made an order that the register of shareholders should be rectified by striking out the names of the allottees of shares allotted in payment for the property assets and goodwill of the old company, except the names of Mr. George Woodyatt Hastings and Mr. Clay.

Solicitors—Messrs. Evans, Foster & Rutter, for all parties.

JESSEL, M.R. }
1874. }
May 26. }

TURNER v. BUCK.

Administration Suit—Trust for Sale of Real Estate—Legacy payable out of Proceeds—Interest when payable.

A testator by his will directed that certain pecuniary legacies thereby given should be paid out of the proceeds of sale of his real estate. The testator's estate became the subject of an administration suit, upon the further consideration of which the question arose from what time the interest on the said legacies was payable:—Held, that the interest ran from a year after the testator's death.

John Besemerer, late of Hove, near Brighton, deceased, by his will dated the 1st day of March, 1866, devised certain copyhold hereditaments to trustees upon trust for sale, and declared that they should stand possessed of the proceeds thereof, and of all moneys which should come to their hands in respect of his parcel of freehold land at Croydon, which at the date of the testator's will was under contract for sale; upon trust in the first place to pay the costs and expenses of and attending the carrying the said sale or sales into effect, and of making out and perfecting the title to the said hereditaments, and should stand possessed of the residue of the same moneys, upon trust thereout to pay to his daughter, Jane Besemerer, the sum of 1,000*l.* cash for her sole and separate use and benefit, and to his son, William Besemerer, 1,000*l.*, and 500*l.* to each of his two grandchildren therein mentioned, and the said testator then gave certain directions respecting the residue, under which his wife became the person materially interested.

The contract for sale of the land at Croydon mentioned in the said will was rescinded during the lifetime of the testator, and such land was subsequently sold in the suit hereinafter mentioned, and it was never disputed that the proceeds of that sale were subject to the trusts aforesaid.

On the 14th of May, 1867, the testator died and his will was duly proved, and a suit was instituted for administration of his estate, and a common decree was taken. Some time elapsed before the estate was realised, and the legacies therefore remained unpaid.

On further consideration the question was raised from what time and at what rate interest on the legacies should be computed.

Mr. Waller and Mr. Colt appeared for the plaintiff, the trustee of the will.

Mr. Southgate and Mr. Oust, for the widow.

Mr. Cozens-Hardy, for one of the legatees, contended that interest should run from the testator's death and that where, as in the case of these legacies, there was a trust for sale of lands in a will, with a direction that legacies were

to be paid out of the proceeds of that sale, and the proceeds were not required for the payment of the testator's debts, interest would run from the date of the death—

Pearson v. Pearson, 1 Sch. & Lef. 10;
Spurway v. Glynn, 9 Ves. jun. 488;
Shirt v. Westby, 16 Ves. jun. 393.

THE MASTER OF THE ROLLS.—Those are all cases where there was an immediate charge on lands, but here there is only a trust for sale. Interest is payable as a penalty for delay, but here there has been no delay.

The legatees can only claim interest from the period at which a sale might reasonably have been effected; a reasonable time must be allowed, and a year from the testator's death is such a reasonable time. You will therefore get interest at four per cent. from a year after the testator's death.

Solicitors—Mr. A. Turner, for plaintiff; Messrs. Flux & Leadbitter, for legatees; Messrs. Nicholl & Newman, for the widow.

LORDS JUSTICES. }
 1874. } OLLERENSHAW v. HARROP.
 April 23. }

Practice—Vacating Enrolment—Rehearing Petition.

Sharp practice is no ground for vacating the enrolment of an order.

A petition which has been dismissed upon the merits in the Court below will not be reheard in the Appeal Court when the order dismissing it has been enrolled.

This was a motion to vacate the enrolment of an order made in this suit, by Malins, V.C., on the 13th of February, 1874, refusing an application made by the plaintiff upon petition to add to the accounts directed by the decree in the suit.

On the 20th of February, 1874, the order was passed by the registrar, and on the same day it was left with the clerk

of entries of the master of reports and entries, in whose division the cause was, for the purpose of being entered; and in the interval between that day and the 27th of February, 1874, the entry of the order was completed, and so entered, was delivered by him to the defendant's solicitors, who delivered the docket of the enrolment of the order, to the clerk of records and writs, in whose division the cause was. It appears that such delivery is such an incipient enrolment of the order as to preclude any subsequent *caveat* being entered. [See *Daniel's Chanc. Pract.* (5th edit.) p. 885.]

The order and docket of enrolment were subsequently signed by the Lord Chancellor.

There was evidence that the plaintiff's solicitors had in conversation with the clerk to the defendant's solicitors, before the enrolment of the order, informed him that the plaintiff would appeal.

Mr. Glasse and *Mr. T. L. Bird*, in support of the motion, urged that too great speed had been used in getting the order enrolled, but even if the enrolment was correct their Lordships might allow the petition to be on their paper for rehearing.

The order was not made on the merits. They cited—

Richards v. Platel, 1 Cr. & Ph. 79;
s. c. 10 Law J. Rep. (N.S.) Chanc. 375;

The Attorney-General v. The Mayor, &c., of Wigan, 5 De Gex, M. & G. 52; s. c. Kay 268; s. c. 23 Law J. Rep. (N.S.) Chanc. 429;

Kemp v. Squire, 1 Ves. sen. 205;

Anon., 1 Ves. sen. 326;

Staunton v. Oldham, 2 Atk. 382;

Parker v. Downing, 1 Myl. & K. 634;
s. c. 4 Law J. Rep. (N.S.) Chanc. 198.

Mr. Pearson and *Mr. Hamilton Humphreys*, for the defendant, Samuel Harrop, were not called upon.

LORD JUSTICE JAMES.—It has been decided by a long string of cases that sharp practice, though I do not see that there really was anything of the kind here, is no ground for vacating an enrolment. This was an application by petition in the Court below to add considerably to the

accounts, that is, to widen the area of the litigation, and I think that the defendant's solicitors were quite right to close the door as soon as possible. Then as to rehearing notwithstanding the enrolment. There are cases, no doubt, where an order may be refused one day for want of evidence, and granted the next on better evidence, as in the case of injunctions or applications for time to answer, but in this case all the grounds of the application were set out in the petition, all the evidence was read, and the Vice-Chancellor, in my opinion, upon the whole merits, dismissed the petition, with costs; the petition was in fact the same thing as a supplemental bill. The motion must be refused with costs.

LORD JUSTICE MELLISH concurred.

Solicitors—Messrs. Clark, Woodcock & Rylands, agents for Darnton & Bottomley, Ashton-under-Lyne, for plaintiff; Messrs. Johnson & Weatherall, agents for Lycott & Co., Manchester, for defendant.

[IN THE FULL COURT OF APPEAL.]

CAIRNS, L.C.	} MILES v. HARRISON.
JAMES, L.J.	
MELLISH, L.J.	
1874.	
March 2.	

Charitable Legacy—Marshalling Assets.

A testator directed his personal estate, including leaseholds to be converted into money, and the residue of the proceeds, after payment of his funeral and testamentary expenses, debts and legacies, to be invested, and, subject to a life interest therein given to his wife, and to certain annuities and legacies including a charitable legacy of 100l., bequeathed all the residue of his personal estate in equal thirds to three charitable institutions, and directed that the three last-mentioned legacies should be paid out of such part of his personal estate as could lawfully be applied to the payment thereof, and which should be reserved by his trustees for that purpose:—Held, reversing the decision of one of the Vice-Chancellors, that the assets must be marshalled in favour of the three charities

so as to throw the debts, funeral and testamentary expenses, including costs of administration, suit and legacies, except the 100l. charitable legacy, upon the impure personality, but that there could be no marshalling as against the 100l. charitable legacy which must be paid in the proportion which the pure personality bore to the impure, and fail as to the residue.

The Rev. John Miles, of Trinity Parsonage, Paddington, by his will, dated in July, 1855, directed his trustees and executors to sell, call in and convert into money his leasehold messuage in the Abbey Road, St. John's Wood, and all his personal estate of which he should die possessed, and after payment of his funeral and testamentary expenses and debts and the legacies thereinbefore given, to invest the residue of the proceeds of the sale and conversion, and to pay the income of such investments to his wife so long as she should continue his widow, and after the death or future marriage of his wife he directed certain annuities to be purchased out of the proceeds of the converted personal estate, and gave various legacies, including 100l. to the Westmoreland Society Schools, and bequeathed the residue as follows—

“As to all the residue and remainder of my personal estate and effects whatsoever and wheresoever which I may be possessed of or entitled to at the time of my decease, I give and bequeath the same as follows—namely, one equal third part or share thereof to St. Mary's Hospital, Paddington, one other equal third part or share thereof to the Society for the Propagation of the Gospel in Foreign Parts, and the remaining one equal third part or share thereof to the Society for Promoting Christian Knowledge. And my will is and I expressly direct that the three last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees or trustee for the time being for that purpose, and that such legacies and shares of residue shall respectively be applied to the purposes of the said hospital and societies respectively, and

the receipts of the respective treasurers of the said hospital and societies respectively shall be sufficient discharges for the same respectively."

The testator died in March, 1866. At his death his personal estate consisted of about 14,000*l.* pure personalty, and 46,000*l.* impure personalty. The suit was instituted for the administration of the testator's estate, and the question which now arose was whether the annuities and pecuniary legacies were to be provided for rateably out of the pure and impure personalty, or whether the assets were to be marshalled so as to leave the whole of the pure personalty available for distribution among the three charities. Wickens, V.C., held that the annuities and pecuniary legacies were to be provided for and satisfied rateably out of the pure and impure personalty, and the charitable societies appealed from the decision.

Mr. Lindley and Mr. Graham Hastings, for the appellants, contended that no other meaning could be attached to the words of the will directing that such part of the personal estate as could lawfully be applied to the payment of the charitable legacies should be reserved for that purpose, than that the assets should be marshalled in favour of those legacies—

Wigg v. Nicholl, Law Rep. 14 Eq. 92;

Wills v. Bourne, ante, 89; s. c. Law Rep. 16 Eq. 487;

Nickisson v. Cockill, 3 De Gex, J. & S. 622; s. c. 32 Law J. Rep. (N.S.) Chanc. 753;

Gaskin v. Rogers, Law Rep. 2 Eq. 284;

Robinson v. Geldart, 3 Mac. & G. 735; reversing s. c. 3 De Gex & S. 499; s. c. 18 Law J. Rep. (N.S.) Chanc. 454.

Mr. Hardy and Mr. Crossley, Mr. Green and Mr. W. W. Cooper, Mr. Dickinson and Mr. Whateley, for the various respondents interested, in supporting the Vice-Chancellor's decision, contended that the direction to pay the funeral and testamentary expenses, debts and legacies out of the common fund to be produced by the sale and conversion of the leaseholds and personalty was inconsistent with any

intention that the assets should be marshalled—

Beaumont v. Oliveira, 38 Law J. Rep. (N.S.) Chanc. 62 (L.J.J.); *ibid.* 239; s. c. Law Rep. 4 Chanc. 309.

They also referred to

The Attorney-General v. The Earl of Winchelsea, 3 Bro. C.C. 373;

Tempest v. Tempest, 7 De Gex, M. & G. 470; s. c. 2 Kay & J. 635; s. c. 26 Law J. Rep. (N.S.) Chanc. 501;

The Philanthropic Society v. Kemp, 4 Beav. 581; s. c. 11 Law J. Rep. (N.S.) Chanc. 360.

Mr. Osborne Morgan and Mr. J. T. Anderson appeared for the executors.

THE LORD CHANCELLOR.—I have naturally great hesitation in arriving at a conclusion in this case which will differ from the opinion entertained by the late Vice-Chancellor Wickens, for whose opinion upon all points, but more particularly upon a point of this kind, I should have the greatest possible respect. At the same time the question turns upon the construction of a very few words in a will which may always give rise to a difference of judicial opinion. Now if I take the gift of the residue and the words accompanying that gift in this case by themselves, I own I should have very little doubt as to their meaning. The testator says, "as to all the residue and remainder of my personal estate and effects, whatsoever and wheresoever, which I may be possessed of or entitled to at the time of my decease I give and bequeath the same as follows, namely, one equal third part or share thereof to St. Mary's Hospital, Paddington, one other equal third part or share thereof to the Society for the Propagation of the Gospel in Foreign Parts, and the remaining one equal third part or share thereof to the Society for Promoting Christian Knowledge." Stopping there I entirely accede to the observations made by Mr. Dickinson, Mr. Green and Mr. Hardy that we have here that which is merely a gift of residue as such. The words which I have read do not go beyond the gift of the residue, and if they stood alone the natural inference would be that that residue was to be ascertained in the

ordinary way. But the gift is accompanied by explanatory and directory words which appear to me not to apply to a residue already ascertained, but to apply to the whole of the personal estate of the testator, and in fact to direct the mode and to order the manner and form in which the residue is to be ascertained, for the testator continues, "And my will is and I expressly direct that the three last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees or trustee for the time being for that purpose."

Now I take the word "which" occurring in the last clause to relate to and to stand for the words "the part of my personal estate which can lawfully be applied to the payment of charitable bequests," and the clause to amount to this—"I direct that the part of my personal estate which can lawfully be applied to the payment of charitable bequests shall be reserved by my trustees or trustee for the time being for the purpose of paying and satisfying the three legacies or bequests in question." I repeat that if I were to look at that alone I should not hesitate to say that that was a plain and sufficiently intelligible direction to the trustees that they were to keep in hand, or at all events by accounting to arrive at the same result as if they had kept in hand what is termed the pure personalty of the testator, to bring that pure personalty to bear as far as it could properly be done upon the payment, and in order to effect the payment which is directed to be made in the gift of the residue. In other words it would be equivalent, to use technical terms, to a direction that the personal estate should, as the Court of Chancery calls it, be marshalled so as to give to the charitable legatees under the residue, the fullest benefit that could be given to them with reference to the pure personal estate.

Well, now, is there anything in any other part of the will which is antagonistic to this, and which will be set aside and violently overridden by this construction? In my opinion there is

nothing which is at all inconsistent with this construction in the other parts of the will. The only part referred to, at least the main part referred to, was the introductory clause by which the testator, after giving his leaseholds and ready money, and other personalty, directs that the trustees shall, "out of the moneys to arise from the sale of the said leasehold estate, hereinbefore bequeathed in trust for sale, and from the calling in, sale and conversion into money of such parts of the said personal estate hereinbefore bequeathed as shall not consist of money, and by and out of the ready money, of which I shall be possessed at my death, pay my funeral and testamentary expenses and debts, and the legacies hereinbefore bequeathed by this my will, or any codicil hereto, and shall invest the residue." That appears to me to be a charging of the whole aggregate fund in the hands of the trustees with all his debts and legacies and administrative expenses. That is quite consistent with an intention on the part of the testator, on the one hand to secure to those entitled to those payments the benefit of the whole of his personal estate, and on the other hand to say that for the purpose of working out his charitable intention to his charitable legatees the result, as a matter of money, should be dealt with as if those who had the two securities for their payment took their payment out of the fund which could not be reached by the charitable legatees, having the residue. But it appears to me that there is no inconsistency in the case. It might be tested in this way: The testator, who said, "I give to my trustees all my leaseholds and mortgages and ready money to pay my debts and funeral expenses and legacies," and then gave pecuniary legacies, and then said as to his residue expressly, "I give my residue to three charities, but I direct that my assets shall be marshalled so as to throw them as far as possible on the pure personalty," the testator, I say, who used those words, would have said nothing whatever inconsistent; the whole would have been harmonious, and the Court would know how to work out the provisions of the will.

Then it is said that if that construction

is put upon the gift of the residue it will be inconsistent with the gift by the testator of the 100*l.* pecuniary legacy to a charity, namely the Westmoreland Society Schools in the county of Surrey. I think that that argument has been sufficiently answered by what has passed. If, as I assume, the gift of the residue amounts to a direction that the personal estate shall be marshalled, a direction of that kind cannot operate to defeat *in toto* the pecuniary legacy to the charity of 100*l.* That legacy will stand upon the footing upon which it would have stood if nothing had been said as to the residue at all, and so far as this pecuniary legacy would fall on the pure personalty it must be paid; and inasmuch as the essence of marshalling is that it puts those only to marshal who have got two funds, this charitable legatee having only one fund, will not be driven to marshal, and the direction to marshal will not be operative as against that legacy; it will be paid out of the pure personalty according to the proportion which the pure personalty bears to the impure. It appears to me therefore that the decree of the Vice-Chancellor in this respect must be altered, and that a direction must be inserted, the frame of which will require some care, that the personal estate of the testator is to be marshalled in the usual way, so that as far as can be done the three charities taking the residue are to be paid. Of course there is an intestacy as to anything beyond that.

LORD JUSTICE JAMES.—I am entirely of the same opinion for the same reasons; and I so entirely agree with the construction the Lord Chancellor has put on the will that I do not think it necessary to add anything.

LORD JUSTICE MELLISH.—I am also entirely of the same opinion. I think the case is really governed in a great measure by the judgment of Lord Selborne, in the case of *Wills v. Bourne* (*ubi supra*), because the will in that case was substantially the same as this will would have been if the direction to reserve had not been there, and if the direction to the trustees had stopped here; "and my will is and I expressly direct that the last-mentioned legacies and bequests shall respectively be paid and satisfied out of

such part of my personal estate as can be lawfully applied to the payment thereof." Then the words which follow seem to me only to make the matter still stronger and clearer than it otherwise would have been.

Mr. Lindley asked that the costs of the suit including the costs of the appeal might be paid out of the impure personalty as being testamentary expenses—

Morrell v. Fisher, 4 De Gex & S. 422.

THEIR LORDSHIPS directed that the costs of the suit in the Court below and the executors' costs of the appeal should be paid out of the impure personalty. The other parties would pay their own costs of the appeal.

Solicitors—Messrs. Batty & Whitehouse, for plaintiffs; Mr. T. Johnston, agent for Messrs. Harrison & Son, Kendal, Messrs. W. Tatham & Son, Messrs. Scott & Son and Messrs. Nicholl & Newman, for the various defendants.

LORDS JUSTICES.

1874.

June 2.

{ *In re* THE COUNTY PALATINE
LOAN AND DISCOUNT COM-
PANY (LIMITED).
CARTMELL'S CASE.

Company—Winding up—Contributory—Purchase of Shares by Company—Powers of Directors—Delegation—Implied Authority of Manager or Agent.

The articles of association of a loan and discount company gave the directors power to purchase, with the company's moneys, the shares of any shareholder, and also gave them power to appoint a general manager to perform such duties as they might determine:—Held, that the power to purchase shares, which was expressly given to the directors themselves, could not be delegated by them to the manager.

Held also, that the manager could not, by implication, bind the company by a contract to purchase shares, such an act not being within the ordinary scope of the authority of the manager of such a company.

In 1871 the manager told one of the shareholders that the company would purchase his shares. The shareholder thereupon

executed a transfer to two trustees for the company. They, however, knew nothing of the transfer, and had not authorised the making of it. It was registered in the books of the company, and thenceforth the transferor was not treated as a shareholder, but received interest on the purchase money, which he left on deposit with the company. In 1873 the company was ordered to be wound up:—Held, that the transferor had not ceased to be a shareholder, and that he was liable as a contributory.

This was an appeal from a decision of Mr. Little, the Vice-Chancellor of the Lancaster Chancery Court.

The company was incorporated by registration under the Companies Act, 1862, on the 1st of June, 1863. The memorandum of association stated that the objects for which the company was established were, *inter alia*, the carrying on the business usually transacted by loan and discount companies, with power to purchase the business or co-operation of any other loan or discount company. The capital of the company was 100,000*l.*, divided into 10,000 shares of 10*l.* each.

The articles of association contained the following clauses—

“18. No share shall be transferred, except in accordance with the regulations herein contained.

“19. Any holder of a share who proposes to transfer the same, shall serve notice of such proposal on the company. The notice shall be in writing, under the hand of the proposer. It shall specify the share or shares to be transferred, and the name or names of the proposed transferee or transferees, and shall be left or sent by post to the registered office of the company.

“20. The directors shall, within seven days from the service of the notice, declare their assent to, or dissent from, the proposed transfer in writing, addressed to the proposer, and sent by post, or left at his registered place of abode. If they do not declare their dissent within such period of seven days, they shall be deemed to have assented to the transfer, and shall cause the same to be registered accordingly. If the directors dissent from the proposed transfer, they shall purchase the

share at the market price, and shall pay the purchase money for the same out of the assets of the company.”

There was no provision as to the form in which a transfer must be made.

The articles contained also the following clauses—

“95. The directors shall cause minutes to be made, in books provided for the purpose—

“Of all appointments of officers made by the directors.

“Of all orders made by the directors and committees of directors.

“Of all resolutions and proceedings of meetings of the company, and of the directors and committees of directors.

“97. The directors may invest any stock or shares which, by the regulations of the Bank of England, or of any other bank or company, are not permitted to be registered in the name of the company, in the names of any members of their body, not being less than three, as trustees for the company, and shall, from time to time, fill up any vacancies occasioned in such trustees.

“98. The trustees may be registered as the holders of such of the shares purchased, subscribed or forfeited, for the benefit of the company, as the directors think fit.

“99. No vote shall be given by any trustee in respect of any shares held by him in that character, except in accordance with the previous direction of a general meeting.

“100. The trustees shall, from time to time, execute such declarations of trust (if any) of the moneys, stocks, funds and shares held by them, as the directors may require.

“104. The directors may purchase any share from any shareholder, on behalf of the company, out of its funds, or may release any shareholder from his shares, on such terms as the directors think fit.

“109. The directors may appoint a general manager, at such salary and with an obligation to perform such duties as they may determine.”

On the 19th of June, 1863, the directors passed a resolution, appointing Mr. Oswald Hopwood the general manager of the company, but the resolution did not

define, in any way, the duties which he was to discharge. He, in fact, assumed the general superintendence of the company's business. At a meeting of the directors, held on the 26th of July, 1866, it was resolved that Messrs. William Davis and John Ellis be appointed trustees for the purchase and sale of shares in the company, on the company's account, and that the premium paid on any share should not be more than 30s. Davis and Ellis were directors of the company from 1864 till October, 1872, and they were both present at the meeting of the 26th of July, 1866.

Mr. William Cartmell was the holder of seventy-seven shares in the company. In June, 1871, he sold twenty of them to a Mr. Chaplin, at the price of 6*l.* 10*s.* per share. Immediately after this he went to the company's office, and saw Mr. Hopwood, and told him that he wished to sell the remainder of his shares. Hopwood said that the company would buy them. On the 30th of June Cartmell called again at the company's office, and Hopwood then told him that the company had agreed to purchase the fifty-seven shares, at the rate of 6*l.* 10*s.* per share, and requested him to execute a form of transfer, which he tendered to him. Cartmell accordingly executed it. The transfer was in the ordinary form of a deed, by which Cartmell assigned the shares to Davis and Ellis, and Davis and Ellis agreed to accept the shares, upon the terms and conditions on which Cartmell held them. The transfer was never executed by either Davis or Ellis. After Cartmell had executed it he handed it back to Hopwood, with the certificates of the shares. The certificates were endorsed with notice of the transfer, and they, as well as the transfer, remained in the company's possession until the commencement of the winding up, and the dividends which accrued upon the shares after the transfer were carried to the company's credit. The purchase money was not actually paid to Mr. Cartmell, but the amount of it was placed to the credit of a deposit account which he had previously opened with the company, and interest upon the amount was regularly paid to him by the company.

By the evidence it appeared, that during the period of the existence of the company 189 shares were purchased from shareholders, and paid for out of the funds of the company. Four purchases of this kind took place in 1866, and three in 1867, the last being in September, 1867. The only other purchase was that from Mr. Cartmell in 1871. On each of these occasions a transfer was executed, similar to that which was executed in Mr. Cartmell's case, but none of the transfers were executed by either Davis or Ellis. The necessary alterations were in each case made in the company's register. During the same period 104 of the shares thus purchased by the company were sold to six different purchasers. On each occasion the purchaser executed a transfer, by which Davis and Ellis purported to transfer to him the shares which he had agreed to buy, but neither Davis nor Ellis executed any of these transfers. The alterations were in each case made in the company's register on the assumption that the transfer was complete. Mr. Hopwood made an affidavit, in which he deposed that he was the manager of the company, from its registration until the latter end of 1872, and he said—"During the time I acted as manager the whole affairs of the company, except the granting of loans, were left entirely with me, including the transfer of all shares by any shareholder to the company, and no shares were transferred without my instructions. At the meeting of the 26th of July, 1866, I was generally authorised to purchase shares offered for sale by any shareholder, notwithstanding such shares were to be purchased in the names of William Davis and John Ellis, as trustees, as I thought fit, provided I did not exceed the premium mentioned in the said resolution." In a joint affidavit made by Davis and Ellis, they said—"Since the commencement of the winding up we have discovered that certain shares in the company were, at various times, transferred into the joint names of us, and that these transfers, and also certain instruments purporting to be transfers of certain of the said shares from us to other persons, have been entered in some of the books of the company; but we say that all these transfers were

made without our knowledge or consent, and without the knowledge or consent of the directors of the company, and were always carefully concealed by Hopwood from us and the other directors of the company, both at the time such transfers were made and afterwards. . . It is altogether untrue that, as stated by Hopwood in his affidavit, he was either at the meeting of the 26th of July, 1866, or at any other time, in any way authorised or empowered, either by us, or by either of us, or by the directors of the company, to purchase any shares offered for sale by any shareholder, either in the names of us as trustees, or otherwise." Both Davis and Ellis also positively denied that they ever agreed to purchase any shares of Cartmell, or that, to their knowledge, any of the directors agreed to do so. Each of them said that he was not aware of the transfer by Cartmell till the commencement of the winding up, which was in 1873. The Vice-Chancellor held that Mr. Cartmell must be placed on the list of contributories for the fifty-seven shares. Cartmell appealed.

Mr. H. M. Jackson and Mr. O. L. Clare, for the appellant.—A written transfer not being required by the articles of association, a mere verbal agreement would be enough—the Companies Act, 1862, sec. 22. There is sufficient in what took place to shew the assent of Davis and Ellis to accept any transfer of shares purchased by the company. At any rate, there was a valid purchase of the shares by the company, under article 104. By article 109 the directors could empower the manager to perform such duties as they might determine; and the resolution of July, 1866, was a sufficient authority to him to purchase the company's shares. This particular purchase was carried out according to the practice of the company, and the directors must have known of it from the books of the company, and must be taken to have ratified it. Mr. Cartmell did all that he could, and it was impossible that he could know whether the manager was duly authorised or not to make the purchase. The manager must be taken to have had an implied authority to bind the company, and his representations were sufficient to bind them—

In re The Land Credit Company of Ireland; Ex parte Overend, Gurney & Co., 39 Law J. Rep. (N.S.) Chanc. 27; s. c. Law Rep. 4 Chanc. 460; *The Royal British Bank v. Turquand*, 6 E. & B. 327; s. c. 25 Law J. Rep. (N.S.) Q.B. 317, affirming the judgment below; 5 E. & B. 248; s. c. 24 Law J. Rep. (N.S.) Q.B. 327.

Mr. North, for the liquidator.—There was no resolution passed by the directors authorising the manager to purchase shares, and this power was one that they could not delegate to the manager—

Howard's case, 36 Law J. Rep. (N.S.) Chanc. 42; s. c. Law Rep. 1 Chanc. 561.

It is clear that the directors themselves did nothing to approve this purchase; the company are therefore not bound by it. Cartmell could not get off the register unless some one else was put on in his place. The document which he executed was not meant to be a surrender, but a transfer, and that required the assent of the transferees to make it complete—

Addison's case, 39 Law J. Rep. (N.S.) Chanc. 558; s. c. Law Rep. 5 Chanc. 294;

Symon's case, 39 Law J. Rep. (N.S.) Chanc. 461; s. c. Law Rep. 5 Chanc. 298;

Heritage's case, 39 Law J. Rep. (N.S.) Chanc. 238; s. c. Law Rep. 9 Eq. 5.

That partners are not necessarily bound by the contents of their own books is shewn by

Stewart's case, 35 Law J. Rep. (N.S.) Chanc. 738; s. c. Law Rep. 1 Chanc. 574.

Mr. H. M. Jackson, in reply.—The liability of directors for what is done by the board when they are present is shewn by

The Joint Stock Discount Company v. Brown, Law Rep. 3 Eq. 139; s. c. *ibid.* 8 Eq. 381;

The Land Credit Company of Ireland v. Lord Fermoy, Law Rep. 8 Eq. 7; s. c. *ibid.* 5 Chanc. 763.

A shareholder may be removed from the list of contributories without the substitution of some one else—

Fyfe's Case, 38 Law J. Rep. (N.S.) Chanc. 725; Law Rep. 4 Chanc. 768.

Where there is a contract for value, the Court, even in the case of powers, does not regard a mere defect of form. Here there was a clear power to relieve a shareholder from his liability for value, and in substance this transaction was carried out—

Campbell's Case, 42 Law J. Rep. (N.S.) Chanc. 505; s. c. Law Rep. 15 Eq. 394; s. c. *ante*, 1; s. c. Law Rep. 9 Chanc. 1.

If Cartmell had been a mere stranger, could it be doubted that the representations of the manager would have bound the company? Otherwise business transactions could not be carried on. Cartmell for this purpose had no better means of information than a stranger would have had, and the manager was acting within the scope of a possible authority from the company.

LORD JUSTICE MELLISH was of opinion that the order of the Vice-Chancellor must be affirmed, though he agreed with his Honour that it was a hard case on Mr. Cartmell. The question was, whether Mr. Cartmell, who was the registered holder of fifty-seven shares in the company, had transferred them, or had in any other way got rid of them, so as to have ceased to be a shareholder in the company. There were three ways in which he might have parted with his shares. He might have transferred them under the provisions of the 18th and following clauses of the articles of association; or he might have sold the shares to the company under the provisions of clause 104; or he might have got rid of his liability on the shares by being released from it under the other power conferred by the same clause. His Lordship thought it quite clear that Mr. Cartmell could not successfully allege that he had transferred his shares in accordance with the provisions of the 18th and following clauses. For although, by the regulations of this company, a transfer of shares need not have been made by deed, nor need it even have been made in writing, still it was of the essence of a transfer that there should be an acceptance of it by the transferee, Davis. And Ellis had positively sworn that they never gave any

authority to have this transfer to them made, and it was therefore impossible that Mr. Cartmell could rely upon the transfer. The real question was, whether there had been any valid purchase of the shares by the directors under the provisions of the 104th clause of the articles, for that was what the transaction purported to be. [His Lordship then stated the facts, and asked whether what took place amounted to a binding transaction.] That depended upon whether what the manager did was within the scope of his authority. In his Lordship's opinion the power given by the 109th clause of the articles to the directors to appoint a general manager would not authorise them, even if they had attempted to do so, to delegate to Mr. Hopwood the power to purchase the shares of the company, because, by clause 104, that power was expressly given to the directors themselves. They could only delegate that which would fall within the scope of the ordinary duties of the manager of a loan and discount company. A company of that kind must necessarily act through a manager. But the directors could not delegate to the manager powers which they themselves would not have had unless they had been expressly conferred on them by the articles. Such an extraordinary power as this could not be delegated, but must be exercised by the directors themselves. Even, therefore, if the directors had attempted to delegate this power, his Lordship did not think they could have done so. But he did not think that the resolution of the 26th July, 1866, was intended to give authority to Mr. Hopwood to purchase the company's shares. The result was, that the contract made by Mr. Hopwood to purchase Mr. Cartmell's shares did not bind the company. The next question was, whether the directors had ratified it. If they had been informed of it after it was made and had not repudiated it, that might possibly have amounted to a ratification. But in his Lordship's opinion it was impossible to rely upon Hopwood's evidence that anything of this kind took place, for both Davis and Ellis swore positively that no notice of the transaction was ever given to the board, and

the minutes of the board contained no entry relating to it. Nor did his Lordship think that the directors must be taken to have had notice of the purchase by reason of the entries made in the company's books, for the books were kept in such a way that what had taken place could not be discovered without much difficulty. There was no reason, therefore, to doubt what Davis and Ellis had said. The remaining question was, whether the company was bound by a sort of estoppel by reason of Hopwood having told Cartmell the company would purchase his shares. Were the company stopped from saying that they had given Hopwood authority to do this? In his Lordship's opinion this case was not governed by the principle of the decisions in *The Royal British Bank v. Turquand* (*ubi supra*), and *In re The Land Credit Company of Ireland* (*ubi supra*). In the latter case the principle was thus stated by Lord Justice Selwyn: "If when an act within the scope of the powers of the board of directors is done by them, or (which is the same thing) is ratified and adopted by them, a person contracting with the directors is not bound to see that certain preliminaries which ought to have been gone through on the part of the company have been gone through, still less, in my judgment, are innocent holders of a negotiable security bound to enquire whether those preliminaries have been observed."

The present case was not one in which the directors had done an act within the scope of their authority, but had omitted some preliminary required by the regulations of the company. It was a case in which an agent had done an act not within the scope of the authority given to him by the directors, and not within the scope of the authority which was held out as belonging to him by virtue of his office. To purchase the shares of the company was not an act within the ordinary scope of the authority of the manager of a commercial company. In this respect there was no difference between the agent of a company and the agent of anyone else. In his Lordship's opinion the company was not bound by this purchase of shares, which was altogether beyond the

NEW SERIES, 43.—CHANC.

scope of Mr. Hopwood's authority as manager.

LORD JUSTICE JAMES said that, hard as the case was on Mr. Cartmell, he was unable to come to any other conclusion than that at which the Vice-Chancellor and the Lord Justice had arrived. He would only add that it was not immaterial to observe that the last purchase of shares purporting to have been made by the company was in 1867, nearly four years before the purchase from Cartmell. No practice could therefore have grown up in relation to the purchase of shares. With regard to the law, his Lordship referred to *Smith v. The Hull Glass Company* (1), where Mr. Justice Maule said, "This is the simple case of an individual, or a body corporate, carrying on business in the ordinary way, by the agency of persons apparently authorised by him or them, and acting with his or their knowledge. The case differs in no respect from the ordinary one of dealings at a shop or counting-house; the customer is not called upon to prove the character or the authority of the shopman or clerk with whom he deals; if he is acting without or contrary to the authority conferred upon him by his employers, it is their own fault. The plaintiffs could only know that the directors had power to appoint persons to perform the duties they appeared to be doing, and they had a right to assume that they were duly and properly appointed."

Those words were very similar to the words used by the Lord Justice in the present case, and they appeared to embody the real principle applicable to cases of this kind, viz., that where the dealing was in the ordinary course of business, it would be implied that an agent had authority to bind his principal. But that was not the nature of the dealing in the present case.

Solicitors—Messrs. Clarkson, Sons & Greenwell, agents for Mr. Ponton, Liverpool, for the appellant; Messrs. Sharpe, Parkers & Co., agents for Messrs. Harvey & Alsop, Liverpool, for the liquidator.

(1) 11 Com. B. Rep. 897; s. c. 21 Law J. Rep. (N.S.) C.P. 106.

HALL, V.C. }

1874. }

May 5, 6. }

LEIGHTON v. LEIGHTON.

Double Portions—Legacy—Satisfaction—Ademption.

Where a father after giving by his will a portion to a child advances to such child a portion without any deed or instrument such provision in the absence of circumstances negating the presumption, was held an ademption pro tanto.

The occasion of a subsequent advancement satisfying or ademing a previous one need not be the marriage of the child or any other occasion calling specially for the advancement of the child.

The question in this suit was whether certain sums transferred by the late Sir Baldwin Leighton to two of his daughters after the date of his will were to be taken as being in satisfaction, so far as they would extend, of two legacies of 4,000*l.* and 6,000*l.* given by his will.

The facts were as follows—By the marriage settlement of the testator, Sir Baldwin Leighton, dated the 8th of February, 1882, an estate called the Loton Park estate, was vested in trustees for a term of 1,000 years, upon trust to raise for younger children in the ordinary way portions of 12,000*l.* as the testator should appoint. There were six children of the marriage, including the eldest son being the present baronet, two unmarried daughters who were the plaintiffs, and three other children. On the occasion of the marriages of two daughters who married, portions of the 12,000*l.* were appropriated to them by means of a power of appointment. The estate was freed from those sums by paying off one of the portions in cash. And in the case of the other, the testator instead of paying cash transferred a larger sum, namely 4,000*l.* of Turkish Stock, in satisfaction of the portion. After this transaction 7,200*l.* was left as a charge on the estate for the three younger children, either in shares to be appointed by the testator, or which in default of appointment would belong to them exclusively; the portions appointed to the two daughters who married, having been accompanied by releases so

as to exclude them from taking any farther share. The testator antecedently to the date of his will made transfers of property to his younger children and certain provisions for them, but his Honour held this could not be brought into consideration for the purposes of determining the question at issue in the suit.

The testator made his will dated July, 1866, by which he provided for his younger children as follows—First, he settled the Loton estate and created a term of 800 years on that estate.

This term was created expressly subject to the term of 1,000 years created by the marriage settlement for the purpose of raising the 7,200*l.* which was mentioned as the sum remaining to be raised.

The trusts of the term thus created by the will were to raise the sums of 4,000*l.* and 6,000*l.*, and to pay the sum of 4,000*l.* to his daughter Charlotte, and the sum of 6,000*l.* to his daughter Margaret, such sums to be accepted by them in full satisfaction and discharge of their shares of the aforesaid sum of 7,200*l.*, raisable under the trusts of the term of 1,000 years, limited by the marriage settlement to which he referred. He then directed that out of the rents and profits of this property Charlotte Leighton and Margaret Leighton should in addition each receive 460*l.* a year as an annuity provided for them until such time as they should respectively marry.

He then settled another estate called the Sweeney estate, and that he settled upon Stanley, his second son (one of the children who remained entitled to a portion), subject to the payment of 100*l.* a year, payable to each of the unmarried daughters also. So that the plaintiffs, the unmarried daughters, taking the two annuity provisions together, would have 560*l.* a piece, as an annuity during such time as they should remain unmarried. Having made that provision by settling the Sweeney Hall estate upon the second son charged with 100*l.* a year, he gave to this second son also a variety of gifts including Railway Stock and other descriptions of property which were specified, and in particular the scrip and stocks which should be in a certain box marked "Sweeney," in his possession.

Then he directed that the gifts which he had made in favour of this son, should be in full satisfaction and discharge of his share of the aforesaid sum of 7,200*l.* raiseable under the trusts of the said term of 1,000 years limited by the aforesaid indenture of the 8th day of February, 1832.

In the year 1869, the testator transferred 2,000*l.* North Western Railway Preference Stock to his daughter Charlotte, and in 1870, he transferred 1,000*l.* North Western Railway Preference Stock to his daughter Margaret; and having been taken ill towards the end of February, wrote on the 24th of February to the London and County Bank, who held certain deposit notes for him amounting to 1,800*l.*, and desired to have the deposit notes. He sent them a cheque upon another London banker with whom he had an account for 200*l.*, and desired them to substitute for the two deposit notes and the 200*l.* cash, which they would get from the cheque, a deposit note for 2,000*l.*, and to forward that so that he could hold it as a provision for his daughter Charlotte. On the next day the 25th of February, 1871, he transferred several sums of stock of about the value of 3,100*l.* in different railways to his daughter Margaret.

The defendant, the present baronet, contended that the sums thus given to the plaintiffs ought to be taken as satisfying in part the sums bequeathed by the will, but the plaintiffs contended that in order to raise a case of satisfaction, the occasion on which the second advance was made must be marriage or some such special occasion, and they relied upon the following cases and authorities which are commented upon in his Honour's judgment—

Ex parte Pye, 18 Ves. 140;
Trimmer v. Bayne, 7 Ves. 508;
Robinson v. Whitley, 9 Ves. 577;
Farnham v. Phillips, 2 Atk. 215;
Baugh v. Read, 1 Ves. 257; s. c. 3 Bro. C.C. 192;

Roper on Legacies, Vol. 1, 376.

Mr. Dickinson and Mr. Cust, for the plaintiffs.

Mr. Fry, Mr. Marten and Mr. Davey, for the defendant Sir Baldwin Leighton.

Mr. Lindley and Mr. Phear, for the defendant, Stanley Leighton, were not called on.

HALL, V.C., without calling on the defendants, said—I mean to decide this case without regard to the special circumstances depending upon the evidence of the parties who have given evidence one way or the other, as to the intention of the testator. I mean to do so because I consider that the evidence which has been given as bearing upon the question, is evidence which cannot be relied upon for varying what I conceive would be the legal presumption, and the law to be applied to the case independently of that evidence.

The question I consider is a question of law to be determined upon the acts of the testator himself in reference to the execution of his will, having regard to the existence of the settlement at the time, and the acts which he did between the date of his will and his death. Those facts and the state of things with regard to them really lie in a very narrow compass.

[His Honour then stated the facts as stated above as to the providing of the deposit note of 2,000*l.* for his daughter Charlotte, and the 3,100*l.* Railway Stock for his daughter Margaret, and continued.]

The argument which has been addressed to me with reference to that is in substance, that these sums so transferred by the testator to the names of his daughters, are not sums which were transferred either upon their marriage or upon any other occasion calling for an advance by the testator, and therefore that the law will not hold the sums in question to have been transferred by the testator, meaning that they should be taken in reduction, as far as the amounts extended, of the gifts given by his will. Now that is the first question which has to be considered, and it is a very simple question. I have had cited before me a great number of authorities for the purpose of establishing that it will not do merely to shew that the transfer has taken place or the payment has been made, but that you must shew something beyond that,

something in the circumstances under which it was so transferred to raise a presumption which it is alleged would not otherwise exist, in favour of the satisfaction of the one gift by the other. I am bound to say, in my opinion that is not a very correct statement of the law. I do not think that for the purpose of raising the presumption it is incumbent upon the person who alleges a satisfaction, to shew anything more than that the testator having given a legacy of a certain amount, he has afterwards in his life time given that legatee a sum of money, the nature of the two gifts not being different so as to rebut the presumption which would exist. I do not think it is necessary for the party alleging satisfaction to shew that. No doubt in many of the cases there is this expression. In *Trimmer v. Bayne* (*ubi supra*), it is said—"The rule is settled that where a parent or a person *in loco parentis* gives a legacy as a portion, and afterwards upon marriage or any other occasion calling for it makes advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will." Now the difficulty that I feel is, how we are to interpret and how we are to explain what is meant by the words "or upon any other occasion calling for it." Who is to be the judge to determine what is the occasion that calls for an advance? Surely ordinarily it must be the testator himself. The testator has given a certain sum of money as bounty by the legacy, and he then says afterwards, at his own time and according to his own view of things, this is an occasion "on which I consider this child of mine ought to be advanced," and he transfers a sum of money or stock into his name. That is ordinarily as simple and as clear and as unquestionable an advance as anything could possibly be. It is an advance of the child. It may be upon marriage, it may be under any other circumstances. Are you to try the circumstances in each particular case whether the child wanted an advance? The baronet says—"I think proper to give a sum of money to the child at this particular time." With regard to the law and the expression of "any other occasion calling for it," I do not find

that expression to run through a number of cases in which this matter has been considered. The rule is stated much more broadly and more generally in many of the authorities, and I may here observe that with reference to this rule, in the case of *Pym v. Lockyer* (1), Lord Cottenham refers to it and says—"The statute of distributions, the customs of London and York, and the whole doctrine of hotch-pot, proceed upon the principle that advancement by a parent does not operate as substitution for but part satisfaction of, what the child would otherwise be entitled to; the object being to produce equality and not according to the rule contended for, inequality, between the children. It appears to me, therefore, that all analogy and all reasoning are against the supposed rule." He thought it proper to apply in that particular case the analogy to be derived from the statute of distributions, and the customs of London and York, as if that was probably some foundation for the reception of that rule into the English law. But in referring to that he says—You would not enquire, for the purpose of applying the statute of distributions, under what circumstances it was advanced unless you could shew it was advanced under such circumstances as might possibly negative the application of the statutory law; if you were not to establish some such special case as that, the mere fact of the child having had the advance would be the ground for applying the rule without more, without saying whether it was upon marriage or any other given circumstances. The child had had so much money and therefore should account for that in distribution. The rule is stated in other cases and it does not say a word about its being on marriage or upon any other occasion calling for advance.

In the case of *Farnham v. Phillips* (*ubi supra*), Lord Hardwicke states the rule—"Where a father after making his will advances his child with a portion, as great or greater than the legacy given by the will, such provision has always been held

(1) 5 Myl. & Cr. 48; s. c. 10 Law J. Rep. (N.S.) Chanc. 153.

an ademption." And the rule is stated in much the same way in other authorities. Then it is true in *Robinson v. Whitley* (*ubi supra*), the Master of the Rolls states this—"I should have doubted whether the rule is, that it is necessary to shew that what was paid was paid as a portion; or that it is necessary anything should appear, except the payment, under circumstances from which it may be inferred that it was paid as a portion." The words "under circumstances from which it may be inferred that it was paid as a portion," no doubt let in the consideration in every case of any circumstances which there may exist which would negative the application of the rule, but to say that you must affirmatively shew circumstances for the purpose of applying the rule, seems to me to be in no case laid down. Many other authorities have been referred to. No doubt many of them are cases of provision by way of settlement, but as I have said it does not follow that other cases which are not provisions made by settlement on marriage, are not within the reason and principle of the rule.

I do not think it necessary to go through all the different cases which Mr. Cnst mentioned. Many of them have peculiar features in them which seem to me to render them inapplicable to the present case. I may mention, however, that with reference to the occasion there is another difficulty. Does it mean an occasion which the father may choose to avail himself of as a desirable opportunity, or is it an occasion with reference to the person who is provided for by the will? In reference to that I may mention the case of *Hartopp v. Hartopp* (2). Now that case was this—The testator made his will, and he made a provision for a younger child. He afterwards made a settlement in which his eldest son joined, for the estate was a settled estate and the testator was tenant for life, his son being the tenant in tail. He joined with his son in resettling the estate, his consent being necessary for the purpose of suffering the recovery, and he seems to have stipulated with the son that the son

should give him, the testator, the father, the advantage of making a charge upon this settled estate; and therefore there was a trust in this re-settlement for raising a sum of 2,100*l.* for the younger son of the father who was the legatee in the will. There was no occasion therefore in reference to the son which called for any settlement at all upon him; the father thought proper to say—"I will stipulate with my elder son to give me a charge in favour of my younger son on the estate." The question was whether that was not an ademption of what was given to the younger son by the will, and it was held that as the father gave by this transaction the 2,100*l.*, though the younger son was no party to the transaction and had nothing to do with it, that amounted to the same thing substantially as the father subsequently to the will giving the sum of 2,100*l.* out of his own pocket to the younger son, and that was held to be a clear ademption of the gift to the younger son. There was a grave discussion as to the admissibility of some evidence there. In the judgment the Master of the Rolls says this—"It is settled that in the case of double provisions by a father for a child, slight circumstances of difference are not to be regarded; at least where the question is, not whether a bounty is meant to satisfy a debt, but whether one bounty is to be substituted in the place of another. That the second provision is in this case a bounty as much as the first cannot be denied, the plaintiff not having given any consideration for the charge in his favour. But it was not by the act of the father alone, but by the concurrent act of him and the eldest son, that the provision was made. It was therefore contended for the plaintiff who claimed both, that as it did not appear that the father was the author of both, or that both were to be borne by his estate, it was not a case in which the presumption against double portions could have any application. On the other side evidence was offered to shew that the intention of all parties was to substitute the charge in the room of the legacy, and that the father bargained for such a substitution, as the condition on which he agreed to concur in the settlement. The

admissibility of such evidence was objected to by the plaintiff, and notwithstanding the cases that were cited I doubt very much whether strictly it be competent in the first instance to give evidence of declarations of an intention to substitute one provision for the other, but it may be shown by extrinsic evidence who is the author of a gift. Where that does not appear on the face of the transaction, whatever is wanting to shew the consideration and from whom it moves, may be supplied by evidence *dehors* the deed, where such evidence does not contradict the deed. In the present case the probability, independently of any extrinsic evidence, is that it was the father who bargained for this charge in favour of his younger son. The evidence clearly shews that to have been the case, and proves that he made it a condition of his concurring in the settlement. The father is thus in effect the sole author of both provisions. By concurring in the settlement, which he was not bound to do, and giving up his life-interest in a part of the estate, he became a purchaser of the second provision, which makes the case the same as if it came directly out of his own estate. Then excluding all declarations of actual intention the presumptive intention is a substitution of the 3,500*l.* thus provided by the father's means for the younger son in the room of the very same sum given by the will." That seems to me to be an example which warrants the view that the mere fact whether the advance is by payment or by settlement by the father upon the son made by deed could not make any difference.

But it is said the occasion must be marriage. Now in *Hartopp v. Hartopp* (2) the occasion was nothing at all except that the father was stipulating for this sum. The occasion was the making the new settlement between the father and the son, and that called for the act being done, and it was held in substance a provision made by the father for the younger son, and the rule against double portions under such circumstances prevented the son taking the two; therefore upon the general question, I express my opinion that it is not necessarily incum-

bent, in order to raise the presumption, to shew even more than the mere fact of the transfer or the payments. If that was so, that presumption being raised as I consider it is, both as to those which were transferred in 1869 and 1870 to the two daughters and as to those sums which were transferred on the occasion of the testator's last illness, the question that then arises is this, whether from the peculiar nature of the provision which had been made by the settlement for these three legatees, that is a circumstance in itself which negatives the presumption. Now as to that I have been referred to a case of *Baugh v. Read* (*ubi supra*). That is referred to in *Roper on Legacies* (*ubi supra*). It does not appear to me that that case rightly is an authority in favour of the plaintiffs in this case. It was cited from Mr. Roper's work as a work that ought to be considered as of some authority, but if that be so, Mr. Roper's authority is certainly not in favour of the plaintiffs in this case, because after stating the case, he says—"It is observable that in the last case the advancement by B. upon the marriage of his daughter A. having been made not merely as a portion, but with a view to the surrender by A. and her husband of her interest under her grandfather's will, excluded the presumption that her father B. intended also that it should go in satisfaction of the legacy he had given her by his will, which construction was strengthened if not wholly confirmed, by the consideration that the legacy could not be considered as a pure bounty or portion, since it was given as the purchase of A.'s interest under B.'s marriage settlement. Such appear to have been the grounds of the determination." The grounds of the determination therefore were, that when the second provision was made, it was expressly said, stipulated and bargained that it should be in satisfaction of one thing. The argument was that it should go in satisfaction of two things. They said, "No, that is not so, you bargained that it should be in satisfaction of one, and therefore we cannot apply it to the other." As regards that case, it is a special one, and Lord Rosslyn seems rather to have considered, as I understand the judgment,

that but for the special circumstances his conclusion would have been the other way, and if so, except for the special circumstances, it is an authority against the plaintiffs rather than for them. That case has been commented upon and explained, and referred to the considerations which I have mentioned in the case of *The Earl of Durham v. Wharton* (3). Lord Lyndhurst there comments upon it, and states those to be the grounds which I have endeavoured to explain. Therefore there seems to me to be nothing special in this case arising out of that circumstance.

[The Vice-Chancellor then referred to the evidence of the plaintiffs in favour of this claim and in opposition to the doctrine of satisfaction, and said that he could not hold it sufficient to rebut the presumption.]

It appears to me, therefore, that the true conclusion is that these sums which have been so transferred, must be taken to have been so transferred in satisfaction, or part satisfaction, of the benefits given under the will. I prefer to decide the case upon the grounds upon which I have decided it, but I cannot help thinking that when you find a testator, immediately before his death, upon the occasion when he knows he is about to die, hastily making these sort of transfers to some of his children, it is not improbable that some such idea as that of saving duty was in his mind. But independently of that, he is doing that which he knows is a thing which is about to be called into immediate action and operation by the fact of his death, the very time which fits in with the time when the persons would take the benefit under the will. That being so, it does, I think, look very like a person doing an act of the kind suggested; it looks like anticipating, in a sense giving them now, that which they would in the course of a few days get under his will by reason of his death. It seems that a person under such circumstances might not improbably be looking to and having regard in such an act as that, to what the parties would take under his disposition, viewing what was done on the

occasion of his last illness, both with reference to the daughters and the son, and treating it all, as I think it is reasonable to be treated, as one series of transactions to be viewed in the same way, it is manifest that he was giving to the second son the very thing which he was to take under his will, and which he would have got under his will. And as to those it was certainly discharging or satisfying the bounty and benefit which was conferred on the son by the will, and it is not unreasonable to suppose that this being so, he was doing the same thing with reference to the daughters. The whole thing is a transaction of the same character and with the same motive, object and purpose in the testator's mind. That, I think, comes in aid of the conclusion to which I have come quite independently of it.

The Vice-Chancellor therefore decided that one legacy was satisfied in full and the other in part, and that the costs must be dealt with as if the suit had been one by the trustees raising this question in the ordinary way.

Solicitors — Messrs. Pownall, Cross & Knott, agents for Mr. R. Marston, Ludlow; Messrs. Sharpe & Ullithorne, agents for Mr. R. D. Newill, Wellington.

LORDS JUSTICES. } *In re THE WHEAL VYTYN*
 1874. } MINING COMPANY.
 June 4. }

Winding-up—Appeal—Costs of Liquidator on Appeal.

When a liquidator is brought before the Court of Appeal as a neutral party, his costs should as a rule be allowed out of the estate, but the Court of Appeal will make no order on the subject, but will leave the matter to the discretion of the Court below.

This was an appeal from an order of the Vice-Warden of the Stannaries made on the application of an intervening com-

(3) 3 Cl. & F. 146; s. c. 10 Bli. N.S. 526; s. c. 6 Law J. Rep. (n.s.) Chanc. 15.

tributory, surcharging Anna Westcomb, as the executrix of the late pursuer of the Wheal Vyryan Mining Company (which was in liquidation) with a sum of money alleged to have been received by him.

Mr. W. Pearson and *Mr. W. W. Karslake*, for the appellants.

Mr. Graham Hastings (with *Mr. Dickinson*), for the intervening contributory. — Their Lordships allowed the appeal, but according to the usual practice without costs.

Mr. Kekewich appeared for the liquidator, but took no part in the argument. He asked for his costs out of the estate, citing, as an instance of the practice—

Bush's Case, 40 Law J. Rep. (N.S.)
Chanc. 205; s. c. Law Rep. 6
Chanc. 246.

THEIR LORDSHIPS thought it was better to leave the matter open for the discretion of the Judge of the Court below. It would be understood that if the liquidator was brought here his costs ought as a rule to be allowed, unless there was some reason to the contrary.

Solicitors—*Mr. Wm. Moon*, agent for Messrs. Force & Battishill, Exeter, for appellant; Messrs. Church, Sons & Clark, agents for Messrs. Francis & Baker, Newton Abbott, for principal respondent; Messrs. Gregory, Rowcliffe & Co., agents for *Mr. R. N. Paul*, Truro, for the liquidator.

JESSEL, M.R. }
1874. } CHAPMAN v. CHAPMAN.
Feb. 16. }

Practice—Chancery Fund Rules, 1872, rule 22.

A., entitled for life to the dividends of a fund in Court, charged them by way of mortgage with the payment of an annuity to B. during the life of A. In 1827 an order was made for payment to B.

during the life of A. of a sufficient part of the dividends to answer the annuity. The annuitant died in 1873, in the lifetime of the grantor:—Held, that the case was within Rule 22 of the Chancery Funds Rules of 1872, and that the executor of the annuitant was entitled to have the payment continued to him without any fresh order.

Ann Rideout charged by way of mortgage her life interest in a fund in Court with the payment of an annuity payable to William Martin, and his executors.

On the 23rd of March, 1857, an order in the suit was made that out of the dividends of the fund an annuity should be paid to William Martin during the life of Ann Rideout.

William Martin having died, Ann Rideout being still living, the executors of William Martin produced the probate of his will to the Paymaster General, and asked for payment of the annuity to them without any fresh order, under rule 22 of the Chancery Funds Rules, 1872.

The Paymaster General doubted whether the case came within the rule on three grounds, viz., First, The order was made before the rule. Second, The payment was a recurring payment. Third, The payment was to be made to William Martin, as mortgagee, and not in his own right.

Mr. C. Browne now mentioned the matter to the Court.

THE MASTER OF THE ROLLS said that he had had occasion to consider the point, and thought that the case fell within the rule.

Solicitor—*Mr. G. E. Thomas*, for applicant.



JESSEL, M.R. }
 1874. }
 Feb. 19, 26. } COMMERCIAL UNION INSUR-
 JAMES, L.J. } ANCE COMPANY AND OTHERS
 1874. } v. LISTER.
 March 18. }

*Insurance—Subrogation—Indemnity—
 Third Party liable—Right of Insuree to
 compromise—Injunction.*

The defendant owned a warehouse at H., which he had insured for about a third of its value in the plaintiffs' offices, and which was burnt down by the negligence of the servants of the corporation of H. On a motion in a suit instituted by the insurance companies to restrain the defendant from suing the corporation for less than the whole loss, and from compromising the action to the prejudice of the plaintiffs, and from refusing to allow the plaintiffs to sue the corporation in his name, he undertook to sue the corporation for the whole loss, and not to compromise the action otherwise than bona fide:—Held, that this undertaking gave the plaintiffs all the relief to which they were entitled before the hearing.

The plaintiffs in this suit were eleven insurance offices, and the defendant, who was a ratepayer of Halifax, was the owner of two silk spinning mills at Halifax, called respectively the Wade Mill and the Wellington Mill. These mills were separately insured against fire with the several plaintiff offices for sums amounting in the whole to 56,250*l.*, the insurances on the Wellington Mill being 36,950*l.* On the 4th of December, 1873, an explosion of gas occurred in the Wellington Mill, and the mill was thereby set on fire and destroyed. The Wade Mill escaped with but little injury. It was considered both by the plaintiffs and the defendant that the mayor and corporation of Halifax, by whom gas was supplied to the mills, were responsible for the explosion, and that in fact it was occasioned by the negligence of the servants of the corporation. The plaintiffs admitted their liability to the defendant on their policies, and the amount of their liability was in course of arrangement, but they claimed to be entitled to recover from the corporation through the medium of the defendant the

amount payable by them, whatever it might be. The defendant, however, who estimated that he had sustained consequential damage through the loss of profits, &c., to the amount of about 6,000*l.*, in the course of correspondence with the plaintiffs' solicitors, claimed to be entitled to throw the amount of his loss covered by his insurances on the plaintiffs, and to sue the corporation for the balance of the damages uncovered by the insurance.

The plaintiffs filed their bill in consequence of the claims set up by the defendant in the correspondence, and at once moved to restrain the defendant from suing the corporation for less than the whole amount of the loss, and from compromising the action to the prejudice of the plaintiffs, and from refusing to allow the plaintiffs to use his name for the purpose of suing the corporation and for a receiver of the moneys payable by the corporation.

*Mr. Southgate, Mr. Cohen and Mr. Kekewich appeared for the plaintiffs.—*They contended that when an insuree had a remedy against any other person for his loss he became a trustee of that right of action for the insurer for the proportion paid by the insurer, on what was called the doctrine of subrogation. They cited—

The Quebec Fire Company v. St. Louis,
 7 Moo. P.C. 286;

Dickenson v. Jardine, 37 Law J. Rep.
 (N.S.) C.P. 321; s. c. Law Rep. 3
 C.P. 639;

*Stringer v. The English and Scottish
 Marine Insurance Company*, 10 B. &
 S. 770; s. c. 38 Law J. Rep. (N.S.)
 Q.B. 321; s. c. 39 *ibid.* 214; s. c.
 Law Rep. 4 Q.B. 676; s. c. Law
 Rep. 5 Q.B. 599;

Randal v. Cockran, 1 Ves. sen. 98;
Rankin v. Potter, 37 Law J. Rep.
 (N.S.) C.P. 257; s. c. Law Rep. 3
 C.P. 562; s. c. in Exch. 39 Law J.
 Rep. (N.S.) C.P. 147; s. c. Law
 Rep. 5 C.P. 341; s. c. H.L. 42 Law
 J. Rep. (N.S.) C.P. 169; s. c. Law
 Rep. 6 E. & I. App. 83;

Yates v. Whyte, 4 Bing. N.C. 272;
 s. c. 7 Law J. Rep. (N.S.) C.P. 116.

Mr. Fry, Mr. Graham Hastings and Mr.

4 H

Tapping (of the Common Law Bar), appeared for the defendant.

[In the course of the argument several observations were made to the effect that the rights of the parties to the money to be recovered from the corporation could not be decided till the hearing, and the motion in the Court below stood over for a week to enable the parties to consider a proposed arrangement. When it came on again it appeared that the defendant was willing to undertake to sue the corporation for the whole loss, and not to compromise the action otherwise than *bona fide*; and in the event of his compromising the action, to charge himself as against the plaintiffs with the amount of rates which would have fallen upon him if he had recovered the total amount from the corporation.]

THE MASTER OF THE ROLLS.—The facts in this case are very clear. A gentleman effected a number of insurances on his warehouses for certain amounts, and a fire occurred which caused him greater loss than the sum of all the insurances. The fire, however, it is alleged, was not caused by the acts of himself or his servants, but by the negligence of the servants of the corporation of the town, so that the corporation are liable for the whole loss. The plaintiffs say that the result will be that the defendant will be a trustee for them of the excess recovered from the corporation beyond the amount of his uninsured loss. That proposition I take to be indisputable. But the plaintiffs want to go further and say that the assured, who is entitled to bring the action against the corporation, is not entitled to be master of that action, and that though acting *bona fide* he is not entitled to compromise it or take any other step without their assent. I can find no ground whatever for that contention. He is entitled to bring an action to recover the whole loss to himself, including that against which he is indemnified. He is not entitled to compromise that action otherwise than *bona fide*.

Other objections are taken on the point that he is a ratepayer, and that he would be liable in that character to contribute a portion of the amount recovered in the

action, and he might have regard to that circumstance in settling it. He is willing, however, to undertake not to take that circumstance into account, and so disposes of that objection. Following, then, the rule laid down by Vice-Chancellor Kindersley as to interlocutory applications which ought not to be made, that undertaking being given, I make no further order beyond it. The order will be: "The defendant undertaking to sue the corporation for the whole amount of loss, and not to take into consideration in any compromise his liability as a ratepayer, let the costs be costs in the cause."

The plaintiffs (on March 18) appealed from this order, and the appeal now came on to be heard before Lord Justice James. It appeared that the total loss incurred by the defendant upon the buildings was between 57,000*l.* and 58,000*l.*, the amount of his claim against the plaintiff companies was 44,000*l.*, and the amount payable by them had been adjusted at about 30,000*l.* The defendant also claimed from the corporation the sum of 6,000*l.* as damages for loss of profits whilst the mill was untenanted, and he had, in accordance with his undertaking, commenced an action against the corporation for the full amount of his claim, nearly 64,000*l.* in all.

Mr. Cotton, Mr. Cohen and Mr. Kekewich appeared for the plaintiffs in support of the appeal.—The defendant had been put by the Master of the Rolls under an undertaking to sue the corporation for the full amount, but he had been left at liberty to compromise for a smaller amount. If he recovered the full amount from the corporation the plaintiff companies would be entitled to be repaid out of it the sums they had paid to the defendant on his insurances. But the defendant claimed to be entitled to disregard the plaintiffs' rights and to compromise his action for any sum he pleased, and if the amount recovered should be less than the amount of loss uncovered by his insurances, he claimed to pocket the whole of the money so recovered.

If an insured had been paid the amount of his loss by the insurers and afterwards

recovered damages from a third party, he was a trustee of the amount so recovered for the insurers. In this case the defendant might be advised that his right of action against the corporation was doubtful on the ground that it was difficult to prove the alleged negligence on their part or on any other ground, and then he might compromise for a sum which would not recoup the insurers. The plaintiffs contended that the insured was a trustee for the insurers of the amount recovered, whether that amount be the whole or only part of the amount of loss, and that a compromise of the action by the defendant without regard to the plaintiffs' rights would be a breach of trust. This Court could not ascertain how far he would be liable for such a breach without trying the action to ascertain what he would have recovered from the corporation. This was an analogous case to one of principal and surety. A surety who had paid the whole amount due from him would be entitled to prevent the debtor from destroying the securities.

Mr. Fry and Mr. Tapping, for *Mr. Lister*, the respondent.—It was most important to *Mr. Lister* that his right to compromise the action should not be interfered with so long as he exercised it *bona fide*, i.e. not for the purpose of defeating the rights of the plaintiffs. He would only be a trustee of such moneys as he recovered in excess of the amount of his loss. He was first entitled to be indemnified from every source up to the full amount of his loss. If *Mr. Lister* should be advised that it would be for his interest to take 20,000*l.* from the corporation in discharge of his claim he should be at liberty to accept it.

There could be no subrogation unless in a case where the whole debt was paid—

Pothier (Evans' Translation), vol. 1, p. 160.

A surety who paid the whole of the debt was unquestionably entitled to subrogate, but not one who paid only part of the debt. They referred to

The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. s. 5.

Mr. Cohen replied.

All the cases cited in the Court below were referred to on the appeal.

LORD JUSTICE JAMES.—In this case the Master of the Rolls has put the defendant under an undertaking to sue for the whole amount, and does not put him upon any other undertaking except as to the words I shall afterwards mention about not compromising with reference to his position as a ratepayer; the Master of the Rolls, as I understand it, has pronounced no decision and expressed no opinion as to what the undertaking would bind the defendant to do. The defendant has undertaken to sue for the whole amount. Well, that means he must sue for the whole amount, whatever that amount be. If I were to put him under any restriction about compromising or anything of that kind, it would be determining the whole case that he is a trustee for the insurance companies. Then that is a matter hardly to be determined on this interlocutory application—to say that he is a trustee in such a way that he is to be deprived of his own free action with respect to a matter in which he is very largely and personally interested. Then the Master of the Rolls has thrown out in the course of his judgment an observation that if he compromises he must compromise *bona fide*. What that is, the Master of the Rolls does not determine, and I do not determine it. The defendant, *Mr. Lister*, is left by this order free to go on with this action; he is left free to conduct it as he pleases. If he does in the conduct of the action anything inconsistent with his duty, whatever that duty may be (which will have to be determined at the hearing of the cause), he will have to make good the loss resulting therefrom. If he has done nothing else than that which he is clearly entitled to do, having regard to the position he is in and the position the other parties are in, then he will be liable to nothing. At present he is himself *dominus litis*, subject to a liability to answer in this Court for anything which upon the hearing of the cause shall be shewn to be a breach of some equitable obligation or a violation of some equitable duty which has been cast upon him by reason of the circumstances of the case, that being a thing which I do not intend to express any opinion upon at present. I shall leave it exactly where the Master of the

Rolls has left it, as a matter to be determined at the hearing of the cause, if the thing should ever arise. But I agree that the words in the undertaking as to his position as a ratepayer ought not to be inserted, as the appellants do not wish the words to remain there—I mean the undertaking about compromising as a ratepayer. That seems to me to be something almost idle to talk about and ought not to be introduced, but as nobody objected to it below, it was introduced. I suppose it was thought it would do neither harm nor good, and therefore it was inserted; but if the plaintiffs who have got the undertaking do not wish those words to be contained, at their request I shall strike them out; but, of course, that will not affect the question of costs, because I simply do that at their request, they having got the undertaking below. I shall, therefore, make the order which the Master of the Rolls did below, and with that exception I shall make no order upon the motion, except that the appellant pay the costs of this appeal.

Solicitors—Messrs. Dawes & Sons, for plaintiffs;
Messrs. Speechly & Chamberlain, agents for Mr.
G. E. Mumford, Bradford, for defendant.

JESSEL, M.R. }
1874. } WARNE v. ROUTLEDGE.
June 11, 12. }

Copyright—Publisher—License—Agreement at Will—Unsold Copies—Married Woman.

A married woman agreed with some publishers that they should publish a book she had written at their own expense, and sell it at a shilling a copy, paying her a royalty of a penny for every copy sold, reckoning thirteen copies as twelve. She afterwards gave notice to terminate this agreement and made a fresh arrangement with other publishers for the bringing out of a revised edition. The first publishers sought to restrain the further publication of the book until the copies printed by them under their agreement with the authoress

were sold:—Held, that they were not entitled to any such relief, as they were endeavouring to import into the contract a term which it did not contain.

Semble, if the married woman had expressly entered into a contract restricting her right to publish the book, such contract might have been enforced by injunction against her, or any person claiming under her with notice.

This was a bill filed by Messrs. Warne & Co., publishers, against Messrs. Routledge, publishers, and a Mr. Harry Whiteside Cook and his wife Milicent Whiteside Cook.

Mrs. Cook wrote a book called, "How to dress on 15l. a year," and entered into a verbal agreement with the plaintiffs that they should publish the book anonymously, bearing all expenses directly or indirectly connected therewith, and that each copy should be published at one shilling, and that the plaintiffs should pay her a royalty of one penny for each copy sold, reckoning thirteen copies as twelve. Mr. Cook afterwards joined in receipts for money paid under this agreement. The plaintiffs published the book as one of a series called, "Warne's Useful Books," and they expended upwards of 150l. in advertising it, and more than 40,000 copies of it were sold. Mrs. Cook, however, became offended because the plaintiffs, on publishing a book on "Beauty" as another of their series, described it as a companion volume to "How to dress on 15l. a year," and she thereupon gave notice to terminate her agreement with them, and made an agreement for the issue of a revised edition of her book with Messrs. Routledge. The plaintiffs at first contended that their agreement with Mrs. Cook amounted to a sale of the copyright, but at the hearing they only asked for an injunction to restrain the further publication of the book so long as any copies printed by them before the notice was given remained unsold.

Mr. Edward Beaumont (Mr. Fry with him), for the plaintiffs.—The agreement gave us at least a right to print any number of copies within reasonable limits, so long as it was undetermined. Then Mrs. Cook cannot derogate from her own grant

by spoiling the sale of the copies we have printed under the agreement. Even if an agreement is terminable at will, a tenant at will has a right to emblements; and we ask for a right of that nature here.

In

Sweet v. Cater, 11 Sim. 572 (1841)

Lord St. Leonards had agreed with the plaintiffs that they should publish 2,500 copies of the tenth edition of his work on vendors and purchasers, and sell them at 3*l.* a copy, and it was held that the plaintiff was in equity an assign of the copyright to the extent that he was to be the sole publisher of it, until the whole edition should be sold. And Shadwell, V.C., in giving judgment, said—"Suppose that before the 2,500 copies which form the tenth edition, are sold, Sir E. Sugden should fancy that he had a right to sell another edition to another bookseller, with the immediate right of publication, I apprehend that this Court would certainly restrain him from doing so on this contract."

Again in

Stevens v. Benning, 1 Kay & J. 168 (1854); s. c. on appeal 6 De Gex, M. & G. 223; s. c. 24 Law J. Rep. (N.S.) Chanc. 153,

Wood, V.C., in giving judgment, said—"No doubt if an author, in consideration of a sum of money paid to him, agrees that certain persons shall have the sole power of printing, reprinting and publishing a certain work for all time, that would be parting with the copyright; but if the agreement is that the publishers, performing certain conditions on their part, should, so long as they do perform such conditions, have the right of printing and publishing the book, that is a very different agreement. The legitimate inference from this contract is that, so long as the publishers duly and properly perform their duty with reference to all they have engaged to do, the author shall not be at liberty to defeat the benefit of his own agreement, by publishing a new edition before the former editions are sold off."

And in

Reade v. Bentley (No. 1), 3 Kay & J. 271 (1857),

an unlimited agreement of this nature was held to constitute a sort of partnership which the author could not terminate without allowing the publisher to reap the fruits of all expenses incurred by him on the faith of it.

And in

Howitt v. Hall, 10 W.R. 381 (1862), a publisher who had purchased the copyright of a work for four years, was allowed to sell after that period copies printed by him during it.

Mr. J. Shortt and *Mr. A. D. Bell*, both of the Common Law Bar, for *Mr.* and *Mrs. Cook*, and

Mr. Daniel Jones, for Messrs. Routledge, were not called upon.

THE MASTER OF THE ROLLS.—This is a bill filed by some publishers against some other publishers, and a lady of the name of Cook and her husband, and it in effect seeks to restrain the lady from publishing or allowing others to publish a work, the copyright in which is undoubtedly vested in her. Now of course if there is anything to prevent her exercising her rights, which is enforceable by injunction, it must be found either in the bill or in the evidence, and I cannot find it anywhere. There is not, as far as I can see, a pretence for saying that she ever contracted not to publish the book, which is what I am asked to prevent her from doing.

First of all this is a bill for an injunction in respect of a contract as to which there can be no specific performance. Whatever the contract may be, it is not contended that it is one which this Court will specifically perform. Therefore it comes amongst that class of cases of which *Lumley v. Wagner* (1) is a remarkable example, in which the Court will restrain a person from doing an act, although it cannot compel the person so restrained to specifically perform the contract. That hardly, however, applies here in the same manner, because the person sought to be restrained, or the person claiming under title from her, is not required to do anything more; and

(1) 1 De Gex, M. & G. 604; s. c. 5 De Gex & S. 485; s. c. 21 Law J. Rep. (N.S.) Chanc. 898 (1852).

therefore many of the objections which have been raised as to the interference by the Court in that class of cases do not apply here. But still it must not be forgotten, as was said by Lord St. Leonard's in the case of *Lumley v. Wagner* (*ubi supra*), that it is not a jurisdiction to be extended.

Now, what is the jurisdiction? The jurisdiction, if found at all, must be founded upon contract, and upon clear contract, because if it is dubious, if it is not clear, the Court says—"We will not interfere by injunction; take any other remedy you have got; but injunction you shall not have, unless you shew us a clear contract." Therefore it is incumbent on the plaintiff to shew a clear contract by some one not to publish this new edition of the work in question. But more than that, the contract, or whatever it was, was a contract entered into with a married woman who was entitled to this copyright for her separate use. And, as I understand, the mere power of contracting, which a married woman has in respect of such property, is not a power of entering into a personal contract in the sense of binding her personally, but is a power of contracting so as to bind her property; in other words, you can enforce that contract as against the persons who for the time being hold that property, so far as it is a contract affecting the property. Therefore I take it that it is not impossible that a married woman may so deal with copyright, to which she is entitled for her separate use, as to prevent the assigns of that copyright breaking that contract. In other words, I think it is not impossible that a married woman may put a kind of fetter upon the right to publish, that is, that she may so far validly bind the copyright, which is a right to publish, that no person claiming under her by way of assignment or license with notice could be allowed to publish. I think that is quite possible. Whether it has been done is always a question to be decided. I think it is possible, that is to say, it would be *pro tanto* a right to publish in favour of the person claiming the benefit of the contract; not that he could publish himself, but that he could prevent other people from publishing.

To illustrate what I mean take a simple instance, I suppose a married woman, having a copyright settled to her separate use, could give an exclusive right to the publisher to publish an edition of 10,000 copies, and could at the same time agree that, in consideration of his agreeing to publish that at a given price, and to pay her a sum of money, she would not grant a license to any other person for a definite period to publish that book, and would not allow it to be published either by herself or anybody else. That sort of contract, enforceable against her, would be enforceable against any one who took either an assignment or sale of the copyright with notice. I think that that must be so, because, if it were otherwise, instead of saying that she had the power of dealing with her property in the same way as a man, it would be saying that she had not the power of entering into the same beneficial arrangements as a man can enter into. But the real question that I have to decide comes long before we reach that point. The question is, what is the contract? Now the facts are very few and simple. The lady, Mrs. Cook, was entitled to the copyright in a book intitled "How to dress on 15l. a year as a Lady, by a Lady." The plaintiffs, Messrs. Warne & Co. are well known publishers. She asked them to publish it or something of that sort. At all events they had an interview, at which, although I cannot say that it appears distinctly in words, that both parties agreed that the plaintiffs' firm would publish the book anonymously at their own expense and risk, yet I think that something of the sort occurred; and, although probably not in words, there was a sufficient amount of conversation between the parties to convey that idea to the minds of these parties. Then this offer was made—"I offered" (this is Mr. Warne's statement) "a royalty of a penny a copy on all copies sold, counting thirteen copies as twelve, to which she replied—'I have a speculative term of mind and will take the penny.' To this I consented." Now that is all. He says that this is all the conversation that occurred. It is not denied that that conversation did not create a contract for any definite period. The

plaintiffs' counsel argued that it was a contract revocable by either party at pleasure. It was a kind of joint adventure determinable at will. What was it for? Why the publishers were to publish this book, and were to pay a royalty of a penny for every copy they sold, a very simple contract. What does it imply? First of all, is it an exclusive license? It is not the assignment of the copyright. That is agreed. I think it might be considered a license, although that is by no means an easy thing to decide. Neither party said a word about its being a license, and of course nothing is better settled in a claim of copyright than that a license of this kind would not be an assignment of the copyright. But then, looking at the nature of the book, and to the publishing, and that it was an agreement that the publishers should publish at their own risk and pay the royalty, I think the contract, so long as it existed, must be taken to be an exclusive contract; that is to say, that as long as Messrs. Warne & Co. were allowed to publish, so long no one else could publish, neither the lady herself or an assign from her. That being established, what is the next right it gives to either party? On the determination of the partnership adventure, or whatever you choose to call it, what right had Warne & Co. in the book? There is authority upon the subject, but I do not think it wants authority; I think it is plain that no termination of the agreement could deprive them of the right of selling the copies which they have themselves printed under this arrangement. Whether the arrangement was at will or for a term, the publishers must obtain the right of selling the copies for their own benefit (subject to the royalty) which they have printed at their own expense in reliance upon that agreement. So far I go with the plaintiffs, but the plaintiffs then want me to import something else, not only that the publishers should have a right to sell any copies they may have printed before the disagreement, but that the owner of the copyright should not have the right to publish at all so long as any copies remain unsold. I cannot find that, and it does not seem to be reasonable to import it, and I

think so, because it would come to this, that if the publishers printed a very large number of copies, it would deprive the authoress of the copyright. Therefore I cannot import such an unreasonable term into the agreement.

Then it is said, that if you give the publisher no protection, the result may be that the author may publish another edition a day or two after the publishing of the first edition, and so destroy the value of the remaining copies of the first edition remaining unsold. That may be; and it is said that that is so unreasonable that you must infer some stipulation to prevent it. Why? No doubt partnerships at will have their inconveniences as well as their conveniences. There is no reason why I should make persons take up a totally different position from that which they have agreed to take up, because it might be convenient to one of the parties after the termination of the arrangement. If you do want that protection for a term of years or for a definite term, you must contract for it. That is all. But I cannot import such a term into the contract. I should make partnerships at will involve consequences that the partners never dreamt of. I put an illustration of this in the course of the argument, but I might put a dozen. Suppose two people took a shop together in London, one finding the capital, the other the skill and power of management, and suppose the one finding the capital took a lease of the shop and expended a large sum of money in furnishing fixtures, stock-in-trade and goods; and a week afterwards the other one determined the partnership. No doubt that might occasion a very great loss to the capitalist; but could I import an agreement that the other man should not carry on any business elsewhere until sufficient time had been given to enable the first man to get remuneration for the expenditure in buying stock and leasing the shop, and so forth? For that is what I am asked to do in this case. The answer is, "No; if you wanted to engage the services of a skilled man for a term of years, you should have made your partnership for a term of years, and then you could not have got rid of him at your will and

pleasure; but you have got the advantage of determining the management at your will and pleasure, and you object to his determining it when he likes." In fact I am asked to make an agreement for the parties, and an agreement which I am satisfied was never contemplated on the part of the lady, and which I very much doubt was ever contemplated by the publishers. I believe it was not. I believe the publishers relied, not upon any legal bargain at all, but upon this: they had great experience with authors, and they had found that as a rule when arrangements of this kind were made they were not broken without sufficient reason; and I cannot help seeing that in this case if something had not occurred, which it is not for me to say, was or was not a sufficient reason, but which the lady thought a sufficient reason, this bargain or arrangement would have gone on and would not have been terminated; and that in my opinion is what the publishers relied on, and that is what the lady relied on. This bargain has been put an end to, and I cannot make a new bargain for the parties; and I say it is not only not necessary to infer any such term as the plaintiffs insist upon, but I think the introduction of such a term would be irrational, and as there is no such term in the contract, and I decline to infer one, the result is that there is no breach of contract of which the plaintiff can complain, and consequently this bill must be dismissed with costs.

Solicitors—Messrs. Beaumont & Son, for plaintiffs; Mr. A. R. Hordern, for Mr. & Mrs. Cook; Messrs. Allen & Son, for Messrs. Routledge.

HALL, V.C. }
1874. }
April 30. }

PERRY v. MERRITT.

*Will—Construction—Absolute Interest—
“Money remaining after Death of Legatee”
—Repugnant Bequest.*

Testator gave all his real and personal estate to trustees upon trust to pay the resi-

due of his personal estate to his wife for her own absolute use and benefit, and after several other devises he gave all the money, if any, that should be remaining after payment of his wife's just debts, &c., to legatees named:—Held, that the widow took an absolute interest in the residuary personal estate.

Thomas Merritt, deceased, duly made his will, dated the 26th of April, 1870, by which he made the following bequest: “That my trustees shall pay the residue of my personal estate to my wife, Elizabeth Merritt, for her own absolute use and benefit, and I direct my said trustees to pay the rents and annual income of all my real and leasehold estates to my wife during her life.”

He made the following bequest at the close of his will, which, it was contended, cut down the absolute gift of the personality to a life interest after the devises. After disposing of the reversion of the real property, he declared that “all the money (if any), that shall be remaining after payment of the just debts and funeral expenses of my dear wife, Elizabeth Merritt, shall be equally divided between my said daughter, Ann Griffiths, and her three children, Charles Jenkins, Frederick William Watkins, and Ann Minerva Nash, to share and share alike as tenants in common.”

Elizabeth Merritt died intestate, and the defendant was her sole next of kin. The trustees of the will filed this bill for administration. The defendant claimed the personality as having been given to Elizabeth Merritt absolutely, and contended that the subsequent clause was repugnant to this absolute gift.

Mr. C. T. Simpson for the plaintiff.

Mr. B. B. Rogers, for the defendant, relied on

Watkins v. Williams, 21 Law J. Rep. (N.S.) Chanc. 601; s. c. 3 Mac. & G. 622;

Randfield v. Randfield, 4 Drew. 147; s. c. 2 De Gex & J. 57.

Mr. T. L. Wilkinson, for Charles Jenkins and others entitled under the gift over.

HALL, V.C., said the principle of *Watkins v. Williams* (*ubi supra*) was applicable. The whole of the residue of the

personal estate having been given to the wife for her own absolute use and benefit, so that she was at liberty to spend the capital as she might think proper, what did the other gift at the end of the will amount to? That gift was in substance one of the money remaining after the payment of the just debts of his wife, i. e., the money remaining after, and that which the wife had thought proper to spend, and the payment of her just debts. A gift of this kind was so indefinite and repugnant to the power of disposition given to the wife, that effect could not be given to it. In *Henderson v. Cross* (1) there was a bequest of residue to the testatrix's father, "to spend both principal and interest, or any part of it, during his lifetime," and should he "not spend the property," then in trust for the testatrix's sisters; and it was held that the gift to the father was absolute, and the gift over was inconsistent with it and inoperative. The Master of the Rolls in deciding that case followed *Ross v. Ross* (2), in which a limitation over of a bequest of a legacy was held to be void. Therefore there must be a declaration that the widow was absolutely entitled, and the personal estate must be carried over to the separate account of her legal representative.

Solicitors—Messrs. Cowdell, Grundy & Co., agents for Mr. H. Field, Swansea, for plaintiff; Mr. L. W. Gregory, agent for Mr. Jonathan Perrin, Bristol, for defendants.

LORDS JUSTICES, } *In re LIVERPOOL CIVIL*
 1874. } *SERVICE ASSOCIATION;*
 April 28. } *Ex parte GREENWOOD.*

Winding up—Payment to Petitioner—Protected Transaction—Companies Act, 1862 (25 & 26 Vict. c. 89), sec. 153.

A creditor filed a petition to wind up a limited company, but delayed his proceedings on payment of part of his debt with a promise of payment of the remainder. No further payment was made, and ultimately a winding up was ordered on his and other petitions:—Held, that the payment to him was not a transaction that ought to be protected by the Court under section 153 of the Companies Act, 1862 (which avoids all payments after the petition, unless the Court otherwise directs), and that the money must be refunded.

(1) 29 Beav. 216.

(2) 1 J. & W. 154.

mately a winding up was ordered on his and other petitions:—Held, that the payment to him was not a transaction that ought to be protected by the Court under section 153 of the Companies Act, 1862 (which avoids all payments after the petition, unless the Court otherwise directs), and that the money must be refunded.

This was an appeal from an order of the Vice-Chancellor of the County Palatine of Lancaster.

On the 8th of May, 1873, the appellant, H. Greenwood, served on the Liverpool Civil Service and Public Supply Association, Limited, a demand, under section 8 of the Companies Act, 1862, for the payment of a sum of 308*l.*, the balance due to him on a bill against the company for advertisements. On the same day Greenwood commenced an action against the company for 100*l.*, part of the whole amount, for which he held a dishonoured cheque, and this amount was paid on the 17th of May, reducing the amount due to 208*l.*

On the 30th of May Greenwood presented a petition, founded on his demand, to wind up the company, and it was answered for the 24th of June.

On the same day Greenwood served his petition on the company; but, at the request of one of the directors and the solicitor of the company, his solicitors delayed the advertisement of the petition till the next day, to give a further opportunity of payment.

On the next day (which was a Saturday) the company offered to pay 100*l.* of the amount, but Mr. Greenwood's solicitors would only accept it on the terms embodied in the following receipt, given in their name—

"Received from the above company the sum of 100*l.*, on account of debt and costs of petition herein; the company to pay the balance of debt and costs on Saturday week, we undertaking that advertisements will not appear earlier than Monday week."

On the following Wednesday, however, Greenwood's solicitors heard that the company had themselves presented a petition to wind up the company. In consequence, Greenwood advertised his petition, the

advertisements appearing on Thursday, the 5th of June.

On the 15th of June a winding up order was made on both the above-mentioned petitions and another creditor's petition.

On an application of the official liquidator of the company, the Court declared the sum of 100*l.*, paid on Saturday, the 31st of May, an asset of the company, and ordered it to be returned by Mr. Greenwood. Mr. Greenwood appealed.

Mr. North, for the appellant.—The only section of the Companies Act, 1862, which can deprive us of the 100*l.* we received *bona fide*, on account of our debt, and in consideration of our delaying our advertisements, is section 153. That provides that all dispositions of the property, effects and things in action of the company . . . made between the commencement of this winding up and the order for winding up, shall, unless the Court otherwise order, be void. If *bona fide* payments made after a petition is presented are not to be allowed to stand good, the presentation of a petition must, in every case, put a stop to the company's business. The payment was made by the company as a going concern, and to enable it to continue its business; and the business has now been sold as a going concern.

He cited—

In re Wiltshire Iron Company, 37 Law J. Rep. (N.S.) Chanc. 554; s. c. Law Rep. 3 Chanc. 443;

Gibbs and West's case, 39 Law J. Rep. (N.S.) Chanc. 667; s. c. Law Rep. 10 Eq. 312.

There is another point that, even if the payment was improper, the Court has no summary jurisdiction against a creditor to make him return the amount; but I feel unable to raise that point, as it seems to have been waived in the Court below.

Mr. Robinson and *Mr. F. Thompson*, for the liquidator, were not called upon.

MELLISH, L.J.—This is an appeal from an order of the Vice-Chancellor of the County Palatine of Lancaster. The question, which is one of some importance, and which appears to have been never yet directly decided, is whether, if a creditor

of a joint-stock company, unable to obtain payment, make a demand under section 80, and then not being paid presents his petition for a winding up, and then, *bona fide*, as I will take it, an arrangement is made between him and the company for the purpose of getting paid during the interval after the petition is presented, by which the company pay a portion of the debt, with a promise, which is not afterwards performed, to pay the remainder, and then the petitioner goes on, and obtains a winding up order, ought the Court, under section 153, to allow that payment to stand, or ought the Court to direct him to bring the money into Court, and so allow him to receive only a proportionate share with the other creditors.

No doubt, under section 153, that is purely a matter for the discretion of the Court.

The effect of that section is, that the payment is made void, unless the Court otherwise orders; and we have to determine whether we shall otherwise order.

I do not mean to express any dissent from the cases which have been cited—that a *bona fide* transaction in carrying on its business by a company, between a petition to wind up and the winding up order ought to be protected. The question here is, whether the petitioner is to retain the money obtained by the very petition on which the winding up order is made. That appears to me contrary to the sound principles that have always prevailed in bankruptcy. By section 79 of the Companies Act, 1862, the company is to be wound up whenever (amongst other things) it is unable to pay its debts. Then section 80 provides that a company is to be deemed unable to pay its debts, when, after demand made as there mentioned, the company has failed to pay or secure the debt.

That happened in this case, and the creditor filed his petition, asserting that the company was unable to pay its debts. If he had withdrawn his petition, and given up his assertion upon payment of his debt, or if he had been paid his whole debt, and then his petition had been dismissed, it would have been different. But if he insists on a winding up

order, on the ground that when he presented his petition the company was unable to pay its debts, and on that ground a winding up order is made, he has no right to any advantage over the other creditors. A creditor of that kind says that he is willing to take an equal share with the other creditors. He ought not to insist on a winding up, and at the same time obtain a larger share of the assets than the other creditors, any more than in the case of a petitioning creditor in bankruptcy. The Court would never allow such a creditor to receive a greater amount than the other creditors. The order of the Vice-Chancellor must be affirmed.

JAMES, L.J., concurred.

Solicitors—Mr. W. W. Wynne, for appellant; Mr. I. H. E. Gill, Liverpool, for respondents.

HALL, V.C. }
1874. } KNIGHT v. KNIGHT.
June 5, 6. } JEPHS v. KNIGHT.

Administration—Husband of Residuary Legatee, Executor—Wasting Assets—Fund in Court—Wife's Equity to a Settlement.

A wife's equity to a settlement attaches only to property which comes to her husband's hands in his marital right.

If a testator bequeaths his property to a married woman, and makes her husband his executor, and he acts, he is primarily responsible to the estate; and if largely indebted to it, his wife has no equity to a settlement out of any part of it till her husband's liabilities to it are discharged.

Further consideration.

The testatrix in these suits bequeathed her residuary personal estate to four legatees, of whom one was a married woman. The married woman's share was not settled by the will to her separate use. She was separated from her husband. He was the executor of the will. As such he proved the will, received and wasted a considerable portion of the assets, and was

much indebted to the estate. There was, however, a small fund, part of the estate, in Court. The wife of the executor asked for a declaration that as he had lost the other part of the estate in which she was beneficially interested, she had an equity to a settlement out of the fund in Court.

Mr. Greene and Mr. Jolliffe appeared for the plaintiff in the suit of *Jephs v. Knight*, who had the conduct of that of *Knight v. Knight*. They contended that as the executor's acts had diminished the estate, and as he was liable to it in respect of them, the general equities of the suit must override the particular equity of any party to it.

Mr. Waller and Mr. Bunting, for the married woman, cited—

Baker v. Hall, 12 Ves. 497;

Wall v. Tomlinson, 16 Ves. 413;

[HALL, V.C., referred to

Osborn v. Morgan, 9 Hare, 432; s. o. 21 Law J. Rep. (N.S.) Chanp. 318.]

Mr. Greene replied.

HALL, V.C.—I should have thought that the question which arises in this case was one on which there could have been found some distinct and authoritative decisions; but as it is, the question must be determined on principle. *Mr. Waller*, indeed, referred to two cases, but they only amount to this, that the Court, when dealing with funds actually in existence, considers whether the funds came to the hands of the executor, or are in his hands as executor, or in his marital right. The question in each case is one of fact. The husband, being executor, may hold the funds in the first instance as such. If, after that, he appropriates them to his marital right, it is not clear that on proof of that the position of things would be interfered with. But the precise question to be here determined is this: the executor is the husband of one of the residuary legatees; on taking the accounts of the estate he is found to be considerably indebted to it; nothing whatever appears to have come to his wife as a residuary legatee, but there is a small portion of the estate in Court. Is it competent for her to say to her husband, "You, as my husband, and as between yourself and the other legatees, cannot claim anything in respect

of my share till you have made good, as executor, all that is due from you to the estate? but, nevertheless, I, as your wife, have a right to my proportion, that is, one-fourth of the assets actually existing in Court." Can the wife of the executor say that, so long as his liability to the other beneficiaries on the estate is undischarged? I think the other legatees may well insist that nothing shall be taken by the executor, in right of his wife, out of the funds in existence, so long as there is anything due from him to the estate: that is to say, the wife's equity to a settlement attaches, not to the property as such, but to that property which her husband takes in his marital right; and if there be no such property there is no such equity—*Osborn v. Morgan (ubi supra)*. It appears to me that if a testator gives his property to a married woman, and makes her husband his executor, the husband is, as executor, primarily responsible to the estate. The estate must, therefore, be distributed on that footing.

Solicitors—Mr. J. G. Shearman, for the plaintiff;
Mr. W. A. Willoughby, for the lady.

BACON, V.C. } LATHAM v. THE CHARTERED
1874. } BANK OF INDIA, CHINA
Jan. 14. } AND AUSTRALIA.

Construction—Assignment—Power of Sale—Bill of Lading—Policy.

Bills were drawn against cotton consigned to England. The cotton was hypothecated, by means of a letter in favour of a bank which bought the bills; at the same time bills of lading and a policy were handed to the bank. The letter contained a power to keep insured, and a power to sell the cotton in case of non-payment, and to apply any balance, after satisfaction of the bills, towards other debts due from the consignor to the bank:—Held, that money received on the policy could not be applied in payment of anything beyond what was due on the bills.

This was a suit by the partners in the firm of Finlay, Scott & Co. to recover the

balance, amounting to about 470*l.*, out of 1,700*l.*, paid by an insurance company to the defendants, the Chartered Bank of India, China and Australia, the holders of a policy of insurance on cotton sent by the ship *Aurora* from Bombay to Liverpool, which ship was burnt on her passage.

The policy was effected by Jethu Vullabjee, a native trader of Bombay, the shipper of the cotton. He consigned the cotton to the defendants, the bank, and on the 14th of April, 1870, drew three bills for 1,200*l.* against it, which were accepted by Messrs. Coupland; but Messrs. Coupland and Jethu Vullabjee both failed, and the bank, who held the bills, paid themselves out of the 1,700*l.* Their right to do this was not disputed, but they claimed under a letter of hypothecation, dated April, 1870, and signed by Jethu Vullabjee, to apply the balance of 470*l.* towards satisfaction of other bills in their hands.

The plaintiffs claimed under a letter of assignment of, among other things, "various policies of insurance" (including the policy in question), "subject, nevertheless, to all now existing legal charges and incumbrances on such policies, proceeds or money." This letter was dated January, 1871.

The bank afterwards bought from Messrs. Haigh, Wilson & Co., of Liverpool, certain other bills of exchange drawn by Jethu Vullabjee, and accepted by Messrs. Haigh, Wilson & Co. These were drawn against cotton sent by the ships *Western Belle* and *Camite*. Messrs. Haigh, Wilson & Co. failed, and the cotton against which these latter bills was drawn did not realise the amount due on the bills. The bank claimed to set off the balance of 470*l.* out of the policy money on the *Aurora* against this deficiency.

There were two questions—one, whether the terms of the letter of April, 1870, gave them a charge on the balance of the policy money; the other whether, under the circumstances, they had not released the estate of Jethu Vullabjee from all liability on the bills accepted by Messrs. Haigh, Wilson & Co., by giving time to this latter firm.

The letter of hypothecation of the 14th of April, 1870, was as follows—

"Having this day sold to you three bills of exchange drawn by me on Messrs. Coupland Brothers, of Liverpool, the particulars of which are noted at foot, and having at the same time handed to you, as collateral securities, for the due payment of the said bills, the bills of lading and shipping documents of the several goods, as stated at foot the agreement is understood to be as follows—

"I authorise the Chartered Bank of India, Australia and China, or any manager or agent thereof (but not so as to make it imperative), to insure the above goods from sea risk, including loss by capture, and also from loss by fire on shore, in case they shall omit to do so immediately after notice from you to that effect, and to add the premiums and expenses of such insurance to the amount chargeable to me in respect of the said bills, and to take their recourse against the said goods or against me for their reimbursement, and also to sell any portion of the said goods which may be necessary for payment of freight; and the said bank are to take such measures generally, and to make such charges for commission, and to be accountable in such manner, but not further or otherwise, as in ordinary cases between a merchant and his correspondent.

"I also hereby authorise the said bank, and the holders of the above bills for the time being, to take conditional acceptances of all or any of such bills, to the effect that on payment thereof at maturity the above-mentioned bills of lading and shipping documents shall be delivered to the drawees or acceptors thereof, and such authorisation on my part shall be taken to extend to cases of acceptance for honour.

"I further authorise the Chartered Bank of India, Australia and China, or any manager or agent thereof, on default being made in acceptance on presentment, or in payment at maturity, of any of the above bills, or on the drawer's suspension of payment during the currency of the bills, to sell the said goods, or a competent part thereof, and to apply the nett proceeds (after deducting usual commission and charges) in payment of such bills, with re-exchange and charges, the balance, if any, to be placed against any

other of my bills which may at the time be in the hands of the said bank, or any other liability of me to the said bank, and, subject thereto, to be accounted for to the proper parties. In case the nett proceeds of such goods shall be insufficient to pay the amount of any such bills, with re-exchange and charges, I authorise the Chartered Bank of India, Australia and China, or the holders thereof for the time being, to draw on me for the deficiency, and I engage to honour such drafts on presentment; it being understood that the account current rendered by the said bank shall be acknowledged and allowed as sufficient proof of sale and loss.

"I further authorise the said bank, or the holders of the said bills for the time being, in case the aforesaid power of sale shall not have arisen at any time before their maturity, to accept payment from the drawees or acceptors thereof, if required so to do, and on payment to deliver the said bills of lading and shipping documents to such drawees or acceptors; and, in that event, the said bank, or the holders of the said bills, are to allow a discount thereon for the time they may have to run, at the Bank of England minimum rate of the day, if taken up in London, or if in India or China, at the current rate of discount of the day on Government acceptances in India or China, as the case may be.

"Lastly. It is mutually agreed that the delivery of said collateral securities to your bank shall not prejudice your rights on said bills in case of dishonour, nor shall any recourse taken thereon affect the title of the bank to said securities, to the extent of my liability to your bank, as above."

This letter was in printed form, and had a schedule of documents, in which the particulars of the bill of lading and three bills of exchange were set out, but no other document.

Mr. Kay and *Mr. Ferrers* contended, that under the letter of hypothecation no right could arise in respect of liabilities other than the particular bills mentioned in it until the necessity for sale arose. The fact of a sale was a condition precedent to the existence of any such right. But if this were not so, the right to apply the

goods themselves, or their proceeds, did not of itself draw with it the right to the policy money—

Berndtson v. Strang, 36 Law J. Rep. (N.S.) Chanc. 879; s. c. on app. *ibid.* 665; s. c. Law Rep. 3 Chanc. 588.

As the policy money was not expressly charged with the further liability, the Court would not import such a charge.

Mr. Eddis and Mr. Westlake, for the defendants, said the policy was, perhaps, not expressly made subject to any charge at all; but the plain meaning of the transaction, as a whole, was that the bank should hold the proceeds of the policy on the same trusts as the proceeds of the goods, if the necessity to convert either into money should arise.

[BACON, V.C., put the question of part of the goods being lost, and sufficient arriving to satisfy the claim on the particular bills. He asked whether, in such case, the defendants could have a charge on the policy money.]

Whether that were the case or no, the necessity to receive the whole policy money had the same effect in charging that money as the necessity for a sale had in charging the purchase money.

No doubt a person who had a right to stop *in transitu* had no claim over a policy effected by a consignee—

Berndtson v. Strang (*ubi supra*).

But there it was clear that the defendants were intended to have some charge on the policy.

Mr. Kay replied.

BACON, V.C.—It is a little surprising that out of one of the most ordinary mercantile transactions that can be, such a question as this should arise, and that it should be discussed at such a length as I have listened to it. I have listened very willingly, because the thing is not without its interests.

The transaction is simply this. A shipper in India draws a bill on his consignees in England, he sells it upon the market in India, and accompanies it with the bill of lading, which is the only document that I know of; but it is stated that at the same time he deposited with the persons who bought the bill of exchange

of him, a policy of insurance against damage by fire to the cargo.

Now what is the meaning of that transaction? Without stopping for a moment to consider the terms in which it is expressed, it is this, and this only: I have shipped to England goods that are worth, at least, the 1,200*l.* for which I have drawn. I give you, by means of the bill of lading, the power to secure to yourself the payment of that 1,200*l.* if the parties liable upon the bills do not pay. Is there anything more in the contract between the parties? Is any other sum than 1,200*l.* in the contemplation of either of them—the man who buys or the man who sells the bills? It is impossible to say that anything else entered into their contemplation. The only use of the policy of insurance is to guard against any accident that may happen by which the value of the goods shipped should be diminished, and to insure the holder of the bills that he shall have, at least, the value of the 100 bales of cotton which are shipped on board the ship. That is the plain transaction, that is so stated in the answer; and, without attaching more importance to the words of the answer than really belong to them, or endeavouring to strain them beyond what I take to have been the true intention of the parties and the true nature of this most ordinary mercantile transaction, the statement in the answer is, that at the same time the shipper handed to the bank, as security for the payment of the said draft, the bill of lading of the cotton and the policy of insurance. That is the real transaction between the parties, and the benefit of that to the full: the defendants, the bank, have had. The letter of hypothecation, as it is called, and rightly enough so called, does not extend that in the slightest degree.—“Having this day sold to you three bills of exchange drawn by me on Messrs. Coupland Brothers, of Liverpool, the particulars of which are noted at foot, and having, at the same time, handed to you as collateral securities for the due payment of the said bills, the bills of lading, and shipping documents of the several goods, also settled at foot, the agreement is understood to be as follows”—And then follows the agreement, which gives, first of all, power

to the purchaser of the bill to insure, if he thinks fit. It gives him power to deal, during the currency of the bill. Then comes this—"I further authorise the Chartered Bank of India, Australia and China, or any manager or agent thereof, in default being made in acceptance, on presentment or in payment at maturity, of any of the above bills, or on the drawee's suspension of payment during the currency of the bills, to sell the said goods, or a competent part thereof, and to apply the nett proceeds" in various ways; and, amongst others, to carry the balance, if any, which shall remain to the credit of the vendor's account with the bank upon any other bills. But it is confined in its terms, as well as it is confined entirely in its nature, to those bills amounting to 1,200*l.*, and to those 100 bales of cotton, which are mentioned in the document to which I have been referring.

Upon what ground can it be said that, if by any accident beyond the terms of this contract, a sum of money came into the hands of the Chartered Bank of India, Australia and China, that they were therefore at liberty to apply that in satisfaction of any debt which the Indian merchant might owe to them? There is no ground whatever for any such pretence. The contract is clear, plain, usual, ordinary, and open to no doubt or question. Nobody has questioned the right of the Chartered Bank of India, Australia and China, to have the bills mentioned in this memorandum satisfied, and they have been satisfied not exactly in the mode here contemplated, but by means of that delivery to them of the policy of insurance, which was so delivered to them only that they might have the bills paid when they arrived at maturity. It would be putting a construction on these words wholly at variance, not only with the intention of the parties, but at variance with the very expressions themselves if I were to hold that by means of this transaction—this letter of hypothecation, and the policy of insurance which accompanied it—that they were entitled to any more than the very sum which was expressed in the bills of exchange.

The case might be decided upon that point, and upon that point alone. That

would be enough to justify the plaintiffs in the demand which they now make.

[BACON, V.C., then decided that, under the circumstances, the bank had given time to Messrs. Haigh, Wilson & Co., and thus released the estate of Jethu Vullabjee from all liabilities on the bills accepted by Messrs. Haigh, Wilson & Co., and said:]—

The policy of insurance I take to have been, not only from the words which are used, but in its very nature, simply a security that the bills should be paid when they become due. They have been paid after they became due. The whole demand of the bank in respect of those bills—all that was contemplated by the letter of hypothecation, has been accomplished. The bank have had all they contracted to have; the bank have had all they are entitled to have; and to say that the proceeds of the policy of insurance are to stand instead of the goods is in contradiction of that principle of law which I gather from *Bernátson v. Strang* (*ubi supra*), where the purport of the decision is to point out clearly that the goods themselves, and the policy effected in respect of those goods, are in their nature distinct, and are not to be confounded, and that one is not to be taken for the other. The same thing is equally apparent here. There is no connection, not only in the expression of the documents referred to, but there is no connection in right or reason, or in fair justice, in an ordinary mercantile transaction, between the policy of insurance, which was only to affect the payment of the bills, or provide the means of paying the bills, and the surplus which, if the goods had arrived safely and had been sold, the bank might have made some claim to.

In my opinion, the plaintiffs succeed in their demand, and they are entitled to the 470*l.*, which is the balance of the policy of insurance, and for which alone this bill was filed.

Solicitors—Messrs. Markby, Tarry & Stewart,
for plaintiffs; Messrs. Linklater, Hackwood,
Addison & Brown, for defendants.

MALINS, V.C. }

1874. }

June 9. }

PLUMER v. GREGORY.

Practice—Cons. Ord. vii. r. 2—Partnership—Solicitors—Joint and Several Liability of Partners—Misapplication of Client's Money.

Where a client has entrusted a firm of solicitors with moneys for investment on his behalf, he is at liberty, in the event of their misapplication of the moneys, to sue all or any one or more of the members of the firm, their liability being both joint and several.

Atkinson v. Mackreth (35 Law J. Rep. (N.S.) Chanc. 624; s. c. Law Rep. 2 Eq. 570) *observed upon.*

This suit was instituted by Jessica Plumer, a married woman, by her next friend, to establish the liability of the estates of Jonas Gregory and his son, William Gregory, both deceased, formerly in partnership with Thomas Clark, as solicitors, under the firm of Gregory, Son & Clark, to repay to her two sums of 1,300*l.* and 1,700*l.*, belonging to her for her separate use, and which she had, as she alleged, entrusted to Jonas and William Gregory, as her solicitors, for purposes of investment on her behalf.

The interest on the two sums was paid to her by the father and son during their respective lives, she believing, as she alleged, that both sums had been duly invested; but, upon the death of William Gregory, in March, 1871—his father having died in 1865—the payment of interest ceased, and she then found, as she alleged, that both sums were, in fact, lost.

The bill also prayed for the administration of the estates of the Gregorys and for the usual accounts.

The bill stated that Mr. Clark was a partner in the firm during part only of the time over which the transactions therein referred to extended, but that he took no part in such transactions, and was not a necessary party to the suit.

Jonas Gregory's executors admitted assets sufficient to answer the plaintiff's claim, but William Gregory's estate was insolvent.

Upon the cause coming on for hearing, a preliminary objection was raised on behalf of Jonas Gregory's executors, the point being also raised by their answer, that, inasmuch as the plaintiff's claim rested on the ground of the partnership transactions, Mr. Clark was a necessary party to the suit. The objection was accordingly now argued.

Mr. Glasse and Mr. Waller, for Jonas Gregory's executors, in support of the objection, contended that no relief could be obtained in the absence of Clark, and cited—

Atkinson v. Mackreth, 35 Law J. Rep. (N.S.) Chanc. 624; s. c. Law Rep. 2 Eq. 570.

Mr. Cotton and Mr. E. Outler, for the plaintiff.—We say that the money was handed to Messrs. Gregory as our solicitors, for the purpose of investment in our behalf. The joint and several liability of the members of a firm of solicitors in such a case is expressly laid down by Lord Romilly, M.R.—

Atkinson v. Mackreth (*ubi supra*), and by the Lords Justices in

St. Aubyn v. Smart, Law Rep. 3 Chanc. App. 646;

affirming your Honour's decision, Law Rep. 5 Eq. 183.

We are, therefore, entitled to sue any one or more of the members of the firm—

Cons. Ord. vii. r. 2.

[MALINS, V.C., referred to his judgment in

St. Aubyn v. Smart (*ubi supra*);

and mentioned—

Blair v. Bromley, 2 Ph. 354, 542; s. c. 16 Law J. Rep. (N.S.) Chanc. 105, 495.]

Mr. Glasse, in reply.—The bill alleges virtually a breach of trust, but prays general accounts against the Gregorys only. We are entitled to have our co-trustee before the Court, that he may be bound by the accounts—

Coppard v. Allen, 2 De Gex, J. & S. 173; s. c. 33 Law J. Rep. (N.S.) Chanc. 475.

MALINS, V.C., said that, with great submission to the late Master of the Rolls, he took it to be perfectly settled that where money had been advanced by a

client to a firm of solicitors, to be applied on his behalf, if the money were lost, the client could sue all or any one of the members of the firm. That was settled by *St. Aubyn v. Smart* (*ubi supra*), in which *Atkinson v. Mackreth* (*ubi supra*) was cited. He was, therefore, of opinion that where there was a breach of duty, whether on the part of trustees, or on the part of a firm of solicitors, which created a joint and several liability, you might sue all or any one or more of such trustees or solicitors.

Solicitors—Messrs. Radcliffe, Davies & Cator, for plaintiff; Mr. W. Bohm, for defendants, Jonas Gregory's executors.

HALL, V.C. }
1874. } MOORE v. MOORE.
May 6, 7, 25. }

Husband and Wife — Donatio mortis Causa—Railway Scrip Certificates—Deposit Note—Costs.

The plaintiff (who was her husband's executrix) claimed railway certificates and a deposit note, either as having been given to her by her husband in his lifetime, or on the ground that he had constituted himself a trustee of them for her, or as donatio mortis causa:—

Held, following *Ward v. Turner* (2 Ves. sen. 431), that railway certificates could not be made the subject of a donatio mortis causa. And held, on the facts, that she was not entitled to the railway certificates, but was entitled to the deposit note as a donatio mortis causa.

Motion for decree.

The plaintiff in this suit was the widow, and she and the defendant James Moore were the executrix and executor of William Moore, who died on the 1st of January, 1873, without issue.

William Moore, by his will, dated the 7th of October, 1871, gave the residue of his real and personal estate to the

plaintiff for life, with remainder, in default of issue of the testator, to his brothers and sister in equal shares. The suit related to certain railway certificates, or stock and shares, and a deposit note. As regarded the railway stock, the bill stated as follows—Previous to 1866 the testator was the owner of a debenture for 100*l.* in the London, Chatham and Dover Railway Company. In July, 1866, he gave the debenture to the plaintiff, telling her that she might either sell it then or keep it; but that it was his opinion that it would pay up in time. In 1870 the debenture was surrendered to the company, who issued to him 64*l.* arbitration debenture stock, 42*l.* arbitration preference 4*l.* 10*s.* per cent. stock, and 14*l.* arbitration ordinary stock, in exchange for the debenture. The testator handed the certificates of those stocks to the plaintiff, saying, "These are yours." The certificates remained in her possession till July, 1872, and in the interim her husband gave her the dividends. In July, 1872, he lost the dividend warrant for that month, and the plaintiff gave him the certificates in order to obtain a dividend warrant in place of the lost one. Such new warrant was accordingly sent to the testator, but he omitted to return the certificates to the plaintiff, though he promised to do so, and frequently spoke of them as her property. Under those circumstances, the plaintiff contended that her husband had constituted himself the trustee for her of the certificates, and all moneys payable by virtue of the same, which she alleged thereby became, in equity, her absolute separate property. With respect to the deposit note, the bill stated that on the 6th of August, 1872, the testator deposited with the Derby and Derbyshire Banking Company the sum of 470*l.* 10*s.*, for which he received the usual deposit note. Early in December, 1872, he became seriously ill of the disease of which he died. On the 25th of December of that year, being hopelessly ill, he told two of his brothers and the plaintiff that he wanted the note and certificates in order that he might give them to her. They were accordingly searched for, but could not then be found; and the plaintiff was so informed. On the follow-

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ing day her husband asked the plaintiff whether she had had the note and certificates given to her, and seemed very much disturbed when told that she had not got them. He then sent his servant to his warehouse to ask one of his brothers to send him the note, but the servant returned saying it could not be found. The testator then sent her back again, with further particular instructions as to the note, and directed her not to come away until she had it. The servant then got it, and brought it to the testator's bedroom, and gave it to him, when he opened the envelope in which the note was, read the note, and handed it to the plaintiff, saying, "Here, missus; this is for you." She then, in his presence, and in that of his brother, said, in reply to a question from her husband, that she had got the note. After that he asked her if she had the railway scrip; and on her saying she had not, he desired her to ask his brothers for it, which she did, and they handed it to her. After her husband had given her the note, he asked her if she had cashed it. He seemed much troubled when she told him she had not; and at last, in order to pacify him, she said she had cashed it and obtained gold for it. As a matter of fact, the plaintiff did not venture to leave the house in consequence of the hopeless state of her husband; and she did not attempt to get the note cashed. The defendant refused to recognise her right to the certificates and the note. She contended that each of the certificates, so far as, and if they did not then belong to her beneficially, under the circumstances above stated, was delivered and given by her husband to her by way of *donatio mortis causa*; and so was the deposit note; and that such delivery and gift were so made by her husband upon his deathbed, and to take effect upon his death and to become absolute thereupon.

The bill then stated that the general assets of the testator were amply sufficient for the payment of his debts, funeral and testamentary expenses, and prayed that the defendant might be ordered to execute the necessary transfer to the plaintiff of the London, Chatham and Dover stocks in the bill mentioned; or otherwise, that an order might be made vesting such

stocks in the plaintiff; that the defendant might be ordered to give, or concur in giving, all necessary notices, requiring payment to the plaintiff of the money payable by the deposit note in the bill mentioned; and to sign, or concur in signing, all necessary receipts for the same, so as to enable the plaintiff to receive such money; or otherwise that an order might be made vesting the right to receive and give discharges for such money in the plaintiff alone; and that the defendant might be ordered to pay the costs of this suit.

The defendant by his answer denied generally and particularly the plaintiff's allegations as to both branches of her case. He stated (generally) that the testator was in the habit of constant communication with him and his brothers, and he never told the defendant of any gift to the plaintiff of the certificates, or of any intention to make such a gift; nor, so far as the defendant knew or believed, did the testator tell either of his other brothers of it. He believed that if the testator had given the plaintiff the certificates, he would have told them or one of them of such gift, and that he would have mentioned it to the defendant as one of his executors. He insisted that even if all the facts stated in the bill were true, yet the alleged gift and delivery to the plaintiff of the certificates and deposit note, would not have constituted a valid gift thereof by way of *donatio mortis causa* or otherwise to the plaintiff.

He further said that, judging from the state of health of the testator at the time of the alleged delivery and gift, and from the other surrounding circumstances, the defendant did not believe that each or any of the certificates (so far as and if they did not then belong to the plaintiff beneficially, under the circumstances in the bill set forth, as he submitted they did not) in fact were or was delivered or given by the testator to her, either by way of *donatio mortis causa* or in any other way; or that the deposit note was delivered or given to the plaintiff by way of *donatio mortis causa* or in any other way; or that such delivery and gift were so made upon the testator's deathbed, or were to take effect upon his death or to

become absolute thereupon; and the defendant therefore justified his conduct as executor, and submitted that his costs should be provided for, and the bill in the suit dismissed with costs.

A great deal of evidence was adduced on both sides; but all of it that is material to this report will sufficiently appear from the judgment, *infra*.

Mr. J. H. Palmer and Mr. Simmonds, for the plaintiff.—First, as to the certificates.

(a) The testator gave the original debenture to the plaintiff. He handed it to her for her own use, and it thereby became hers. But if that is not sufficiently clear;

(b) Then he paid her the dividends on the shares after the surrender of the debenture. He made himself a trustee of them for her—

Grant v. Grant, 34 Beav. 623; s. c.

34 Law J. Rep. (N.S.) Chanc. 641.

(c) Such a relationship need not be constituted by a written declaration of trust; it may be by parol—

Morgan v. Malleson, 39 Law J. Rep.

(N.S.) Chanc. 680; s. c. Law Rep.

10 Eq. 475;

Jones v. Lock, 35 Law J. Rep. (N.S.)

Chanc. 117; s. c. Law Rep. 1

Chanc. 25;

Richards v. Delbridge, *ante*, 459; s. c.

Law Rep. 18 Eq. 11,

followed

Milroy v. Lord, 4 De Gex, F. & J.

264; s. c. 31 Law J. Rep. (N.S.)

Chanc. 798,

but is no doubt distinguishable from the present case.

[HALL, V.C.—Do you contend that “if a man says to A. B., I have 1,000l. stock in my name, I give it to you,” that makes the person in whose name the stock stands a trustee for A. B. ?]

Mr. Palmer.—Yes. That is

Grant v. Grant (*ubi supra*);

a fortiori, where, as here, the dividends are paid over to the donee; because that is what the trustee of them for her would himself do.

(d) But the plaintiff's case as to the certificates does not rest there. She claims them as a *donatio mortis causa*. As to that, it fortifies rather than weakens

the gift to consider that the testator, at the last moment, intended to “perfect” a “previously imperfect” gift.

[HALL, V.C.—In

Ward v. Turner, 2 Ves. sen. 431,

Lord Hardwick held that delivery was necessary to *donationes mortis causa*, and that the delivery of receipts for South Sea Annuities was not sufficient, though a strong evidence of the intent.]

Mr. Palmer.—That case is distinguishable from the present one. Then again, cases of policies of assurance, bonds, promissory notes, and bills of exchange are in point—

In re Veal; *Veal v. Veal*, 27 Beav.

303; s. c. 29 Law J. Rep. (N.S.)

Chanc. 321;

Rankin v. Weguelin, 27 Beav. 309;

s. c. 29 Law J. Rep. (N.S.) Chanc.

323 (N.);

Amis v. Witt, 33 Beav. 619;

Witt v. Amis, 1 B. & S. 109; s. c.

30 Law J. Rep. (N.S.) Q.B. 318;

Gardner v. Parker, 3 Madd. 184;

Lawson v. Lawson, 1 P. Wms. 441;

Miller v. Miller, 3 P. Wms. 356.

In re Beak's Estate; *Beak v. Beak*,

41 Law J. Rep. (N.S.) Chanc. 470;

s. c. Law Rep. 13 Eq. 489;

Bouts v. Ellis, 4 De Gex, M. & G.

249; s. c. 17 Beav. 121; s. c. 22

Law J. Rep. (N.S.) Chanc. 716.

Second, as to the deposit note. The plaintiff is clearly entitled to that, either as given to her by act *inter vivos*, or as a *donatio mortis causa*.

Mr. Lindley and Mr. Cracknall, for the defendant.—The plaintiff's case divides itself into two parts—

First, as to the certificates; which head is again sub-divided, thus—

(a) As to what the testator did with them before his last illness.

(b) As to what he did during it, so as to make a *donatio mortis causa* of them.

Second, as to the deposit note.

(a) As to the testator's acts with reference to the railway certificates before his last illness. The plaintiff's case is that her husband, in July, 1866, after the embarrassed state of the affairs of the London, Chatham and Dover Railway Company had become notorious, gave her the debenture and told her “she might

either sell it then or keep it, but that it was his opinion it would pay up in time." She did not say where the debenture was kept, and it is not forthcoming; but that of course is explicable. The testator was the registered owner of it in the books of the company, and so continued. Her statement, therefore, that he told her to sell it or keep it cannot possibly be equivalent to a gift of it to her. But if not a gift of it, will it make him a trustee of it for her? Certainly not. The testator exchanged it afterwards for the arbitration stock. The plaintiff does not say where the certificates were kept. The defendant says that "they were kept in the safe in the warehouse, and that he had seen them there many times." The burden of proving the gift by her husband to her of these certificates prior to his last illness lies wholly on the plaintiff, and she must strictly discharge herself of that obligation. It was said in her behalf that she had the warrants, but that was not correct, for the testator had them and received the money on them, after which he gave the money to the plaintiff. But that will not make a gift of the capital stock to her. Standing alone, certainly it would not; though of course it is not inconsistent with the fact of a gift, if proof of that can be adduced *aliunde*.

Morgan v. Malleon (ubi supra)
was observed upon unfavourably in
Warriner v. Rogers, 42 Law J. Rep.
(N.S.) Chanc. 581; s. c. Law Rep.
16 Eq. 340.

Grant v. Grant (ubi supra)
certainly was a very different case from this one—

Edwards v. Jones, 1 Myl. & Cr. 226;
s. c. 5 Law J. Rep. (N.S.) Chanc.
194;

Antrobus v. Smith, 12 Ves. 39;
Dillon v. Coppin, 4 Myl. & Cr. 647;
s. c. 9 Law J. Rep. (N.S.) Chanc.
87.

We rely on the distinction taken in

Edwards v. Jones (ubi supra);

Milroy v. Lord (ubi supra).

And also on

Richards v. Delbridge (ubi supra).

There is, in fact, nothing here to support the alleged gift, *inter vivos*. Even if regarded as, in the first instance, an im-

perfect gift, it must be accompanied by an express declaration of trust, either written or by parol, if it is to be afterwards perfected. An imperfect gift *simpliciter* will not be aided by this Court, while a declaration of trust may be. That, therefore, brings the question to one of fact—Was there an imperfect gift, or a declaration of trust?

[HALL, V.C.—Is there any other case of a gift by a husband to his wife than that of

Grant v. Grant (ubi supra)
which is material to the present one?]

Mr. Lindley.—Yes.

Penfold v. Mould, 36 Law J. Rep.
(N.S.) Chanc. 981; s. c. Law Rep.
4. Eq. 562.

As to the evidence of any declaration of trust here—

Paterson v. Murphy, 11 Hare, 88;
s. c. 22 Law J. Rep. (N.S.) Chanc.
882.

[HALL, V.C.—I must interpose here to observe that, having regard to the case of

Ward v. Turner (ubi supra),
I think that these certificates cannot be made the subject of a *donatio mortis causa*. I cannot distinguish the nature of such property from that of South Sea Stock; and in the absence, therefore, of any other or higher authority, I so decide.]

Mr. Lindley.—Then, on the evidence we say there was clearly no gift of them *inter vivos*, and so far therefore the plaintiff's case fails.

Second, as to the deposit note. The plaintiff claims that by way of gift, and also as a *donatio mortis causa*; but can a deposit note be made the subject of a *donatio mortis causa*?

[HALL, V.C.—That is concluded by authority, and I shall follow

Amis v. Witt (ubi supra).

Mr. Lindley cited,

Hewitt v. Kaye, 37 Law J. Rep. (N.S.)
Chanc. 600; s. c. Law Rep. 6 Eq.
198;

Cosnahan v. Grice, 15 Moore P.C.
215;

1 *Williams on Executors*, 4th ed. 650.

We say that to shew a gift of the note, *inter vivos*, there must be much clearer

proof than we have here. The evidence as to that is altogether too loose.

Mr. Palmer in reply. — The Court having decided that the railway scrip cannot be the subject of a *donatio mortis causa*, it remains that it is the plaintiff's by virtue of a gift of it to her. As to that, the testator gave her the debenture, and though he exchanged it afterwards, he handed her the dividends, and constituted himself a trustee of them for her. The dicta (and they were nothing more) as to certain chattels in

Grant v. Grant (ubi supra)

were carried to a very great length. If it is reasonably clear that the husband intended his wife should have the benefit of the property, then he is the donor of it and she is the donee; no matter how or under what names that result be attained, such the result is. Here the testator did so intend, and the plaintiff is entitled to all she claims—

Snellgrove v. Bailly, 3 Atk. 214;

Moore v. Darton, 4 De Gex & S. 517;
s. c. 20 Law J. Rep. (N.S.) Chanc.
626.

HALL, V.C.—The plaintiff's case is divisible into two parts. First, she claims to be entitled to certain debentures—to certain railway stock—the particulars of which are a sum of 64*l.* London, Chatham and Dover Arbitration Debenture Stock, 42*l.* London Chatham and Dover Arbitration Preference Stock, 4½ per Cent. Stock, and 14*l.* London, Chatham and Dover Arbitration Ordinary Stock, those three sums of stock representing a debenture of 100*l.* of the London, Chatham and Dover Railway Company.

Her case in respect of those three sums is founded upon an alleged gift by her husband to her of the 100*l.* debenture. The evidence in support of that gift is her own evidence, in which she deposes to the fact of the debenture having been given to her by her husband; the evidence of a *Mr. Jeffries*, a friend of the husband; and the evidence of *Sarah Taylor*, a domestic servant. The plaintiff represents that the debenture in question was given to her by her husband; that it was delivered up by her to her husband on the occasion of the

debenture being changed for the stock in question; that the certificates for the stock were afterwards given to her by her husband, and were afterwards given up again by her to her husband, by reason of the loss of one of the dividend warrants under some circumstances which are stated in her affidavit. The delivery of the debenture and the delivery of the certificates, are not deposed to by anyone but the claimant, the plaintiff herself; but the alleged gift is supported by the evidence of *Mr. Jeffries*, and by the evidence of the domestic servant, *Sarah Taylor*. The evidence of *Mr. Jeffries* is contained in the 3rd paragraph of his affidavit, which has been more than once read in the course of the argument, and it amounts to this—that he and the testator, the husband of the plaintiff, had a conversation about London, Chatham and Dover shares, and that the husband stated to *Mr. Jeffries*, so far as the memory of *Mr. Jeffries* serves him, that which is stated in his affidavit. The conversation was in reference to the expediency of *Mr. Jeffries* buying shares in the London, Chatham and Dover Railway Company, and the testator is represented to have said, "I would not if I were you. I had one 100*l.* share. It will be a long time before ever they pay anything, and I have given it to the missus. It will perhaps be worth something some time, and come in for pocket-money." Then *Mr. Jeffries* says, "I am not sure as to the exact words used by the said *William Moore*, but I am sure that he said he had given the share referred to to his wife, the plaintiff." That was in the year 1867, and the affidavit is made in the year 1874; a period of seven years or thereabouts intervening, therefore, between the conversation and the time of the filing of the affidavit. It has been observed that the statement of the witness is not very applicable to a debenture, but I do not think there is anything which turns upon that. The testator had only this 100*l.* debenture in the London, Chatham and Dover Railway Company, and that was the subject-matter no doubt that he was referring to. Well, then, we have got the evidence of the servant, *Sarah Taylor*, and the servant, in reference to the same

matter, says, in paragraph 6, "I recollect in or about July, 1872, my master handed me a letter which had come by the morning's post, saying to me, 'That is the Chatham and Dover cheque. Give that to the missus. That's the missus's property.' My mistress had not then come downstairs, so I left it on the table." She afterwards says, in paragraph 7, "My master generally handed me the letters containing the dividend cheques; and as he was generally downstairs before my mistress, he would say, 'Here is part of the missus's fortune.' I frequently heard my mistress say to the master that he had given the Chatham and Dover shares to her, to which he always assented, and sometimes he replied, 'Yes, I know I have.' I recollect my mistress wanting to sell the shares, and my master advised her to keep them, as he thought they would make more money." It appears that when these dividend cheques were received, the testator used to take them to the warehouse of the firm in which he was a partner, and to pay them into the firm and get cash for them, and no doubt the dividends were paid over to the wife from time to time as he received them.

Now the plaintiff's case as to that is a case of a gift *inter vivos*. I am so far dealing with it at present. It is a case of a gift *inter vivos*, by the husband to her, of the debenture originally, which is now represented by the three sums that I have mentioned, and the question is whether she has established, so as that the Court can act upon it, that the debenture and consequently the three sums of stock are the property of the plaintiff? Though the case be one between husband and wife, the *onus probandi* must rest upon the plaintiff to make out a satisfactory case to entitle her to relief in respect of those sums of stock founded on the alleged gift; and the case must be tried and determined exactly in the same way as it would have been tried and determined if a bill had been filed by the next friend of the wife in the lifetime of the husband against the husband. I say tried in the same way, but we should have had the evidence of the husband then, and he would either have admitted

it or he would have denied it. He being dead, it must be tried in the same way except in that respect. But we have not got his evidence in that respect, and therefore it is the case of the wife on such evidence as I have referred to, coupled with the fact of her receiving the dividends from time to time, and being allowed to receive them; and the question is whether, upon such evidence as we have here, the plaintiff is entitled to a decree? I am of opinion that the evidence is not sufficient for such purpose; it is in my judgment too loose and unsatisfactory to establish such a case. It is quite possible that the husband may have had this 100*l.* debenture which he attached very little importance to, and thought it was worth nothing and so forth, and that he was content to let his wife receive the dividends upon it and so forth; but to say that, upon this evidence, the wife could have called upon the husband, or that she could have established her case against the husband's creditors supposing he had become bankrupt, to have this stock transferred into the name of a trustee for her; to say that she could have done that seems to me to be saying that which would not be founded upon a just view of the case, with a due regard to the obligations resting upon the donee or the person claiming the gift to establish satisfactorily to the Court the existence of the gift. Therefore I hold that that part of the case is not made out so far as it depends upon the proof of the gift.

If I should be wrong in that respect, and if the evidence should be considered to be sufficient, there would then remain the very important question to be determined whether, if such were the case, the gift could be sustained having regard to the fact of its never having been made a complete gift. It is contended that, under these circumstances, the Court would hold the husband to be a trustee for the wife, and that a trust was established. It would be going, I think, further than any case has gone yet, to hold such to be the case with reference to any property of this description. It would rather seem to be that the husband, intending to make a gift of this kind to the wife, did it in an insufficient

manner. It may be from ignorance of the law, as to the necessity of putting it in some name instead of that of the wife, but he thought that handing over the certificates to her was sufficient. I am assuming now as a fact in the plaintiff's favour, that he handed over to her the debenture, and that the certificates were in her possession, and were in her possession for some time; I am assuming all that in the plaintiff's favour. The husband seems to have considered that that would amount in itself to a gift to the wife. He did not suppose that he was becoming a trustee for the wife, but he thought that the thing was complete; although he was in point of fact mistaken, because he could not make a gift of this kind to the wife. But his being mistaken in that respect is not a reason, in my judgment, why a person who never meant to become a trustee should be made a trustee, and thereby assume an office of which he never supposed he was holding the responsibilities, and which responsibilities he never meant to undertake. He meant apparently to give her this, which to his mind was a worthless sort of thing, and might or might not be worth anything by handing over to her the certificates; and there the matter was intended to be complete so far as the gift was concerned, and he was to have no more to do with it. I think that that is the correct view of the case, although it be a case of husband and wife.

I can conceive a case where different circumstances might arise; but under the circumstances of this case, I think that is consistent, and consistent only, with the decision and the view taken of these cases by the late Lord Justice Turner, and also by the late Lord Justice Knight Bruce; but more especially by Lord Justice Turner in the case of *Milroy v. Lord* (*ubi supra*). I think it very important indeed to keep a clear and definite distinction between these cases of imperfect gift, and cases of declarations of trust; and that we should not extend, beyond what the authorities have already established, the doctrine of declarations of trust, so as to supplement and supply what otherwise would be mere imperfect gifts according to authorities of the very

highest authority. I am referring to the decisions of Lord Cottenham in *Edwards v. Jones* (*ubi supra*), and of Sir William Grant in *Antrobus v. Smith* (*ubi supra*), and other cases where the distinction has always been considered to be a very marked and clear distinction; and it is only by doing that that we shall ever be able to satisfactorily dispose of these cases when they arise.

There seems almost to be a notion arising that if in some cases you have got any trust declared, however imperfect the gift is, and although the donor never meant to be a trustee at all, as, for instance, in the case of an imperfect gift to A B with a trust declared, that that is a declaration of trust, although A B does not become a trustee because he has not got the thing effectually transferred to him; and that you are to turn the donor into and make him, a trustee. That seems to me not to be consistent with the earlier and high authorities which have been cited in the course of the argument, two of which I have referred to. It therefore appears to me that the plaintiff has failed to establish that part of her case; and I do not hesitate to say that I think the plaintiff would have very great difficulties in her way even if the fact of the intended gift were made out sufficiently, which I hold it not to be. Then supposing the plaintiff not to succeed on those grounds, it is said that the plaintiff, as to the sums in question, is entitled, because what took place on the 25th and 26th of December amounts to a *donatio mortis causa* of these three sums of stock. As regards that I have said in the course of the argument that I shall hold that stock of this description is not the subject of a *donatio mortis causa* at all; and I found my judgment in that respect upon the case before Lord Hardwicke, of the South Sea Annuities—*Ward v. Turner* (*ubi supra*). Then, independently of that which would be an answer to the case, holding, as I do, that notwithstanding modern cases have gone very far beyond the earlier cases as to donations *mortis causa*; and leaving it to some higher tribunal to extend the rule; and considering as I do that stock of this description is not sub-

stantially distinguishable from South Sea Annuities, I should, with reference to that, also say, in this particular case, that the plaintiff has a further difficulty in her way as to these sums of stock, namely, Was it ever intended to be a *donatio mortis causa* at all? As to that my impression is that it never was meant to be anything of the kind, but that it was meant to be a completing of an imperfect gift; that it was meant to be, but not effectuated, a clothing of the supposed or believed ownership of the plaintiff then existing by reason of the gift of the debenture (supposing that to be established) with the possession of the documents which had gone out of her possession and were not then in her possession. What Sarah Taylor in her evidence says as to that in paragraph 5 of her first affidavit is this, "Shortly afterwards on the same day my mistress came down into the sitting-room, and I heard her say to the said Edward Moore, who had come in, 'Oh, Edward, I was going to send Sarah into the warehouse. Master has been asking if I have got my London, Chatham and Dover papers.' He said, 'I'll go and fetch them.' My mistress returned upstairs, and Edward Moore brought in some papers and handed them to me, and I took them into master's bedroom and gave them to my mistress." She there speaks of "my" London, Chatham and Dover papers—that is to say, she had said she had not got them. Her husband was anxious that she should have those documents in her possession which had gone out of her possession; and he was anxious that she should have them as being at that time the owner of them; therefore, they were put in her hands as such, and there was no idea whatever of making a new gift or a new transaction, and no idea of any incompleteness which wanted the perfection beyond the having possession of the documents in respect of this supposed existing separate ownership in the property itself. Therefore it would rather appear to me, even treating it as the subject-matter of a *donatio mortis causa*, that the plaintiff's case is one which would fail on that ground. *Edwards v. Jones* (*ubi supra*) I think is an authority rather that

way, and I know of no case to the contrary. I believe there is a case before Knight Bruce, V.C.—I think it is *Farguharson v. Cave* (1)—where an attempt of the same kind was made, and failed. I do not at all say there may not be cases of incomplete gifts, where under the circumstances, and shewing what takes place on the occasion, you may make out that the party on his deathbed meant to do that which would operate, if necessary, as a *donatio mortis causa*. I do not mean to say that you could not have a case of that kind; but the evidence in this case does not satisfy my mind that that was at all what was intended; and I take it that, in order that it should operate in that way, you must establish that it was the fair and reasonable intention of the party that it should operate as a *donatio mortis causa*, if it did not operate in any other way. Therefore, on all those grounds I hold that the plaintiff has failed to make out her case with regard to the three sums of Railway Stock, the London, Chatham and Dover Stock.

The other part of the case relates to the deposit-note, and the first question which is raised as to that is, whether it can be the subject of a *donatio mortis causa*? It has been suggested and submitted to me by Mr. Lindley that it cannot; and that, although it has been decided to be capable of such a gift, the decision is not warranted by earlier authorities upon which the particular decision must be taken to have been founded. I have said in the course of the argument, and to that I adhere, that having regard to the case actually decided by the late Master of the Rolls, I shall not depart from that decision. If that decision is to be disturbed, it must be disturbed by a higher authority than mine. I proceed, therefore, to deal with this case upon the assumption that a deposit-note is capable of being made the subject of a *donatio mortis causa*. Then it is said, supposing that to be so, that it was not intended here to be a gift out-and-out, and that it is in fact a case of imperfect gift *inter vivos*, and not a case of that kind. It is said that, ac-

(1) 2 Coll. C.C. 356; s. c. 15 Law J. Rep. (N.S.) Chanc. 137.

according to the evidence of the lady herself, it was meant to be a gift to her absolutely, and that the testator was disappointed that she had not sent and got the money at once without waiting until his death; which she would have done if the gift was intended to be one conditional upon his not surviving. Upon that part of the case I am with the plaintiff. I think that the circumstances are such as that having regard to the testator's state of health, although he may have been quite willing that the wife should go and get the money at once from the bankers, yet it is not inconsistent with that, that the gift itself should be a gift conditional upon his not surviving his then illness. I think it is consistent with that, and that that was the real character of the gift; and that if the man had recovered, the deposit-note would have had to be returned, or the money, if received, would have had to have been paid over. I think that that is the correct way of viewing the character of the transaction. Then, supposing that to be the character of the transaction, it is then said that the gift itself is not sufficiently established so as to entitle the party to the benefit of it. There is a controversy between the parties in some respects as to the evidence. No doubt as to some part of the statement on behalf of the plaintiff with regard to what took place when the testator's brother, Charles, and his wife were present, and with regard to what took place afterwards when James was present, there is a controversy. There is a controversy as to that, and a dispute upon that subject; but notwithstanding that, it appears to me that there is sufficient evidence of the actual gift of this deposit-note by the testator, that is, by the husband to the wife. The wife deposes to it; she is confirmed expressly by the servant who speaks very clearly to the fact of its being given by the deceased to the wife, and that is consistent with the fact of the deceased having sent to the warehouse for the note, and handing it over to her instead of allowing it to remain there. But I cannot accept it as a sufficient explanation that it was sent for, either for safe custody or because the wife was appointed executrix, and the tes-

NEW SERIES, 43.—CHANC.

tator contemplating death, was thinking she might as well have it at once, and that it would come into her possession as executrix. I do not know why he should have selected her to have the custody of it, because she was executrix, and the defendant was executor—they were jointly executors. Therefore I cannot accept that explanation. I do not see any reason to doubt the evidence of the servant, Sarah Taylor, as to that; and it is a very natural thing that the testator should have desired to give this out-and-out to the wife, although he had made her tenant for life of the whole of his property under his will. Therefore I come to that conclusion—having made the observation which I have in reference to the contradiction of the evidence in some respects between the plaintiff and the defendant and the brothers of the defendant—notwithstanding that contradiction, because I believe the evidence of Sarah Taylor; and in reference to that, it is not necessary for me to say anything as to whether I credit the evidence in that respect of the defendant and his brother and the wife of the brother. I say nothing upon that subject; but the case is made out in that respect to my satisfaction. Holding, as I do, upon the authorities, that the deposit-note is capable of being made a donation *mortis causa*, and considering that it is made out that it was in fact given, I, therefore, hold the plaintiff to have established her case as regards the deposit-note.

Then, that being so, the plaintiff fails as to the 100*l.*, and succeeds as to the deposit-note; and as to that, therefore, such order as may be necessary must be made. There will be no order as to the first paragraph of the prayer of the bill. There must be a proper order made to give effect to a declaration as regards the deposit-note. I suppose the defendant must concur in signing what may be necessary to enable the plaintiff to receive that. In point of fact he is the executor.

The following were the minutes of the decree pronounced:

HALL, V.C., 25th of May, 1874—

Declare, that the railway stock or shares in the bill mentioned form part of the testator's general estate, but that

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there was a valid *donatio mortis causa* to the plaintiff of the deposit-note, and order the defendant (subject to the payment of the testator's debts, &c.), to concur in any endorsement necessary to enable the plaintiff to obtain the money payable under the note, and direct the costs of the plaintiff and defendant to be taxed as between solicitor and client, and paid out of the testator's estate.

Solicitors—Messrs. Bevan & Daniell, agents for Mr. A. Heny, Derby, for the plaintiff; Mr. F. C. Greenfield, agent for Messrs. W. & W. H. Whiston & Cooper, for the defendant.

LOORDS JUSTICES. }

1874.

April 28. }

LAING v. ZEDEN.

Stakeholder — Interpleader — Parties — Costs.

Stakeholders having a bill filed against them by one set of claimants, and an action brought by the others (the legal owners), who were only made parties to the first bill by amendment after the action was commenced, filed a bill to restrain the action, not however making the first claimants parties. The bill of the first claimants having been dismissed,—Held (reversing the decision of BACON, V.C.), that the bill of the stakeholders against the second claimants must be dismissed with costs, and an enquiry as to damages under their undertaking was directed.

The only way in which a person harassed by two claims can protect himself is by an interpleader proceeding. If he litigates with the parties separately, he will have to bear the costs of the party who is successful.

This was an appeal from a decree of Vice-Chancellor Bacon, reported *ante*, p. 239, where the facts are stated. The point was shortly this—

The suit of *Hathesing v. Laing* (*ante* p. 233) was instituted by persons claiming on an alleged equity certain cotton shipped from Bombay, to restrain the

shipowners, James Laing and Mary Gourlay, from giving up the goods to the holders of the bills of lading, the Comptoir d'Escompte de Paris. To this suit the Comptoir d'Escompte were not made parties, and they commenced an action at law against the shipowners to obtain the goods. The shipowners thereupon filed the bill in this suit against Zeden, the ship's agent, and the Comptoir d'Escompte, to restrain the action, but did not make the other claimants parties to it.

The claim raised by the plaintiffs in *Hathesing v. Laing* having been disallowed, and their bill dismissed with costs, the Vice-Chancellor made a decree in the present suit of *Laing v. Zeden* (which was heard immediately afterwards) giving the plaintiffs their costs out of the fund, as stakeholders.

The defendants, the Comptoir d'Escompte, appealed.

The Vice-Chancellor had been influenced by the fact that the plaintiffs in *Hathesing v. Laing* had offered to make the Comptoir d'Escompte parties to their suit before the action was brought. They were made parties just after their action was commenced, on an order obtained before its commencement. The cotton was sold by consent in the suit of *Hathesing v. Laing*.

Mr. Kay and Mr. B. B. Rogers for the appellants.

[THE LORDS JUSTICES suggested that this was merely an appeal for costs.]

We ask for damages under the undertaking given when the injunction was granted against us. The money we could have employed in trade has been kept locked up in consols for three years. An enquiry as to damages may be directed, notwithstanding the dismissal of the bill.

With respect to the costs—

Newby v. Harrison, 30 Law J. Rep. (N.S.) Chanc. 863; s. c. 3 De Gex, F. & J., 287.

The suit is not an interpleader suit. It was to restrain a just action, and the bill should be dismissed with costs.

Mr. A. E. Miller and Mr. Edward Beaumont, for the plaintiffs, relied on the circumstances. They never opposed the appellants' claim, but were simply pre-

vented from complying with it by the injunction in *Hathesing v. Laing*. They were justified in filing the bill—

Nelson v. Barter, 2 Hem. & M. 334.

In effect the bill was a bill of interpleader.

No reply was called for.

LORD JUSTICE JAMES.—I am of opinion that the decision of the Vice-Chancellor cannot be sustained in this case. The Comptoir d'Escompte had a clear legal right to a quantity of cotton not affected by any equity whatever. Having that legal and equitable right, they brought an action against the plaintiffs in this suit, against which the plaintiffs in this suit had no defence. Thereupon the bill was filed, on which it has been shewn that there was no equity. It appears to me that the Comptoir d'Escompte have sustained damages by reason of that proceeding, and that they are entitled to have those damages ascertained. It is said that Laing was a mere stakeholder, and that he was therefore entitled to his costs against the Comptoir d'Escompte. They have done no wrong. It is said they ought not to have brought their action after the injunction had been granted in the first suit. But there was no injunction against them, and I do not quite understand how the injunction was granted. It is said, however, that Laing was a stakeholder.—It was perfectly immaterial to him whether he delivered the goods to the Comptoir d'Escompte or the other claimants. But the only way in which a man can avail himself of such a plea is by a bill of interpleader. The bill of interpleader is not a merely formal thing. It is not a thing equivalent to a bill of interpleader that is required, he must file a bill of interpleader. It does not always work complete justice, but it does so as far as possible. It gives relief between the two claimants, and it stops other litigation. It gives the stakeholder his costs out of the fund, and the other party is there to indemnify the defendant who is entitled. Here the plaintiff has not given the Comptoir d'Escompte any chance of getting their costs out of the other party. The costs should come out of

the fund, with a remedy over against the wrongful claimant. And then it is only said that he ought not to have brought the action after an injunction was granted. But we, in this suit, know nothing about that injunction. The bill must be dismissed, and dismissed with costs; and we must direct an enquiry as to damages.

LORD JUSTICE MELLISH.—I am of the same opinion. I am quite clear that at law the remedy was solely against the present plaintiffs. The defendants had a clear title on a bill of lading against the plaintiffs, but they would not deliver the goods because a third person—without any real title—asserted a claim. The only remedy of a person in the plaintiff's position under those circumstances is by a bill of interpleader. If he does not choose to file such a bill, but litigates with both parties separately, he is left liable to the party who is really entitled.

Then it is said this was as good as an interpleader bill. But it did not bring the parties together, and it left the defendant no remedy over against the other party for costs. The appeal must be allowed.

Solicitors—Messrs. Lyne & Holman, for appellants; Messrs. Lowless, Nelson & Jones, for plaintiffs.

HALL, V.C. }
1874.
April 16. }

TOMLIN v. BUDD.

Railway — Metropolitan Railway — Superfluous Lands — Extension Act — Powers of Leasing and Mortgaging — Power of Sale by Implication.

A railway company had the usual power of selling superfluous lands. By a subsequent extension act, powers were given to the company of leasing and mortgaging without limit as to time such of these lands as were connected with the structure of the railway:—Held, that the extension act did not take away the power of sale and substi-

tute powers of leasing and mortgaging, but amplified the power of sale by removing some of the restrictions upon it.

This was a suit for specific performance and was heard upon demurrer. The question in the cause turned on the powers of the Metropolitan District Railway Company to sell certain lands as superfluous lands. The two Acts bearing on the case were the Metropolitan District Railway Act of 1864, 27 & 28 Vict. c. cccxxii., and their Extension of Powers Act, 1868, 31 & 32 Vict. c. cviii.

In the first Act of 1864, the Lands Clauses Consolidation Act was incorporated, which provides, by section 127, that superfluous lands shall be sold and disposed of, or else after ten years shall vest in the adjoining landowners, and by section 128, that first the original vendors and then the adjoining landowners are to have a right of preemption.

By the Act of 1868, after reciting (amongst other things) that for the purposes of constructing their railway and works, the company had become owners of lands, houses and buildings, erected over the railway or immediately adjoining thereto or otherwise connected with the structure of the railway, and that other property in similar circumstances might thereafter belong to the company, and it was expedient that the company should maintain control over such property, and that the provisions thereafter contained should be made with relation thereto, it was enacted by section 15 as follows—

“The following provisions shall apply to any lands or buildings now or hereafter acquired by the company adjoining to or built over the railway or works of the company, and in any way connected with the structure of their railway and works, and the site thereof not actually used for the purposes of the railway, and shall apply also to any yards, gardens or premises attached to such lands or buildings, and the same lands, buildings, yards, gardens and premises, are in this section referred to as the premises.

“First. The company may hold and let the premises, and may grant leases of the same for any time they may think fit.

“Second. The premises shall not be deemed part of the undertaking of the company charged with the general mortgages or debenture stock thereof, excepting such portion of the mortgages as may be expressly charged upon the premises or upon any specific portion thereof.

“Third. The company may from time to time borrow on mortgage of the premises any sums of money, and the only security for the mortgages shall be the said premises or the parts thereof specifically mentioned in his mortgage.

“Fourth. Nothing contained in this enactment shall be construed to alter any of the provisions contained in the Acts relating to the company or any agreements entered into by the company which require the re-sale or re-conveyance of any of the premises to any person specifically named in such provision or agreement.”

The plaintiff had bought from the railway and had agreed to re-sell land adjoining the line. The purchaser from him refused to complete and demurred to his bill for specific performance.

The lands to which this suit related were admitted to be lands connected with the structure of the railway, and so within the second Act; and the question was whether they could also be superfluous lands within the first Act, so as to enable the company to make a title to them.

Mr. W. Pearson and Mr. Smart, for the demurrer.—The company cannot sell these lands, being required for the maintenance of the railway, and the provisions of the Act of 1868 do not include a power of sale. They cannot be sold under the 128th section of the Lands Clauses Act, for the powers of leasing and mortgaging are inconsistent with these provisions and are in substitution for the power of sale.

Mr. Dickinson and Mr. Jolliffe, for the plaintiff, were not called upon.

HALL, V.C., held, that the Act of 1868 had not altered the powers of the company as to the disposal of their superfluous lands under the Act of 1864. The Act of 1868, after reciting in effect that without new parliamentary powers certain lands (including the land the subject of this suit) would have to be sold as super-

fluous lands, had given the company power to hold and to lease them under proper restrictions, but nothing in the 15th section took away the power of selling the lands under the Act of 1864, though indirectly the restrictions imposed on the company by section 128 of the Lands Clauses Act were removed, when by the second Act it was provided, as to the lands or buildings adjoining to or built over the railway, and connected with the structure of the railway, that the company might lease them for any term, or mortgage them separately. Therefore under the new Act the company could sell either under an implied power of sale which they had, as owners with unlimited powers of leasing and mortgaging, or by virtue of the express powers given by the Lands Clauses Act, and amplified instead of being restricted by the subsequent Act. Therefore the decree would be in favour of the plaintiff and the demurrer must be overruled.

Solicitors—Mr. F. J. Thairwall, for plaintiff;
Messrs. Budd & Son, for defendant.

BACON, V.C. { *Re* THE FREEHOLD AND GE-
1874. NERAL INVESTMENT COM-
June 4. PANY (LIMITED);
GREEN'S CASE.

Company—Contributory—Qualification of Director—Attendance at Board Meetings—Application within reasonable Time.

In March, 1865, G. was asked to become a director of a company. He then attended three board meetings of the directors, and his name was entered in the minute book as attending, but he alleged he merely came as a visitor, and to see how the company was managed. He allowed a prospectus to be issued on which his name appeared as a director. In May, 1865, he wrote to the secretary, requesting that his name might be withdrawn, and though he afterwards acted for the company as auctioneer, he never again interfered as director. No shares were allotted to G., and his name did not

appear on the register of members. In 1870 the company was ordered to be wound up. In July, 1873, the official liquidator, for the first time, fixed G. on the list of contributories, in respect of twenty shares, the number required by G. for his qualification as director:—Held, that having regard to the lapse of time, and as G. had entered into no actual contract to take shares, his name was improperly placed upon the list.

This was a summons, adjourned into Court on the application of the official liquidator of the above company, to have Mr. William Green's name placed upon the list of contributories in respect of twenty shares.

The company was registered in the month of June, 1864. The promoters of the company were Mr. Charles Green, who was a son of William Green, and Mr. Stansby, and the principal part of the property of the company consisted of an estate at Brunswick Square, Camberwell, which was sold by Stansby to the company for 25,000l.

In the month of March, 1865, William Green was requested to become a director of the company, and on the 17th of March he attended a meeting of the board of directors, and signed his name in the attendance book. At the same meeting a new prospectus was issued, which had before been submitted to William Green for consideration, and on which his name appeared as a director.

On the 7th of April William Green again attended the board meeting of the directors, and signed his name in the attendance book.

Subsequently to the meeting of directors on the 7th of April, the prospectus on which William Green's name appeared as director, was extensively advertised, and between the 13th and the 24th of April applications for shares in the company were received from thirteen persons.

On the 4th of May, 1865, William Green wrote to the secretary of the company, and, after saying he had learnt that his name had been of no assistance to the company in their appeal to the public, requested that his name might be withdrawn.

This letter was brought before the

board of directors on the 5th of May, and in the agenda book of the day the word "read" was written in the hand of the chairman opposite the entry, but the word "withdrawn" was afterwards written over the word "read" by the secretary, and no entry with respect to the said letter was made in the minute book of the meeting.

On the 12th of May, 1865, Mr. William Green again attended a board meeting of the directors.

On the 30th of May, pursuant to instructions from the directors, the secretary of the company wrote to William Green, requesting that he would qualify as a director by taking the twenty shares in the company necessary for that purpose. To this letter William Green replied as follows—"I have to acknowledge the receipt of your letter of the 30th ultimo, from which I infer that you consider I remain as a director of the company; if so, I beg leave again to withdraw my name as, beyond allowing it to remain at the request of Mr. Stansby until after the allotment of shares had been made (it being considered possible that some of the applications might have been received through the publication of my name in the advertisements), I had no intention of departing from my letter of earlier date, in which I withdrew from the board."

This letter was read by the directors at their meeting on the 6th of June, and the directors requested their solicitor to see Mr. William Green about it. On the 9th of June the secretary wrote to Mr. Green as follows—"Our solicitor having reported to the board that you had, on his explanation, promised to qualify as a director of the company, I am instructed to ask if you will kindly carry out the arrangement;" and the secretary also wrote as to the sale of some property. On the following day Mr. W. Green replied as to the sale of the property, but neither then, nor at any time after, replied to the former part of the letter, nor took any steps to qualify for the office of director.

William Green, in an affidavit filed by him, stated that he only attended the board meetings of the directors as a

visitor, and to see how the business of the company was conducted; that he had never acted as a director of the company, that no shares in the company had ever been applied for by him, or had ever been allotted to him, and that he had never received any dividend on any shares, or any fee for acting as a director.

On the 27th of May, 1870, the company was ordered to be wound up.

In the month of July, 1873, the liquidator came to the conclusion that as Mr. William Green had acted as a director he was the owner of the twenty shares which formed the necessary qualification of a director, and then, for the first time, placed his name on a supplemental list of contributories.

On a summons being taken out by William Green to have his name removed from the list, the Chief Clerk decided in his favour, but, at the request of the official liquidator, the summons was adjourned into Court.

Mr. William Pearson and Mr. North, for the official liquidator.—Green was regularly appointed a director, and it is clear he accepted the office and acted as director. The prospectus was issued with his name, in order to induce people to take shares. Then, being a director, he must have the necessary qualification shares—

Re The North Kent Railway Extension Company; Kincaid's case, 40 Law J. Rep. (N.S.) Chanc. 19; s. c. Law Rep. 11 Eq. 192;

Re The British and American Telegraph Company; Fowler's case, 42 Law J. Rep. (N.S.) Chanc. 9; s. c. Law Rep. 14 Eq. 316;

Harward's case, Law Rep. 13 Eq. 30;

Re Diaderi & Co., 40 Law J. Rep. (N.S.) Chanc. 248; s. c. Law Rep. 11 Eq. 442;

Re The Metropolitan Public Carriage and Repository Company; Brown's case, 43 Law J. Rep. (N.S.) Chanc. 153; s. c. Law Rep. 9 Chanc. 102;

Re The Great Northern and Midland Coal Company; Currie's case, 3 De Gex, J. & S. 867; s. c. 32 Law J. Rep. (N.S.) Chanc. 421;

Re The Empire Assurance Company; Leake's case, 40 Law J. Rep. (N.S.) Chanc. 172; s. c. Law Rep. 6 Chanc. 469.

Marquis of Abercorn's case, 4 De Gex, F. & J. 78; s. c. 31 Law J. Rep. (N.S.) Chanc. 828,

is distinguishable from this case, and it did not, like all the other cases, arise under the Act of 1862.

Mr. Romer, for William Green.—Admitting, for the sake of argument, all the facts which are disputed, I still contend, on the authorities, that Mr. Green's name ought not to be placed on the list.

The following facts in this case are not disputed—

1. That a person before being a director must hold twenty shares.

2. That a person by taking a contract from the company ceases to be a director.

3. That Green made no application for shares, that no shares were allotted to him, and that he received no fees as director.

4. That nothing has been done since June, 1865.

The following facts are in dispute, but I will admit them—

1. That Green attended three meetings.

2. That he allowed a prospectus to be issued in his name.

Now I contend that a person who merely acts as director does not thereby contract to take shares—

Abercorn's Case (ubi supra).

The principle on which this case was decided was the same before as since the Act of 1862. It has often been regarded as a binding authority since that Act—

Re Llanharry Hematite Iron Ore Company; Tothill's Case, 35 Law J. Rep. (N.S.) Chanc. 120; s. c. Law Rep. 1 Chanc. 85;

Roney's Case and Stock's Case, 4 De Gex, J. & S. 426; s. c. 33 Law J. Rep. (N.S.) Chanc. 731;

Brown's Case (ubi supra).

Kincaid's Case (ubi supra);

was before *Brown's Case*, and there the director had subscribed an undertaking that he would take the necessary number of qualification shares. In

Harwood's Case and Fowler's Case (ubi supra),

there were absolute allotments. In

Currie's Case (ubi supra), the directors had expressly agreed in writing to take 100 shares. In

Leake's Case (ubi supra), the only question was whether the shares were fully paid up. The dispute in

Re Disderi (ubi supra), was whether the payment made was *bona fide*.

On the facts of the case there is no sufficient evidence to shew that Green acted as a director; it is not enough to show that he attended board meetings, or did formal acts—

Re Peninsular, West Indian & Southern Bank; Austin's Case, Law Rep. 2 Eq. 435;

Re The Imperial Land Credit Company; Eve's Case, 37 Law J. Rep. (N.S.) Chanc. 844.

The order for winding up was not made till five years after Green had distinctly refused to take shares, and it is now four years since the winding-up. On the question of time alone we ought not to be placed on the list—

Ex parte Brotherhood, re The Agriculturist Cattle Insurance Company, 31 Beav. 365; s. c. 31 Law J. Rep. (N.S.) Chanc. 861; s. c. on app. 4 De Gex, F. & J. 566.

Mr. William Pearson, in reply, on question of delay, cited—

Sidney's Case, Law Rep. 13 Eq. 228.

BACON, V.C.—Indeed, I think it would be the most unreasonable and unlawful thing that could be imagined, if I were to accede to the request of the official liquidator in this case, unreasonable in the highest degree, because it is not until nine years after this communication by letter, which never went beyond that, that there was any suggestion that Mr. Green was a director. The winding-up has been going on for four years, the liquidator has had an opportunity of looking into all these matters, reading all these books, knowing all these transactions, and has had the valuable assistance of the secretary, whose affidavit now is the principal support of the application before me. When I say it would be unreasonable I do not mean there is any

statute of limitations or any positive rule; but it would be highly unreasonable to rip up a thing of that kind at the end of ten years.

But, putting that aside, my opinion is there is no ground in law for what has been argued. Cases have been referred to, and there have been various expressions of different Judges in those cases, but in the judgments which Judges pronounce, it is inevitable that, having their minds full, not only of the case before them, but of the principles involved in the cases which have been referred to, a Judge, in stating as much as is necessary to decide the case before him, does not always express all that might be said upon the subject. That leaves it open sometimes to misconstruction, and enables ingenious advocates, by taking out passages which are to be readily found, to draw conclusions which the Judge never meant to be drawn from the words he used. But among all these cases, has any case been mentioned in which a man has been fixed as a director or shareholder or anything else, in which there has not been a contract between the parties? In *Kincaid's Case* (*ubi supra*), and every other case, there has been a contract for something or other—a contract to sustain some character, either a subscribing of the agreement or in some other way there has been something on which you could fasten the liability. In this case there is not the beginning of any such thing. Of all the cases that have been decided, *Austin's Case* (*ubi supra*) seems to me to be most like this. I do not forget what has been argued about the *Marquis of Abercorn's Case* (*ubi supra*), because that is valuable on principle, and lays down plainly that you shall not fix a man as director in a company, who has never meant to assume that character himself. If he has called himself by the name—if for the purposes contemplated by him and the persons with whom he was then in connection, he has called himself director, that is not according to the *Marquis of Abercorn's Case* (*ubi supra*), a serious fixed intention to become a director. It is not suggested in this case that any creditor has been misled, or any co-director misled, or anybody

imposed upon by the fact that for a certain number of days or weeks this gentleman was called under the name of director. All that is made out on this evidence is that which Mr. Green himself furnishes. He says there being a company in contemplation, I being selected to become a director, being under no obligation, said I would look into the matter and if I liked it, and if I was satisfied with the prospects of the concern, I would at some future time become a director. He says they were glad to avail themselves of his assistance and his name. The prospectus was prepared, he appears a director in it, he attends the meetings on this conditional agreement that if in the result he is not satisfied with the prospects of the company he will not have any thing to do with it, and then by the plainest intimation that can be conceived, he says to the company, "All the assistance you have been able to derive from the use of my name seems to have been of no avail, if it has been useful to you I am very glad of it, but for the future we break off here (I am not using his words) I should have become a director if it had pleased me, but I am not satisfied and will not be a director." Then not being understood, the secretary comes to the front again, and makes it necessary for Mr. Green to say, "You shall not misunderstand me, I will have nothing in the world to do with it, I withdraw altogether"—that letter is read at a meeting; and then comes an unsatisfactory part of the case, because when the chairman writes "read" against that letter, when it is entered in the minute-book his secretary writes "withdrawn" over the word "read," and the secretary nine or ten years after this mixes up what he thought then with what he knows now. I cannot give attention to that. The correspondence is clear and specific. Mr. Pearson reproaches Mr. Green that when a letter was written asking him to qualify himself as a director, by having to answer that letter, answers the other part and remains silent as to that. I think that was about as prudent and proper a course as could be suggested. He had been asked before and said, "I withdraw."

He is asked a second time and says, "I will withdraw;" comes the secretary and says, "qualify yourself as a director," and he says nothing. I think he acted perfectly rightly.

Now, as to the acts as director, which are so much insisted upon, there being no trace of a reason why he should be director except that which you can draw from his own affidavit that he agreed to come in for a time, compare that with what was done in *Austin's Case* (*ubi supra*). Austin went to the board and sat with the board, signed the cheques, acted in a substantial way as a director, and shares were allotted to him, none of which ever took place in this case, and when they were allotted they were sent back again by him, he saying, "As to holding any shares I will have nothing to say to it." That was held to be perfectly right on his part, and the attempt to fix him with these shares utterly failed. That case, with the *Marquis of Abercorn's Case* (*ubi supra*), and the observations made in *Brown's Case* (*ubi supra*), seem to me to be the only cases that are worth considering on this occasion, because in all the others there has been either subscription to an agreement or some plain independent separate contract, something which constituted the relation of shareholder in the company, in the person who was afterwards fixed as director.

In this case there is not a particle of anything of the sort. The persons who had the conduct of the company knew he was not a director. For the five years they carried on business they acted on that assumption, and for the four years which have elapsed since they lost all control over it and it has been in the hands of an official liquidator he has never thought of it until just now. The summons taken out by the official liquidator must be dismissed; but the official liquidator must have his costs out of the estate. I cannot, under the circumstances, give any costs to Mr. Green.

Solicitors—Mr. W. Moon, for the official liquidator; Messrs. Hunter, Gwatkin & Co., for Mr. W. Green.

LOREDS JUSTICES. } IN RE THE RUBY CONSOLIDATED MINING COMPANY, LIMITED. ASKEW'S CASE.
1874.
July 15.

Company—Motion to rectify Register—Companies Act, 1862, sec. 35—Misrepresentation and Concealment in Prospectus—Holder of fully paid up Shares—Right to summary Relief—Practice.

Where a holder of fully paid up shares in a limited company applied by motion under the 35th section of the Companies Act, 1862, to have his name struck off the register of shareholders, on the ground that he had been induced to take the shares through misrepresentation and concealment of material facts in the prospectus, and his application had been granted in the Court below, the Lords Justices on appeal declined to dispose of the case, on the grounds that the effect of granting the application would be to entitle the applicant to recover from the company as of course the money he had paid for his shares, that the question would be more properly heard and determined in an action or suit than in a summary way upon an application of this kind, and that since the applicant's shares were fully paid up he would be subjected to no liabilities by being retained on the register pending such proceedings. They accordingly directed the motion in the Court below to stand over, with liberty to the applicant to take such proceedings as he might be advised.

This was an appeal on behalf of the above-named company, from an order of Malins, V.C., granting an application made by Mr. Henry William Askew by motion under the 35th section of the Companies Act, 1862, to have the register of shareholders rectified by striking off his name, on the ground that he had been induced to take the shares which he held in the company by fraudulent misrepresentation and concealment in the prospectus of the company.

The company was registered in May, 1872, its object being to acquire, work and develop certain silver mines in Nevada in the United States. The prospectus of the company stated that the titles to the properties had been investigated and found perfect, and that the price

to be paid by the company was 285,000*l.* cash. Upon the faith of this prospectus Mr. Askew applied for fifty shares of 10*l.* each in the company. These were allotted to him in June, 1872, and upon allotment he paid for them in full. In May, 1874, in consequence of certain statements made at a meeting of the company at which he was present, Mr. Askew made inquiries into the affairs of the company, and thereby learned that a short time previously to the purchase of the mines by the company, Hartmont, one of the directors named in the prospectus, and certain persons associated with him, had purchased the properties from one Heynemann for 40,000*l.*, and that Hartmont and his associates had subsequently sold the properties to the company for 285,000*l.* The prospectus was silent as to this transaction. It further turned out that the 285,000*l.* was paid to Hartmont and his associates not in cash, as the prospectus stated was to be the case, but in fully paid-up shares, and that the other directors, or some of them, had received out of these shares a sufficient number to give them their qualification as directors. It further appeared that the statement in the prospectus that the title had been investigated and found perfect was untrue, and that in fact as late as June, 1872, after the date of the prospectus, the solicitor of the company had been requested to ascertain whether the title was good, and there had been some litigation in America relating to the title.

The Vice-Chancellor held that the case was one within the scope of the 35th section of the Companies Act, 1862, that there had been misrepresentation and concealment in the prospectus which invalidated the contract to take shares entered into by Mr. Askew, and that the application must be granted with costs. The company now appealed from this decision.

Mr. Cotton and *Mr. Kekewich*, for the company, appeared in support of the appeal.—There was no suggestion that any of the directors besides Hartmont were aware at the time of issuing the prospectus of the purchase by him for

40,000*l.* The knowledge of one director was not the knowledge of the Board, still less of the company. A fraud committed by one director on his co-directors could not be imputed as a fraud on the part of the company. They cited

Re The Reese Silver Mining Company,
36 Law J. Rep. (n.s.) Chanc. 385;
(L.J.J.) *ibid* 618; s. c. Law Rep.
2 Chanc. 604.

Kent v. The Freehold Land and Brick-making Company, 37 Law J. Rep. (n.s.) Chanc. 653; Law Rep. 4 Eq. 588; s. c. (on appeal) Law Rep. 3 Chanc. 493.

Mr. Glasse and *Mr. Graham Hastings*, for the respondent, *Mr. Askew*.—*Mr. Askew* has been deceived by the misrepresentations in the prospectus, and was entitled to have his name removed from the register—

Ship's Case, 2 De Gex, J. & S. 544. This application to rectify the register by removing his name was properly made by a motion under the 35th section of the Companies Act, 1862—

In re The Bank of Hindustan, &c., Ex parte Los, 34 Law J. Rep. (n.s.) Chanc. 609, 615.

[JAMES, L.J.—Where a man has paid up his shares in full, to decide that he is not a shareholder would be equivalent to deciding that he was entitled of course to recover the amount he had paid on his shares. This is not a convenient mode of deciding that question.] [MELLISH, L.J.—Where a man is under liability as a holder of partly paid up shares, and may become subject to fresh liabilities by being suffered to remain on the register, it may be very proper that this Court should exercise a summary jurisdiction, but the case of a fully paid up shareholder who is under no liability is different.]

The rights of a fully paid up shareholder in the surplus assets of the company, would be affected by reason of his being retained on the register if the company were wound up before his action or suit had been heard—

Oakes v. Turquand, 36 Law J. Rep. (n.s.) Chanc. 949; s. c. Law Rep. 2 E. & I. Ap. 325;

Ex parte Ward, 37 Law J. Rep. (n.s.)

Exch. 83; s. c. Law Rep. 3 Ex. 172; and

Addie v. The Western Bank of Scotland,
Law Rep. 1 Sc. Ap. 145,
were also referred to.

JAMES, L.J., said that they could not dispose of the case on this application. The order of the Vice-Chancellor must be discharged, and the motion before him stand over, with liberty to the applicant to take such proceedings as he might be advised. The Vice-Chancellor had not fully apprehended that in granting the application he was completely determining the matter which would have to be determined in any action or suit which the applicant might bring for the recovery of the amount paid by him on his shares. For *Alison's Case* (1) had determined that if a man were held not to be a shareholder in a company, the order discharging him from being a shareholder made it a mere matter of course to return to him the money he had paid on his shares. So in this case if Mr. Askew's name were to be struck off the register in accordance with this application the same consequences would follow. Here the applicant was under no liability. As he had paid up his shares in full he could not be called upon for a farthing more. The question whether he was entitled to have his name struck off the register should be tried in some proceeding in which witnesses might be examined and cross-examined. It would be better tried in some more formal proceeding than on this motion. This motion must therefore stand over.

MELLISH, L.J., said it was quite clear that the 35th section of the Companies Act, 1862, gave the Court a discretion in cases of this kind not to make any order where it considered that the question could be more properly tried by another proceeding. In his opinion this was so in the present case. Askew ran no risk by being left on the register pending such proceedings as he might take. If he had been the holder

of unpaid shares there would have been strong ground for contending that he was entitled to be relieved at once in a summary manner on this application. But here the only real question was whether he was entitled to recover the 500*l.* paid by him upon his shares. That question would be more properly decided in an action in the ordinary way, on evidence directed to the point. The order must be that stated by Lord Justice James. The costs of this application to be dealt with when it came again before the Vice-Chancellor.

Solicitors—Messrs. Markby, Tarry & Stewart, for appellants; Messrs. Harper, Broad & Battock, for respondent.

LOARDS JUSTICES. }
1874. } CABALLERO v. HENTY.
March 11. }

Vendor and Purchaser—Sale by Auction—Misleading Particulars—Sale “subject to existing Tenancies”—Constructive Notice—Specific Performance.

A public-house and premises put up for sale by auction were described in the particulars as in the occupation of certain persons at certain rents. The conditions stated that the property was sold “subject to existing tenancies.” The defendants, who were brewers, by their agent became the purchasers of the property at the auction. Shortly afterwards they discovered that the property was in lease to another brewer for a term of years, of which about nine remained unexpired. Thereupon they refused to complete their contract. In a suit against them by the vendor for specific performance,—Held, that there was a mis-description of the property, which precluded the vendor from enforcing the agreement, and that the purchasers had not constructive notice of the lease.

James v. Litchfield, 39 Law J. Rep. (N.S.) Chanc. 248; s. c. Law Rep. 9 Eq. 51, dissented from.

(1) 42 Law J. Rep. (N.S.) Chanc. 505; s. c. on App. 43 Law J. Rep. (N.S.) Chanc. 1; s. c. Law Rep. 15 Eq. 394 and 9 Chanc. 1.

This was an appeal from a decree of the Master of the Rolls dismissing the plaintiff's bill with costs.

The bill was filed by the plaintiff, as vendor, for the specific performance of a contract entered into by the defendants for the purchase of a public-house at Arundel, Sussex, known as "The General Abercrombie." The said public-house, together with other freehold property at Arundel belonging to the plaintiff, was put up for sale by auction on the 30th of October, 1871, in several lots, subject to certain conditions of sale. The said public-house formed lot 6, and was described in the particulars as "all that capital freehold full-licensed public-house, known as 'The General Abercrombie,' situate in Queen Street, Arundel, aforesaid, as the same is now in the occupation of Mr. T. W. Slatter, at the low rental of 20*l.* per annum, together with the two cottages at the back, each let at 2*s.* per week, as the same are now in the occupations of Burmand and Stilwell." Lot 1 in the same particulars was another public-house in Arundel, and was described as "The Wheatsheaf Inn," situate, &c., "as the same is now in the occupation of Mr. Lucas, under a lease of which eight years are unexpired." The particulars comprised five other lots besides these two above-mentioned, but made no reference to any tenancies in respect of any of these five lots. The conditions of sale stipulated that the purchasers should be entitled to possession or receipt of the rents and profits of the properties from the date of completion, and stated that "the properties are sold subject to the several tenancies now existing." They further provided that the properties should be taken to be correctly described as to quantity "and otherwise," and that any error or mis-statement should not annul the sale. The defendants, who were brewers at Chichester and elsewhere in Sussex, determined to purchase lot 6, with a view to extend their business, it being their habit to purchase public-houses in various localities in Sussex for the purpose of supplying them with beer and other articles. Such houses were, they stated, usually held by what was termed "a public-house occupation," determinable on a short notice, varying from six months to one month. The defendants accordingly sent their agent Peat to bid

for lot 6 at the auction, and the said lot was knocked down to him for 600*l.* He thereupon paid 90*l.* for deposit and signed a memorandum of contract as purchaser in the usual form. The contract contained no reference to any lease. It appeared that the auction, which took place at an inn in Arundel, was conducted in a very noisy and irregular manner; and that when lot 6 was put up, upon a suggestion having been made by some one that the property was subject to a lease, a noisy altercation took place between the auctioneer and several other persons as to whether there was any lease of the premises or not. The evidence as to what happened was somewhat conflicting, but it appeared that a person present at the auction produced a document which was stated to be a lease of the premises to himself, and handed it to the auctioneer, who read aloud the whole or a part of it before proceeding to a sale of the lot. The defendants' agent stated that he did not hear the lease read, and was not aware of the existence of it when he bid for the property. But the proceedings had been conducted with so much noise and confusion that the production of the lease might easily have escaped his attention. In answer to the purchaser's requisitions upon the abstract which had been forwarded to the plaintiff's solicitors, they replied to the effect that the public-house was under a lease for a term of fourteen years, which would expire in about nine years from the date of the purchase, to Mr. G. S. Constable, a brewer of Arundel. After a considerable amount of correspondence on the matter, the defendants ultimately declined to complete the purchase, on the ground that when they bought the property they were not aware of the existence of the lease, and that they had no intention of purchasing any house under lease. The plaintiff then filed her bill for specific performance of the agreement. The Master of the Rolls dismissed the plaintiff's bill with costs. The plaintiff appealed.

Mr. Roxburgh and *Mr. W. A. Clark*, for the plaintiff.—The conditions of sale stated that the properties were sold subject to the existing tenancies. This was suffi-

ent notice of the lease to the purchasers. Having this notice of the tenancies they were bound to inquire as to the interests of the tenants—

James v. Litchfield (*ubi supra*);
Daniels v. Davison, 16 Ves. 249;
Bailey v. Richardson, 9 Ha. 734;
Taylor v. Stibbert, 2 Ves. 437;
Sugden's Vendor and Purchaser (7th ed.), 745; (14th ed.), 774.

The lease here had been read in the auction room, and this was direct notice of it to the defendants through their agent. The defendants had waived the objection (if any) on the ground of mis-description.

Hargreaves v. Rothwell, 1 Keen 154;
 s. c. 5 Law J. Rep. (N.S.) Chanc. 118;

Fordyce v. Ford, 4 Bro. C.C. 495;
 were also referred to.

Mr. Waller and Mr. Stallard, for the defendants, were not called upon.

LORD JUSTICE JAMES.—The judgment of the Master of the Rolls is right. The property was put up for sale by auction under particulars and conditions of sale [His Lordship read the material parts of them]. The defendants, who were brewers, wished to buy the property for the purpose of extending their business, and they swear they authorized their agent to buy in the ordinary way in which brewers buy public-houses in order to supply them with beer. He was not authorized to buy a public-house with a lease for eight years to another brewer. Even assuming that the agent heard the lease read, there was no reference to the lease in the agreement which he signed. It was said the purchasers were bound to go to Slatter and ascertain from him the nature of his tenancy, and *James v. Litchfield* (*ubi supra*) was cited as an authority for that proposition. I am not prepared to follow the dicta in that case, which support the notion that the doctrine of *Daniels v. Davison* (*ubi supra*) applies as between vendor and purchaser, whilst the matter still rests in contract. Such a notion does not seem to me to be deducible from the previous authorities. These decisions apply only to certain equities between the purchaser and the tenant when the pur-

chase has been completed, and have nothing to do with the rights and liabilities of vendors and purchasers as between themselves. I am of opinion that in this case the purchasers were not bound to inquire of the tenants before they bid, and that the vendor cannot enforce this agreement. His Lordship then went on to discuss the question of acquiescence on the part of the purchasers, and held that there had been no such acquiescence and that the appeal must be dismissed with costs.

LORD JUSTICE MELLISH was of the same opinion. The question was, what was the contract? The particulars shewed that Slatter was tenant, but did not shew that he held under another brewer or contain any reference to the lease. There was such a mis-description of the property as entitled the purchasers to avoid their contract, and they had done nothing to adopt it or acquiesce in it. The appeal must be dismissed with costs.

Solicitors—Messrs. Routh & Stacey, for plaintiff;
 Messrs. E. C. Holmes & Son, agents for Messrs.
 R. & G. Holmes, Arundel, for defendants.

MALINS, V.C. } *In re* THE ECLIPSE GOLD
 1874. } MINING COMPANY.
 Jan. 31.

Winding up—Additional Capital—Old Shareholders—New Shareholders—Fully Paid-up Shares—Shares partly Paid-up—Division of Surplus.

A company having spent its capital, raised additional capital by the issue of new shares, providing that if the company were wound up before the new shares should be fully paid-up no call should be made on them, except for payment of debts remaining after realisation of all the assets, and no call should be made on them for repayment to the old shareholders. In the winding up of the company more was called up from and paid by the new shareholders than was necessary to pay the debts, but the new shares were still not fully paid-up:—

Held, first, that though the surplus had arisen from the payments of the new share-

holders, yet that, in the absence of any contract to that effect, they were not entitled to have it returned to them, but that it must be divided rateably among all the shareholders, old as well as new.

Secondly, that the old shareholders were not, under the circumstances, entitled to have the amount which they had paid up on their shares equalised with the amount paid by the new shareholders on theirs by the return of the excess before division of the surplus, but that the surplus was divisible according to the amounts paid on each set of shares.

This company was constituted in 1869, with a capital of 100,000*l.*, in shares of 1*l.* each, for the purpose of carrying on mining operations in California. In 1872 the capital of the company had been exhausted, and they were largely indebted to their bankers and others. Under these circumstances, it was determined to raise a further capital of 50,000*l.*, by means of the issue of 40,000 1*l.* shares and 10,000 1*l.* bonus shares; the bonus shares to be allotted to the takers of the new shares. The new capital was issued in pursuance of certain resolutions duly passed at a special general meeting of the company, held in February, 1872. The 4th of such resolutions provided as follows—

“In the event of the company being at any time wound up before the whole amount of 1*l.* shall have been paid or called up on all the new shares which may then have been issued, such last-mentioned shares shall have the special privilege and advantage that no call shall be made thereon for any purpose other than for payment of the debts of the company which may remain after the realisation of all the assets of the company, and particularly that no call shall be made thereon for the purpose of repayment to the holders of ordinary or other fully paid-up shares, of the amount paid up in excess of the amount paid upon such new shares;” and the 6th resolution provided that—“Except as aforesaid, the new shares and the capital represented thereby shall for all purposes be deemed ordinary shares, and part of the ordinary capital of the company.”

Five shillings per share was paid by the takers of the new shares on allotment, and calls to the amount of 11*s.* per share more were afterwards made, making 16*s.* per share paid up upon the new shares. A resolution was passed for a voluntary winding up of the company in December, 1872. It subsequently appeared that a large sum which ought to have been paid by Mr. Haymen, one of the directors, on his new shares, had not, in fact, been paid by him, and that, owing to this circumstance, calls had been made on the other new shareholders to a greater extent than was actually necessary to satisfy the debts of the company.

In the course of the liquidation of the company, the sum so due from Mr. Haymen was compromised for a sum of 3,500*l.*, and, the debts being paid, this sum became a surplus returnable among the shareholders. The question then arose whether the new shareholders exclusively were entitled to this sum, or whether it was to be divided rateably between them and the old shareholders. This question now came on for argument upon an adjourned summons.

Mr. Cotton and *Mr. W. O. Harvey*, for the liquidator, whom the Vice-Chancellor had directed, for the purpose of the argument, to represent the new shareholders.—The surplus moneys which are now available for distribution have wholly arisen from payments made by the new shareholders, who, as it turns out, have had calls made upon them to a larger amount than was necessary for payment of the debts of the company. The debts have all been paid, and these moneys ought to be returned to the persons who subscribed them, *i.e.*, the new shareholders.

Mr. J. Pearson and *Mr. Everitt*, for the old shareholders, were not called upon.

MALINS, V.C.—This is a company which, in the month of January, 1872, had proved unsuccessful, and without additional capital must have been a complete failure. It was then arranged that new capital should, if possible, be obtained. Certain persons agreed to take additional shares, which were to be called new shares, and they stipulated for certain privileges, which were embodied in the 4th resolution,

passed at the general meeting of February, 1872. Under these circumstances, considering that the new capital was to resuscitate the company, and give it its only chance of success, it would, no doubt, have been a reasonable thing if it had been provided, not only that they should have certain advantages in the way of dividend, but that, in the case of a winding up, the new shareholders should be paid in full before the old shareholders got anything. But, in order to give them the right, I must find a contract to that effect, and I do not find a word of the kind. That which might reasonably have been done was not done. Probably they ought to have had that advantage given to them, and I have seen cases where such an advantage has been secured to new shareholders. But in this case they had the privilege of not being called upon, except for particular purposes, and beyond that I do not find that they contracted for anything. As to Mr. Haymen's debt, I cannot go into it. I cannot enter into the question of how the deficiency arose. I am therefore of opinion, that the debts having been paid, the sum in question, whatever remains after the liabilities have been satisfied, must be divided rateably amongst all the shareholders.

Mr. J. Pearson and Mr. Everitt, for the old shareholders.—That being so, by the terms of the 6th resolution, the new shareholders are (except as to the specific benefits provided for them by the 4th resolution) on precisely the same footing, as to their rights, as the old shareholders, and the decisions in

In re Hodge's Distilling Company, Limited, Maude's Case, 40 Law J. Rep. (N.S.) Chanc. 21; s. c. Law Rep. 6 Chanc. 51,

and

In re The Anglesea Colliery Company, 35 Law J. Rep. (N.S.) Chanc. 546; s. c. Law Rep. 2 Eq. 379; (on appeal) 35 Law J. Rep. (N.S.) Chanc. 809; s. c. Law Rep. 1 Chanc. 555,

apply. Accordingly the old shareholders who have paid up the full 20s. upon their shares are entitled to be repaid the 4s. which they have paid upon each share

over and above the 16s. which the new shareholders have paid, before the surplus moneys are divided, otherwise the assets will not be distributed according to the equities of the parties concerned, and the two classes of shareholders will not be on an equality.

Mr. Cotton and Mr. Harvey, for the new shareholders, were stopped by the Vice-Chancellor.

MALINS, V.C.—This case differs from *Maude's Case* (*ubi supra*). In that case there was no issue of new capital, but the shareholders had a right to anticipate their calls. Some had, and some had not done so; but Mr. Maude, as I understand, had anticipated his calls, and it was urged before me, and I thought there was great force in the argument, that, inasmuch as he had paid up his call, he was entitled to a greater amount of profit, if profit had been made, and so, having had a greater amount of profit, he could only share with the others according to what he had paid when the division of profits took place.

This is a case in which the company being, as I have already pointed out, in great distress, with no possible chance of success except with the addition of fresh capital—fresh capital is provided by these new shareholders. Therefore, my opinion is that, in the winding up, the capital ought to be divided amongst the old shareholders and the new shareholders, according to the amount which they have respectively advanced. It would be the height of injustice to hold that, out of the money provided by the new shareholders, the old shareholders are actually to get 5s. of their money back, and, therefore, this being a totally distinct case from anything which has occurred before, and the other cases having no application to it, the division will be as I have already stated. The costs of all parties will come out of the estate.

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Solicitor—*Mr. J. W. Sykes*, for all parties.

LORDS JUSTICES. }
 1874. } THE REPUBLIC OF LIBERIA
 July 8. } v. THE IMPERIAL BANK.

Practice—Insufficient Affidavit of Documents by Plaintiff—Vexatious Delay—Dismissal of Bill.

When a plaintiff has vexatiously delayed making a sufficient affidavit of documents in his possession relating to the matters in question in the suit, the Court will order the bill to be dismissed with costs as against the defendant who has sought the discovery.

This was an appeal from a decision of Vice-Chancellor Malins.

This suit was instituted in 1871 by the Republic of Liberia against the Imperial Bank and a number of other defendants, praying that an account might be taken of all dealings and transactions in respect of a loan raised in England in August, 1871, on behalf of the Republic, and of the proceeds thereof. The bill alleged that a sum of 4,000*l.*, which was standing to the credit of the private account of Mr. E. J. Roye, the President of the Republic, with the Commercial Bank of Liverpool, formed part of the proceeds of the loan and belonged to the Republic; and it prayed that the Commercial Bank might be restrained from parting with the 4,000*l.* to any person other than the special agent of the plaintiffs. On the 15th of February, 1872, an injunction was granted as to the 4,000*l.* against E. J. Roye and the Commercial Bank. In May, 1872, E. J. Roye having died, his son E. F. Roye came to England and took out administration to his father, and was made a defendant to the suit. In November, 1872, he put in his answer, by which he, as his father's administrator, claimed the whole of the 4,000*l.* On the 31st of May, 1873, on the application of the defendant, E. F. Roye, whose answer was then sufficient, an order was made by Vice-Chancellor Malins that the plaintiffs should, by one or more of their ministers or officers, make the usual affidavit of documents, and file the same on or before the 2nd of November, 1873 (42 Law J. Rep. (N.S.) Chanc. 574). On the 7th of July, 1873, an order was made that the Commercial Bank should pay the

4,000*l.* into Court, and this was done. The time for filing the affidavit of documents was on several occasions enlarged upon the application of the plaintiffs. Ultimately, on the 23rd of April, 1874, no sufficient affidavit having been filed, the Vice-Chancellor, on the application of the defendant E. F. Roye, ordered that the time for filing a full and sufficient affidavit of documents should be enlarged to the 12th of July, 1874; and in default of the plaintiffs' filing such affidavit by that time, it was ordered that the 4,000*l.* in Court should be paid out to the defendant E. F. Roye, and that thereupon the plaintiffs' bill should stand dismissed as against him, without further order, with costs. The plaintiffs appealed.

Mr. Glasse and Mr. B. B. Rogers, for the appellants.—Though the affidavits already made are insufficient, we have made an honest attempt to do all we can to comply with the order of the Court. The order from which we appeal is without precedent. The case of

The Princess of Wales v. The Earl of Liverpool, 3 Swanst. 567, was a totally different case. The document of which production had been ordered there was the very foundation of the plaintiff's title.

Mr. Higgins and Mr. A. G. Langley, for the defendants.—The delay in this case has been unreasonable and vexatious—

The Princess of Wales v. The Earl of Liverpool (*ubi supra*) is an authority in favour of the Vice-Chancellor's order, and the observations of the Lord Chancellor and the Lords Justices in

The United States v. Wagner, Law Rep. 3 Eq. 724; s. c. (on appeal) 36 Law J. Rep. (N.S.) Chanc. 624; s. c. Law Rep. 2 Chanc. 582,

also shew that the Court will exercise such a jurisdiction as this in a proper case.

Mr. B. B. Rogers, in reply, asked that if the Court thought the Vice-Chancellor's order should be affirmed, the cause might be heard as against the defendant Roye on bill and answer.

JAMES, L.J.—Now that all the dates and the conduct of the cause have been shewn to us, I am of opinion that the

Vice-Chancellor was perfectly warranted by all the principles of this Court in making this order. It is said that there is no precedent for making an order dismissing a bill on the ground that no sufficient affidavit of documents has been made by the plaintiff; but it is quite obvious that it must be within the power of the Court to do this, and it was not contested at last, when we put the question to the counsel for the plaintiff, that if a plaintiff who is called on to make discovery persists in refusing and delaying to make it, he cannot keep the suit for ever pending over the head of the defendant; but there must be a time at which the defendant shall be at liberty to go away from the Court and attend to his other affairs, instead of being kept here at the will and pleasure of a plaintiff who is himself recalcitrant with respect to the order of this Court. The Vice-Chancellor has had this matter before him time after time upon applications for further time; he has considered the case, and he has at last fixed a time, and has said, "If you do not make the affidavit by that time I will have no further delay, but the bill shall be dismissed." There was this case before the Vice-Chancellor, there was money in Court which had actually been taken out of the bank of a man who said that it was his money. The plaintiffs say that it is their money; the defendant says, "it is my money; it was money which was standing in my bank. You have taken it away, and you will not go on with your suit in a proper manner." The Vice-Chancellor was pressed with those considerations, and at last he said, "I will fix upon a day, and if the affidavit of documents is not made by that time, the money shall go back to the man who paid it in, and the bill shall be dismissed as against him with costs." That I apprehend was within the power of the Court if the facts and circumstances of the case justified the making of the order. I am of opinion that the Vice-Chancellor was well warranted in the exercise of his judicial discretion in fixing that time. We propose to vary his order to this extent only. It has been stated to us that there is a mail expected to come within a day or two after the

NEW SERIES, 43.—CHANC.

12th of July, and we propose, therefore, having regard to the possibility that the mail may bring the document which ought to have been put in long ago, to substitute in the order the 28th of July for the 12th of July. It is possible that that document, if it is brought, may not be quite sufficient, and there may be some other document in England wanted. But if, on the 28th of July, the Vice-Chancellor is satisfied that the order has been in substance complied with, he may then listen to any further application which is made to him. We give to the 28th of July simply because we think that in the interval it is possible that the order may be complied with. But this alteration will not affect the costs of this application. The plaintiffs must pay the costs of this application within fourteen days from to-day, and if they do not the order will remain simply as it was pronounced by the Vice-Chancellor.

With regard to having the case heard on bill and answer, I think that cannot be allowed now that the thing has been going on year after year. It is impossible to tell what injustice might be done by allowing that now. The plaintiffs ought to have taken that course before.

It was afterwards arranged that the plaintiffs should, within fourteen days, pay 75l. for the costs of the application, subject to taxation.

Solicitors—Messrs. Tilleard, Godden & Holme, for plaintiffs; Messrs. Flux & Co., for defendant.

[IN THE FULL COURT OF APPEAL.]

CAIRNS, L.C.	}	MAYNARD v. EATON.
JAMES, L.J.		
MELLISH, L.J.		
1874.		
March 2.		

Sale of Shares—Infant Transferee—Winding-up—Action against Vendor—Compromise by Retransfer—Suit by Vendor for Indemnity against the real Purchaser.

E. E. instructed his brokers to purchase 100 shares in a joint stock company to be

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transferred into the name of his son G. E. The shares were accordingly purchased from M., and transferred by E. E.'s direction into the name of his son, G. E., who was an infant, but not known by M. or his brokers to be so. The company was shortly afterwards wound up, and G. E., who had been placed on the list of contributories, commenced an action at law against M., who was an auditor of the company, for repayment of the purchase money, charging fraud and failure of consideration. The action was compromised by M. repaying the purchase money and taking back the shares, the charge of fraud being withdrawn, and M.'s name was substituted for that of G. E. as a contributory. Two and a half years afterwards M., who had paid several calls under the winding-up, filed his bill against E. E. for repayment and indemnity, alleging that E. E. was the real purchaser for his own benefit, and had passed the name of G. E. as the purchaser in order to evade liability, and also stating that the plaintiff did not know at the time of the compromise of the action that E. E. was the real purchaser :—Held, reversing the decision of one of the Vice-Chancellors, that the compromise of the action was a bar to the suit.

The object of this suit was to obtain a declaration that the defendant, Edward Eaton, was the true owner of 100 shares in the Bank of Hindustan, China and Japan (limited), which had been sold by the plaintiff, Frederick Maynard, under the circumstances hereinafter stated, and was liable to repay to him all sums paid by him in respect of calls since the sale, and otherwise to indemnify him in respect thereof with consequential relief.

On the 4th of September, 1866, the defendant, Edward Eaton, instructed his brokers to purchase shares in the Bank of Hindustan, China and Japan (limited), and they accordingly through their agent purchased for the next account day, being the 13th of September, 1866, one hundred of such shares, which had been sent into the market by Maynard.

On the 8th of September Edward Eaton directed the shares to be transferred into the name of his son George Eaton, and on the 12th of September, which was the name day, the name of George Eaton as

the purchaser was furnished to Maynard's brokers.

The purchase money, 350*l.*, was paid on the 14th of September by Edward Eaton, and the shares were transferred into the name of George Eaton, who was duly registered as the proprietor.

On the 16th of November, 1866, the auditors of the company, of whom Maynard was one, made an unsatisfactory report of its affairs to the shareholders, and shortly afterwards George Eaton wrote to Maynard informing him that he was only eighteen years of age, charging him with unfairness in the transaction and claiming back his purchase money; and in February, 1867, the company being then in course of winding-up, he, by Edward Eaton as his next friend, commenced an action at law against Maynard for repayment of the purchase money, charging fraud and failure of consideration. After the cause had been set down for trial the action was compromised, the plaintiff at law withdrawing the charge of fraud and Maynard repaying to him the 350*l.* paid for the shares. George Eaton's name, which had originally been placed on the list of contributories, was shortly afterwards removed and that of Maynard substituted.

Calls to a considerable amount were from time to time made under the winding-up, and on the 2nd of July, 1869, Maynard filed the present bill against Edward Eaton, charging that he had purchased the shares for his own benefit, and had passed his son's name as the purchaser in order to evade liability as holder of the shares, and stating that he, the plaintiff, did not at the time of the compromise know, and had no reason to suspect, that Edward Eaton was the real purchaser of the shares, or that they had been bought by his direction.

The plaintiff in his affidavit swore that he had not at the time of the sale of the shares made the investigation into the accounts which led to the unfavourable report in November, 1866.

The defendant by his answer stated that the shares were purchased out of a sum of 1,000*l.* which he had promised to advance for his son, George Eaton's benefit, having advanced the like sum for

each of his other two sons, and relied upon the compromise of the action as a bar to the suit.

Vice-Chancellor Malins, before whom the cause was heard in the first instance, was of opinion that the defendant, Edward Eaton, had purchased the shares for himself, and had given the name of his son as the purchaser in order to avoid liability in case the speculation should be unfortunate. The plaintiff had entered into the compromise without the knowledge of this fact, and it was therefore not binding upon him. His Honour therefore made a decree giving the plaintiff the relief sought by the bill.

The defendant appealed.

Mr. Cotton and *Mr. Ince*, for the appellant, after citing

Holmes v. Blogg, 8 Taunt. 508,

and

Ex parte Taylor; in re Burrows, 25

Law J. Rep. (N.S.) Bankr. 35; s. c.

8 De Gex, M. & G. 254,

were stopped by the Court.

Mr. Glasse and *Mr. Higgins* (with whom was *Mr. Grosvenor Woods*), for the respondent, contended that the compromise was made with the son in entire ignorance of the real facts of the case, and was no bar to a suit against the father. The defendant was bound to indemnify the plaintiff against all loss occasioned by his giving the name of an irresponsible purchaser—

Merry v. Nickalls, 41 Law J. Rep.

(N.S.) Chanc. 767; s. c. Law Rep.

7 Chanc. 733;

Dent v. Nickalls, 22 W. R. 218;

Castellan v. Hobson, 39 Law J. Rep.

(N.S.) Chanc. 490; s. c. Law Rep.

10 Eq. 47.

THE LORD CHANCELLOR.—I assume, for the sake of argument, that the real purchaser of the shares was the father, and that he was using the name of his son as the purchaser while intending to retain the benefit of them for himself. There might be some fine shade of difference between the case of a father buying for himself and a father buying for his son, intending *bona fide* to give his son the benefit of the purchase; but putting aside such cases I assume that the father intended to purchase the shares for his own benefit.

But these shares were registered in the name of the son, and before the action was brought for the rescission of the contract the plaintiff Maynard was informed that the transferee was an infant, and he must have known from the form of the action that the person bringing the action was an infant, as he sued by his next friend. It is clear, therefore, that at the time when the action was compromised the present plaintiff knew that the plaintiff at law was an infant. The object of the action clearly was to have the contract rescinded under which the shares were purchased from the plaintiff. Other counts were indeed added, but the action was really for that purpose, and it was so treated by both parties. Maynard tells us in his bill that he was induced to consent to the compromise under which he paid back the purchase money, because he considered that the action, if tried, would raise the question whether his conduct had been correct with reference to the sale of the shares. However the trial did not take place, and the compromise gave the plaintiff in the action the full benefit which he sought by his action, and the purchase money was returned to him. It was argued that Maynard at that time was ignorant of the fact that the father was the real owner of the shares. But supposing it to have been so, how could that in any way have been relevant to the validity of the compromise? Suppose Maynard had been told in Court when the compromise was about to be concluded that the real owner of the shares was the father, I cannot imagine in what respect it would have been relevant, either in trying the action before a jury or as to the terms of the compromise, whether the beneficial owner was the son or the father. The only person who could have maintained the action was the infant whose name was on the register. The action having resulted in the rescission of the contract, the vendor had a right to be reinstated as the owner of the shares, and by being so reinstated, he lost any right which he might have had against the father for any indemnity in respect of them. I cannot think, therefore, that the view taken by the Vice-Chancellor is right. I think that the compromise is an absolute bar to

the suit, and that the bill must be dismissed with costs.

JAMES, L.J.—I am of the same opinion. I agree with the argument that the compromise would not have been binding if there had been any concealment of truth or suggestion of what was false, but that must be understood as relating to what was relevant to the matter to be compromised; and the question whether the father or the son was the beneficial owner was immaterial to the question whether there was a valid sale of the shares. It was an action against the vendor by the real purchaser, whoever he might be, for the purpose of getting rid of the contract, and whatever the vendor's motive may have been for consenting to the compromise, the effect of it was to put an end to the transaction, and to restore the shares to the vendor.

Having thus put an end to the litigation, it is not competent to him to revive it now by filing a bill against the father.

MELLISH, L.J., concurred.

Solicitors—Messrs. Stephens & Stephens, agents for Messrs. Parrott, May & Sons, Macclesfield, for appellant; Mr. John Tucker, for respondent.

LOKDS JUSTICES.

1874.

April 30.

May 2, 4, 5, 26.

EDWARDS v. WARDEN.

Statute of Limitations—Express Trust—Mutual Benefit Society—Contract of Insurance—Condition Precedent—Non-payment of Premium—Defendants out of Jurisdiction—Unconditional Appearance—Objection to Jurisdiction not taken by Demurrer or Plea.

The Bombay Civil Fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members, and by a grant from the Government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands

of the Government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the Secretary of State for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime:—Held, that there was no fiduciary relation between the trustees of the fund and a person making a claim against the fund, and that therefore the plaintiffs could only recover the arrears of the annuity which accrued due within six years before the filing of the bill.

Held also, that even assuming that the suit ought to have been instituted in Bombay, still inasmuch as the defendants resident in India had appeared unconditionally, had not moved to discharge an order made for service of the bill on them in India, and had not raised any objection to the jurisdiction by demurrer or plea, and as the Government of India in fact held the money, and had taken no objection to the suit, the Court ought to decide the question in dispute.

By the original rules of the fund the annuity to which the widow of a member was entitled depended upon the amount of his property at the time of his death. The rules were afterwards altered so as to give the widow of a member a fixed annuity independently of the amount of her husband's property. But it was provided that, to entitle a member to the benefit of this provision on behalf of his family, he must, after he had accepted a retiring annuity, subscribe to the fund one per cent. per annum on his annuity, or one per cent. on the total value of his annuity at the time of acceptance.

A member retired while the altered rules were in operation. They were suspended a few months after his retirement, and the suspension was not removed till after his death. He never paid or tendered the subscription due from him:—Held, that the contract with the association was in the nature of a contract of insurance, and that, the premium not having been paid or tendered, no claim could be sustained by the member's widow against the association under the new rules.

This was an appeal from a decision of Vice-Chancellor Bacon.

In the year 1804 a fund, called the

Bombay Civil Fund, was established in Bombay by voluntary subscription, for the purpose of securing to the Civil servants in that Presidency the following benefits, namely—First. Assistance to a subscriber compelled by sickness or infirmity to quit India for the benefit of his health, and not being possessed of sufficient means to pay his passage to Europe and support himself and family during his necessary stay there. Second. Provision for the widows of subscribers left without adequate provision, and for their orphans left without sufficient means for their maintenance and education. Between the years 1804 and 1825 some changes were made with respect to the fund. The Government agreed to contribute 2,800*l.* a year, and to receive and retain the balances in their hands at eight per cent. interest, and provision was made for granting a certain number of annuities of 400*l.* a year each. In the year 1825 the association was, with the assent of the Government, remodelled. The contributions were made compulsory on all persons becoming thereafter members of the Civil Service, and new rules and regulations were adopted. Under the new constitution the objects of the fund were greatly changed and enlarged, so as to make it not only a provident fund for the relief of poor members and poor widows and orphans, but also—and more prominently—a fund to induce retirement and accelerate promotion, by providing annuities of 1,000*l.* a year for a certain number of members desirous of retiring after twenty-five years' service and twenty-two years' residence in India. For the purpose of effectuating this new scheme it was provided that the association should be divided into two distinct branches, sharing the capital stock between them—the Annuity Branch and the Provident or Charitable Branch; that a fixed levy of four per cent. on all salaries and emoluments and the 2,800*l.* a year provided by Government should be contributed to the Annuity Branch, and that there should be a separate contribution of one per cent. to the Provident Branch, the latter subscription being liable to be increased according to the demands of the branch, but the augmented contribu-

tion ceasing when the subscription of one per cent. should be again considered adequate to meet all claims. The right to the annuity of 1,000*l.* was subject to this provision—that in case the accumulated value of the subscriber's contributions, with interest, was less than half the value of his annuity he was to pay the difference. The provision made for widows and orphans was still made dependent on their other means. A majority of three-fourth of the subscribers had power to alter the rate of contribution, the rate or grant of pensions or annuities, and to make any addition to or change in the rules and regulations of the association, with this proviso—"No decision upon general questions, or upon any other question affecting the resources or the expenditure of the fund, shall be final until sanctioned and approved of by the Court of Directors of the East India Company, to whom all parties considering themselves aggrieved by such decision shall have a right of appeal, and the decision of the Honourable the Court of Directors shall in all cases be final." By the rules of 1825 it was provided that the whole property of the fund should be vested in trustees, consisting of the committee of managers for the time being, who were to be five *ex officio*—namely, four high Government officials and the secretary of the fund—and four others elected annually, the leaving Bombay without intention to return during the current year being *ipso facto* a vacating of the office. The provision that the property should be vested in the managers as trustees was, however, never really acted on, but the funds were always in the treasury of the Government on behalf of the association, and existed only as a floating debt of the State.

In the year 1826 a Mr. Farish proposed at a general meeting of the subscribers to the association the following resolutions, which were carried: 1. "That the pensions now granted only to widows and children who do not possess property to the amount specified in the regulations, be henceforward granted in all cases to the widows and children of members of the new Annuity and Charitable Fund without reference to property." 2. "That

to entitle a member to the benefit of the foregoing resolution on behalf of his family, after he shall have accepted the annuity he shall subscribe to the charitable fund one per cent. per annum on his annuity, or one per cent. at the time of acceptance upon the total value of his annuity, as laid down in the table furnished in by the Court of Directors." 7. "That the operation of the above and other resolutions shall be suspended until the favourable decision of the Honourable Court be received to the propositions for transferring to the Charitable Fund the capital of the institution as it stood on 30th of April, 1825, after deducting for the Annuity Fund 533,333 rupees."

Some years elapsed before the assent of the Court of Directors was obtained to the division of the fund, but at a general meeting held in January, 1830, a despatch containing such assent was received, and the suspension of Mr. Farish's resolutions thereupon ceased. In June, 1830, however, it was considered by the managers that the increased burden on the fund which those resolutions would occasion could not be borne without additional resources, and it was therefore proposed that the subscriptions should be thenceforth levied at the rate of two per cent., and that such additional levy should have a retrospective effect as from the 1st of May, 1825. The latter proposition failed to secure the requisite assents, and, in consequence, Mr. Farish's resolutions were again suspended by unanimous vote. Communication had been in the meantime made to the English agents of the fund for the purpose of their intimating to the annuitants then in receipt of their annuities that the suspension of Mr. Farish's resolutions had been removed, and in effect inviting them to avail themselves thereof. Before anything, however, was done on this, a further communication was sent, announcing that the resolutions had been again suspended, accompanied by an intimation in effect that the right of the annuitants was suspended, but that if and when the suspension was again removed the annuitants should receive due notice, so as to be able to avail themselves of their right to contribute.

The following provisions contained in

the regulations of 1825 are also material with reference to one of the questions raised in this case. By article 11, sections 1, 2 and 3, it was provided: 1. "The widow of every member of the new Annuity and Provident Fund dying shall be entitled to receive from the fund an allowance or pension not exceeding 300*l.* per annum." 2. "If she be possessed of property exceeding 200*l.* per annum at the time of her husband's death, or shall be entitled to property to that amount from any and every source and sources whatever independent of this institution, the allowance or pension shall be reduced in such amount as her property may exceed that sum, so that the allowance or pension of a widow, taken together with such property as she may possess or be entitled to, shall not in any case exceed 500*l.* per annum." 3. "In estimating these sums, legacies and bequests to the children and their separate property of any kind shall not be considered as forming any part of the income of a widow."

And by article 12, section 4, "In estimating the income of a child or children, the same rules are to be applied as in estimating the value of the income of a widow, and the property left by a deceased member is to be considered as the property of the widow and children collectively in settling their claims upon the fund."

Mr. Thomas Flower was a civil servant in the Bombay Presidency, and he was a member of the Civil Fund from its formation. He assented to the new Constitution adopted in 1825, and the new rules and regulations made then, as well as to Mr. Farish's resolutions in 1826. In the year 1829, Mr. Flower received intimation that he was entitled, if he pleased, to retire as from May, 1830, upon an annuity of 1,000*l.* a year, on payment of the amount required by the rules. He accepted the offer, and on the 24th of May, 1830, his agents were informed that the sum to be paid by him was 32,510 rupees. The sum was forthwith paid into the treasury, and thereupon Mr. Flower became entitled to his annuity, and ceased to be a Civil servant as from the 1st of May, 1830. He therefore became an an-

nuitant while Mr. Farish's resolutions were in operation.

He left India, and went to reside in England. He never paid or tendered any additional subscription to the fund under the terms of Farish's resolutions, and, indeed, he never did any act with reference to those resolutions, but he received his annuity in full up to the time of his death. He died on the 11th of February, 1834, leaving a widow and one daughter surviving him. He left property which produced an income exceeding 500*l.* a year. By his will he gave the whole of his property to his widow, with the exception of 6,000*l.*, which he gave to his daughter, but during her minority the income of the 6,000*l.* was to be paid to her mother for her maintenance and education.

In the year 1838 the widow made an application to the agents of the fund in London for the payment of an annuity to her under Farish's resolutions. This application was refused, and she took no further steps to enforce compliance with her demand. On the 15th of October, 1842, the daughter attained the age of twenty-one, and on the 13th of March, 1843, the widow wrote to the agents in London of the fund as follows—

"I do myself the honour to apply to you under the following circumstances: By the will of my late husband, our daughter, on coming of age on the 15th of October last, became entitled in her own right to the sum of 60,000 rupees, the interest of which until that period had been paid over to me by her trustees for her education, &c. My annual income has consequently now been reduced to the sum of 422*l.* 2*s.* 2*d.*, and which reduced scale of income may, I hope, from the above date, now be made good to the amount of 500*l.* per annum, in accordance with the liberality of the regulations of the Civil Fund, to which my deceased husband was so long a contributor. I have only to add that, should you feel yourselves unable to comply upon your own responsibility with the above request, I hope that you will bring the same as speedily as convenient to the favourable consideration of the trustees of the fund in India."

This letter was laid before a general meeting of the subscribers to the fund, but the request was not acceded to, it being considered that the widow was not entitled to the allowance which she claimed. She took no further steps to enforce her claim; and on the 23rd of December, 1863, she died. No payment out of the fund was made to her during her lifetime.

The daughter, who had, in 1845, married Mr. Tenison Edwards, took out administration to her mother's estate, and on the 30th of July, 1867, the bill in this suit was filed by Mr. and Mrs. Edwards, claiming the benefit of Farish's resolutions, and, in the alternative, alleging that the widow was, at all events, entitled under the rules of 1825 to a considerable annuity, even having regard to the amount of her property, as from the time when the daughter attained twenty-one. The defendants to the bill were four persons who were or had been members of the committee of management of the fund, and the secretary, as representing the entire body, and the Secretary of State in Council for India.

An order was made for service of the bill in India on the defendants (other than the Secretary of State), who were residing there. No application was made to discharge this order, and the defendants did not raise any objection to the jurisdiction of the Court by demurrer or by plea. They, however, by their answer, in which they raised a defence on the merits, also objected that the Court had no jurisdiction to entertain the suit.

The Vice-Chancellor was of opinion that the widow was entitled under Farish's rules to an annuity of 300*l.* from the time of her husband's death until her own death, and decreed payment of the arrears for the whole of that period, with interest at five per cent., less the amount of subscription which Mr. Flower ought to have paid under the rules.

The trustees appealed.

Mr. Cotton, Mr. Kekewich and Mr. Horne, for the appellants.—The suit is brought in the wrong *forum*; it ought to have been instituted in the Bombay Court. There is no fiduciary relation between the plaintiffs and the defendants, and

therefore lapse of time is a bar to the suit, or at least nothing can be recovered but payments of the annuity which accrued due within six years before the filing of the bill. It is like the case of a mutual assurance society; the trustees hold the funds on trust for the whole body of members, but they are not trustees for a person claiming against the whole body. It is an adverse claim by one member against the association. But on the merits there was no contract between Mr. Flower and the association under Farish's rules, as he never made or tendered the payment he ought to have made under those rules. It is like the case of a contract of insurance, where it is essential that the premium should be paid as a condition precedent to the existence of the contract. Mr. Flower knew of the suspension of the rules, and acquiesced. Moreover, on the true construction of the rules of 1825, having regard to the total amount of Mr. Flower's property, his widow was not entitled to any annuity. It does not signify how he divided his property among his family.

Mr. Kay, Mr. A. E. Miller and Mr. Beaumont, for the trustees.—The objection to the jurisdiction cannot now be sustained. It ought to have been taken earlier. The funds, too, are in the hands of the Government, and the Secretary of State is in this country and has raised no objection—

The East India Company v. Robertson,
12 Moore P.C. 400,

and

Boldero v. The East India Company,
11 H. L. Cas. 405,
are in our favour as to the jurisdiction.

Then we say that the whole body of the association are trustees of the Provident Fund for the widows and children of members who are entitled to receive benefits out of it. The members themselves had no interest in that fund; they subscribed to it only for the benefit of their families. Mrs. Flower was not a member of the association and was ignorant of the rules, and she could not therefore be bound by any acquiescence so long as she was ignorant of her rights. The case is really one of an express trust.

On the merits, the *status* of a subscri-

ber could not be altered by anything which took place after he retired—

The East India Company v. Robertson,
(*ubi supra*);

Boldero v. The East India Company
(*ubi supra*);

Armitage v. Walker, 2 Kay & J. 211;
The Secretary of State for India v.

Underwood, 39 Law J. Rep. (N.S.)
Chanc. 569; s. c. Law Rep. 4 E.
& I. App. Cas. 580.

The suspension of Farish's rules after Mr. Flower retired could not affect his rights. The payment of the one per cent. by him was not a condition precedent; the association might have deducted it from his annuity. If he had tendered it, they would have refused to receive it.

As to the construction of the rules of 1825, that is in our favour; the widow was clearly entitled to an annuity sufficient to make up her income to 500*l.* a year when the daughter attained twenty-one.

Mr. Cotton in reply.

Mr. Macnaghten, for the Secretary of State, took no part in the argument.

The judgment of the Court was reserved.

On May 26 the judgment of the Court was delivered by

JAMES, L.J., who (after stating the facts as above, and observing that it might fairly be presumed that Mr. Flower was informed of the communications which were made to the London agents of the fund in 1830 and afterwards during his lifetime with respect to Farish's rules) proceeded thus—The Secretary of State has taken no part in the discussion before us. The other defendants insist that the suit ought not to have been instituted in and ought not to be entertained by this Court, the proper *forum* being the High Court at Bombay. But they admit at the bar that, if the suit could be sustained in this country against the association or body by means of members representing it, they may be taken as sufficient representatives of such association or body. It certainly does seem a very strong proceeding for a Court of justice in this country to summon an association of

members at Bombay, who from the nature of the society must be all public servants there, and to call on the managers and trustees of that body, who must be for the most part engaged in the performance of high official duties at, and be all actually resident in, Bombay, to come in and plead and litigate here. It is to be observed that by the rules the annuities to widows and children are payable in English money, and are to be paid in England if the annuitants reside in England or elsewhere in Europe. We think, however, that it is unnecessary to determine whether the circumstance of the annuities being made payable in England gives jurisdiction to this Court to enforce payment, because, assuming that if a motion had been made to discharge the orders for service of the bill in India, and the objection to the bill had been raised by plea or demurrer, it would have been fatal; still, having regard to the fact that the defendants did appear unconditionally to the suit, that no application was made to discharge the orders for service of the bill in India, that no objection to the jurisdiction was raised either by plea or by demurrer, that the case has been fully litigated here in pleadings evidence and argument on all points, and that the Government of India really holds the money and has taken no objection to the suit, we think that we ought to deal with and determine the question which has arisen between the parties.

First, then, as to the right of the widow and daughter to the benefit of Mr. Farish's resolutions. It is contended, and we think rightly, that Mr. Flower, having ceased to be a member, and having become an annuitant after the suspension had been removed and before it was re-introduced, became for himself and his wife and daughter absolutely entitled to the benefit of those resolutions, and that the members could not by any subsequent act deprive him of his vested right. But what was that right? A right by subscription to a fund during his life to obtain after his death a certain benefit to his wife for her life if she should survive him, and a certain benefit to his daughter if she should survive him and be then a minor. It was a right to have what was

an exact equivalent to a very ordinary policy of insurance granted by insurance offices. But it is of the essence of all such contracts that the premium should be paid, and there is no distinction between the subscription in this case and the premium payable to an insurance office. But it is said that in this case the association, by suspending the resolutions before Mr. Flower could contribute, and, by their communication to the London agents, deprived him of the means of subscribing, and therefore absolved him from the performance of the condition precedent. But there is, in our opinion, a fallacy in treating it as a waiver of a condition precedent, or anything analogous to that. What Mr. Flower had was a right to purchase an insurance for a certain sum of money or for certain annual payments, and he was told that the whole scheme, including the granting of the insurance, was for the present suspended. He acquiesced in that, and never paid or tendered his money. It was at the utmost a rescission of a contract giving a right of purchase. He might, of course, have disputed the right to rescind or suspend, but he was bound to do so at once or within a reasonable time, and to insist on his right to pay his subscription or premium and obtain his insurance. It is like a contract for sale of a lottery ticket; if it is rescinded by the vendor and the purchaser acquiesces therein, and keeps his money without tender, protest or objection, it would be impossible for him afterwards to insist on the contract and claim the prize if it should have drawn one.

It is further said that in this case the annuitants were induced to acquiesce by the following promise, contained in a letter of the secretary of the 9th of September, 1831, to the London agents:—"Many applications having of late been made to the trustees by the annuitants in England to be admitted as subscribers to the charitable branch of the fund on the terms laid down in Mr. Farish's propositions, I request you will have the goodness to acquaint any gentleman from whom enquiry on the point may be addressed to you that, should the propositions be again brought into full operation, no time will be lost in communicating the same,

with the view to an option being allowed to all who may be disposed to avail themselves of the benefit resulting from them;" and it is said that the propositions or resolutions were again brought into full operation (although after Mr. Flower's death) on certain terms and conditions. It is contended that the widow and daughter became then entitled to obtain the benefits on paying the sums which Mr. Flower would have paid if he had subscribed on his retirement. But the letter referred to, when properly considered, so far from supporting the contention of the plaintiffs, really goes very strongly against them. It gives distinct notice of the view of the position taken by the association, and, withdrawing for the present all option under Mr. Farish's resolutions, it promises in the future to tender again, in a certain event, a similar option—that is, an option to an annuitant to subscribe, and so purchase the contingent benefit. It did not mean, and could not mean, that if Mr. Farish's resolutions were again brought into full operation, and any annuitant should die in the meantime, leaving a widow and children, that widow and those children should have the option—it would be absurd to call it an option—the absolute right to the benefit on paying the small amount of subscriptions which would in that case have been payable during the annuitant's life. You cannot deal with the right to an insurance against a contingency when the contingency has become a certainty. In this case one is apt to be misled by the fact that Mr. Flower died so soon after he received his annuity, and that his widow lived so long after him.

It is said, it is obvious that, if the association had not prevented him, Mr. Flower would have paid the few pounds a year subscription to secure the great benefits he would thereby have secured. But it is of the very nature of life insurance, and of all contingent benefits connected with life, that, if the payer dies immediately or soon after, the benefit obtained should seem enormous compared with the price paid. It is impossible to predicate of the annuitants generally, or of any particular annuitant, that they or he would have accepted the op-

tion. What a man may have thought of his own or his wife's chance of life, or of his chance of marrying a wife at all, or whether his means were such as to make the difference between the regulations of 1825 and Mr. Farish's resolutions immaterial, are things which it is impossible to speculate upon with a view to place the widow and child of a man who had not subscribed on the same footing as if he had subscribed. It is not unimportant also to bear in mind that the whole class of annuitants acquiesced in the suspension, and that if any attempt had been made in or soon after 1830 to enforce the rights of the annuitants to subscribe under Mr. Farish's resolutions, it is by no means improbable that an appeal might have been successfully made to the Court of Directors, on the ground that a new burden was created without any adequate corresponding resource. And it appears that in 1842 the directors wrote as follows with respect to the revised regulations of 1840, having a similar object—

"We find that you allow eight per cent. interest upon the whole of the balance and subscriptions of the provident branch of the Bombay Civil Fund. To this we object, as part of those subscriptions consists of the increased rates levied under the revised regulations (which we have not recognised) for extending advantages to the widows and children of the members of the fund. We must therefore decline a higher rate of interest than four per cent. upon the new subscriptions raised for securing to widows an annuity of 300*l.* without reference to property."

We have arrived at the conclusion that even if the claim under Mr. Farish's resolutions had been prosecuted immediately upon or soon after the death of Mr. Flower, or after the subsequent removal of their suspension, it could not have been sustained.

There is, however, a subordinate claim which arises under the regulations of 1825.

[His Lordship referred to article 11, sections 1, 2, 3, and article 12, section 4, and proceeded—]

We are of opinion that section 4 of article 12 cannot be held to over-ride the very distinct provisions contained in the

11th article. The privileges of widows are made the subject of one distinct chapter, and those of children of another, and the Court is bound to put any possible reasonable construction on the words in the latter which will not have the effect of nullifying a very clearly-expressed provision contained among the privileges of the widows in the former. We think that such a construction may well be put. We consider that the words in section 4 of article 12 apply only in terms to the case where both widow and child come upon the fund, and that it was intended that in such a case the benefits of the fund should be marshalled between them. And it appears by the evidence to have been so decided by the association very early in favour of a Mrs. Best and her children, the widow losing a little, but the family, in the aggregate, getting 100*l.* a year more than they otherwise would have got. We are of opinion, therefore, that the claim of the widow ought to have been allowed, not from any earlier date or to any greater extent than is stated in her own letter, but on the footing of that letter, viz., that as from the 15th of October, 1842, her income had been reduced to 422*l.* 2*s.* 2*d.*

To this claim, however, the association raises a very formidable objection, arising from the lapse of time and the equitable rules in that respect adopted by analogy to the Statute of Limitations. To this it has been replied that, this being the case of an express trust—the case of a trust fund—the rules as to time have no application. We are unable to accede to this view. There was no relation of trustee and *cestui que trust* between any person or persons and Mrs. Flower or her representative. The managers, it is true, are called trustees, but they are trustees (so far as they are trustees at all) for the association, not for persons having claims against the property of the association. It is, in our judgment, impossible to distinguish this case from the case of a claim against the Equitable Assurance Office, or any other mutual assurance society whose accumulated funds and current income are the sole assets out of which a claim in respect of a policy could be satisfied. There is no fiduciary relation between such a body, or its

trustees, and a policy-holder, or the grantee of an annuity. Even in the case of a common partnership, where the legal right devolves on the surviving partner of realising the assets and winding up the affairs of the partnership for the benefit of himself and the estate of the deceased partner, it was held by the House of Lords in *Knox v. Gye* (1) that a suit by the representative of the latter was barred by the lapse of six years. We are unable to suggest any principle on which the fund, society, or association, or whatever it may be called, is precluded from setting up the same defence. It is said that in this case the fund has become, from accumulation at high compound interest, very rich. But it is easy to conceive that the converse might have happened, while at the same time it is difficult to see why contributions should be levied from Civil servants of 1867 to 1874 to meet a claim which ought to have been satisfied and might have been enforced out of the income of 1843. The defence arising from lapse of time must be the same whether the association be rich or poor. The claim, however, appears to us to be in substance a claim to a sum of money payable *de anno in annum*, and, as to so many of such annual sums as became due within six years from the filing of the bill, with interest from the filing of the bill, we think the plaintiffs are entitled to a declaration and a decree. This amount can be easily calculated and inserted in the decree.

Our order will be to discharge the decree of the Vice-Chancellor, and in lieu thereof to dismiss the plaintiffs' bill so far as regards that part of the prayer which relates to the claim under Farish's rules, to declare that there ought to be paid to the plaintiffs the amount which accrued due to Mrs. Flower in respect of an annuity of 77*l.* 17*s.* 10*d.* between the 30th of July, 1861, and the 23rd of December, 1863, with interest on that amount at five per cent. from the 30th of July, 1867, the date of the filing of the bill. Although this is a very small matter compared with the real claim made in the suit, we think we are justified under

(1) Law Rep. 5 E. & I. App. 656.

all the circumstances of the case in not making any order as to costs. And we desire again to repeat what we said at the close of the arguments,—that the Association in its present circumstances would be acting properly in not insisting on the lapse of time in respect of Mrs. Flower's application of March, 1843, which we think was refused under a misconception as to the meaning and legal effect of the rules of 1825.

Solicitors—Messrs. Freshfields & Newman, for the trustees of the Fund; Messrs. Lawford & Waterhouse, for the Secretary of State; Mr. W. A. Day, for the plaintiffs.

JESSEL, M.R. }
1874. } HONYWOOD v. HONYWOOD.
June 4, 5, 9. }

*Timber—Thinnings—Timber Estate—
Tenant for Life—Waste.*

By the general law (which may however be varied by special custom), timber consists of oak, ash and elm of the age of twenty years and upwards, provided they are not so old as no longer to have a reasonable quantity of useable wood in them.

Except in the case of a timber estate, a tenant for life, impeachable for waste, cannot fell timber. He can fell anything that is not timber, save trees planted for purposes of special utility or ornament, the germens of underwood, and trees which, though too young to be properly timber, would grow into timber. Some, however, even of these last he may fell, if for the purpose of promoting the growth of other timber in the same wood.

The property in timber, felled by a tenant for life or any other person or blown down by a storm, is in the owner of the first vested estate of inheritance, unless he has colluded with the tenant for life to induce him to fell it, in which case equity will not allow him to get the benefit of his own wrong. The property in trees not timber is in the tenant for life, and at law remains so though he may have committed waste by felling them wrongfully, and made himself liable for an action of waste, but where if equity would allow him to take the property in trees felled thus.

Where timber which is decaying or which for any special reason requires to be felled, is felled with the sanction of the Court, the proceeds are invested and the income is given to the successive owners of the estate, till the fund is taken away by the owner of the first absolute estate of inheritance. The same course is adopted in cases of equitable waste, where ornamental trees have been felled.

By his will, dated in 1859, W. P. Honywood, of Mark's Hall, in the county of Essex, devised his real estates to four trustees upon trust to manage the same, to allow his wife the occupation of his mansion and all the premises then in his occupation, and, after payment of certain annuities, to pay her all the surplus rents and profits. He died the same year, and this suit was instituted in 1862 by Mrs. Honywood for the administration of the estate.

In 1864 and subsequent years timber was cut down and sold with the sanction of the Court. The first order with respect to it was made on the 23rd of March, 1864, and it directed that the proceeds of the sale of timber and other trees should be paid into Court to the "Timber account," to be invested in consols, and the income paid to Mrs. Honywood. This and the subsequent orders, which were to a similar effect, were made on affidavits by the agent of the estate to the effect that the trees proposed to be felled were ripe and would deteriorate if left standing. The cause now came on for further consideration, and a question was raised between Mrs. Honywood and the remainderman as to their respective rights in the produce of the sale of trees which had been felled in the ordinary course of thinning, or from being ripe for cutting and liable to deteriorate by being left standing as well as injurious to the surrounding trees.

Mr. Fischer and Mr. Cookson, for Mrs. Honywood.—The form of the orders does not decide that the tenant for life was not entitled to the principal.

[THE MASTER OF THE ROLLS.—I think it does, or they would have been made without prejudice to any question.]

Even if she waives her claim as regards the money arising from the sale of ripe

timber cut on account of its having reached maturity, she must at least insist on her right to the proceeds of such timber as, ripe or not, has been cut in the ordinary course of thinning—

Earl Cowley v. Wellesley, 35 Beav. 685; s. c. Law Rep. 1 Eq. 656.

[THE MASTER OF THE ROLLS.—I find on reference to that case, which was a special case, that the question of the nature of the trees was hardly raised, and that in fact the thinnings on the Wilts estate were thinnings of woodlands containing oak, ash, elm, Scotch fir, larch and spruce trees, many of which trees are not timber at all.]

The proper thinning of a wood for the purpose of improving the growth of the remaining trees is not waste—

Bagot v. Bagot, 32 Beav. 509; s. c. 33 Law J. Rep. (N.S.) Chanc. 116.

So in

Pidgeley v. Rawlins, 2 Coll. CC. 275, it was held that the cutting of larch trees, twenty years old, for this purpose was legitimately done by the tenant for life. So in

Bateman v. Hotchkin, 31 Beav. 486; s. c. 32 Law J. Rep. (N.S.) Chanc. 6,

it was held that the tenant for life was entitled to thinnings of plantations if properly made. In

1 *Cruise's Dig.* 116, where

22 *Vin. Abr.* 442

is referred to, the statement is made, "Where oak and ash are seasonable wood and have been usually cut down at certain periods, it was formerly held that it was not waste to cut them down at that time, but I can find no modern decision on this point." *A fortiori* must this be true, where the cutting has been to improve the timber left standing. See also

Berriman v. Peacock, 9 Bing. 384; s. c. 2 Mo. & Sc. 515; s. c. 2 Law J. Rep. (N.S.) C.P. 23,

and

Kerr on Injunctions, 240.

Mr. Southgate and *Mr. Freeling*, for the trustees and those entitled in remainder, and *Mr. Crossley*, for another party, submitted the question to the Court, without taking any part in the argument.

THE MASTER OF THE ROLLS.—I think the discussion has not only not been wasted, but that it has been very useful, and I am glad to find that my impression of the law, when I come to look at the authorities and the statements made in the text books, is really confirmed. As I understand the law, it is this—the tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England, and secondly, on the special custom of a locality. By the general law of England, oak, ash and elm are timber, provided they are of the age of twenty years and upwards, provided they are not so old as not to have a reasonable quantity of useable wood in them, which, I think Lord Coke or one of the text writers says, is not sufficient to make a good post. I think it is Coke, but I am not quite certain of it. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the county, that is, of a particular county or division of a county, and it varies in two ways. First of all you may have trees called timber by the custom of the county, beech in some counties, hornbeam in others; and even white thorn and black thorn and many other trees are considered timber in peculiar localities. These add to timber trees in such counties. Then again in certain localities and owing probably to the nature of the soil, timber even of twenty years, that is, trees of even twenty years old, are not necessarily timber, but may go to twenty-four years, or even to a later period I suppose, if necessary; and in other places the test is not the age at all, but the girth of the tree which makes it timber. But, however, these are special customs. Once arrive at the fact that a tree is timber, and the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, and that exception has been established, principally by modern authorities, in favour of the owners of *timber estates*, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. And the reason of the distinction is this,

that that being the kind of cultivation, therefore the timber is not to be kept as part of the inheritance, but part so to say, of the annual fruits of the land, and in those cases, the same kind of cultivation may be carried on by the tenant for life that has been carried on upon the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life. With that exception, I take it that a tenant for life cannot cut timber, and therefore I hold in this case, that, it not being a timber estate, the tenant for life cannot cut timber at all.

Now the next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy *germens*, as the old law calls them, or stoles of underwood, and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind, but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits waste, as he prevents the growth of the timber. Then again there is a qualification, that he may cut down those trees which being less than twenty years old (I should say oak, ash and elm, to make it plainer), he may cut down oak, ash and elm under twenty years of age provided they are cut down for the purpose of allowing the proper development and growth of other timber, that is in the same wood or plantation. That is not waste; in fact it is for the improvement of the estate and not the destruction of it, and therefore he is allowed to cut them down. If, therefore, in the course, as I understand to be the fact, of the proper management of this estate, any oaks, ashes and elms have been cut down for the purpose of allowing of the growth of the other timber in a proper manner, that would not be waste on the part of the tenant for life, though impeachable for waste.

Then the only other question to be decided is, whose is the property of the timber cut down? There I think the law is reasonably clear. If the timber is timber properly so called, that is, oak, ash and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owners of the first vested estate of inheritance. The only exception is where the remainderman or the owner of the first vested estate of inheritance has colluded with the tenant for life to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. But with that exception, as I understand the law, the property of the timber when cut down is in the owner of the first vested estate of inheritance. There is again a second equitable exception, and that is this, that, where timber is decaying or for any special reason it is proper to be cut down and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance, is a party, gets an order of the Court to have it cut down, there, the Court, saying to the tenant for life—"You could not cut it down because you are impeachable for waste," and saying to the remainderman, "It would not be cut down without the interference of the Court, so that you would have got it," disposes of the proceeds on equitable principles and makes them follow the interests in the estate. In that case therefore the proceeds are invested, and the income given to the successive owners of the estate until you get the owner of the first absolute estate of inheritance who can take away the money. The same course, as I understand it (there is a decision of Lord Lyndhurst the other way, but modern decisions have settled the law), the same course is adopted in the case of the commission of equitable waste, that is, where ornamental trees or trees which could not otherwise be cut down even by a tenant for life unimpeachable for waste are cut down. In that case also, as I understand it, the proceeds are

invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement, giving the income to the tenant for life and so on.

Then we come to the property in trees not timber, that is, either from their nature not timber, or because they are not old enough, or because they are too old. In all those cases, I take it, the property is in the tenant for life. If he cuts them down himself, I understand the property is in the tenant for life, and although he has cut them down wrongfully and committed waste the property is still in him, though he has committed a wrong, and would be liable to an action in the nature of waste. I am not sure that would follow in equity, my impression is that equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. This is not the case at Common Law, and I am not aware that the exact point has been decided in equity. Then if the tenant for life has cut down oak, ash or elm under twenty years of age in a due course of cultivation, and for the purpose of improving the growth or allowing the development of timber trees, she will be entitled to the proceeds of the trees so cut down, and assuming, when I come to look at the affidavits, there are some which shew that there is such a class of tree cut down (as I understand is actually the case) then I shall direct an enquiry to ascertain what portion of the proceeds she is entitled to.

As regards the future, I think I have said enough, without any further declaration, to shew what the tenant for life will be entitled to.

The matter was again (on June 9) mentioned, and the plaintiff waiving any enquiry as to the proceeds of past cuttings, a declaration as to future cuttings was made in accordance with the judgment.

Solicitors—Messrs. Frere & Co., for Mrs. Honeywood; Messrs. M. & F. Davidson, for the trustees; Messrs. Beaumont & Warren, for the heir at law.

MALINS, V.C. }
1874.
June 22.

AXMANN v. LUND.

Partnership—Patent—Partners asserting Validity of—Dissolution of Partnership—Retiring Partner disputing Validity of Patent—Threats of Legal Proceedings—Injunction.

A. and B. entered into partnership for the purpose of working a patent taken out by B., the partnership deed providing that the patent rights should belong solely to B. During the continuance of the partnership the partners issued circulars asserting the validity of the patent, and warning the public against its infringement, although they had been advised that the patent was in fact void. The partnership, having continued for seven years, was dissolved by deed, and A. and B. each proceeded to manufacture the patented articles for himself; but shortly afterwards B. commenced issuing circulars to A.'s customers, asserting that A. was infringing his patent, and threatening them with legal proceedings in case they purchased from A. A. then moved for an injunction to restrain B. from issuing these circulars, contending that, the patent being void, he had an equal right with B. to manufacture the articles intended to be protected by it:—Held, that although A. had, during the continuance of the partnership, precluded himself from disputing the validity of the patent, yet, after the expiration of the partnership, he was as much at liberty as any other person to dispute its validity, and that B.'s proper course for asserting his claim to the patent was, instead of issuing the circulars complained of, to have instituted proceedings against A. to establish its validity.

On B. declining to undertake to institute any such proceedings, the Court granted the injunction—Rollins v. Hinks (41 Law J. Rep. (N.S.) Chanc. 358; s.c. Law Rep. 13 Eq. 355) followed.

This was a motion by the plaintiff, Edmund Axmann, for an injunction to restrain the defendant, Laurentius Andreas Waldemar Lund, his agents, servants and workmen, from asserting to the customers of the plaintiff, or any of them, or any other person or persons whomsoever,

ever, that the plaintiff in manufacturing or selling his goods in his business as in the bill mentioned, or any of such goods, was infringing the defendant's letters patent or patent rights, or any of them, and from threatening such customers or any of them, or any other person or persons, with legal proceedings in case they purchased or sold the plaintiff's said goods, or any of them.

In the year 1864 the defendant Lund took out a patent for an alleged invention of improvements in the manufacture of studs, buttons, brooches and other such-like articles; and being in want of means for working the invention he applied for assistance to the plaintiff, a manufacturing jeweller, and proposed that they should enter into partnership for the purpose of working the invention. The plaintiff believing, as he alleged, that the defendant's invention was a novel one, and had never before been patented, made sundry advances to the defendant to enable him to pay off certain expenses incurred in taking out the patent; and on the 29th of November, 1866, a deed of partnership was executed by which both parties agreed to work the patent as partners for a term of ten years, but that the patent itself should be considered as belonging solely to the defendant Lund.

In the year 1868 a patent for further improvements in the manufacture of studs and buttons was taken out in the joint names of the partners.

In consequence of certain supposed infringements of the patent of 1864, the partners took the opinion of counsel as to the validity of that patent, and were advised that the patent was void, and that no proceedings to restrain its infringement would be successful. They accordingly took no steps to protect any rights they might have had under that patent beyond issuing circulars asserting the validity of this patent, and warning the public against its infringement. Differences subsequently arose between the partners, and ultimately a dissolution deed was executed on the 2nd of July, 1873, by which the plaintiff for a consideration assigned his share in the partnership stock-in-trade and effects to the defendant. On the 14th

of October following an agreement in writing was entered into between the plaintiff and defendant, by which it was agreed that all rights under the patent of 1868 should be considered as the property of the parties in equal shares, but the agreement attempted no definition of the rights of the parties in the patent of 1864.

After the execution of the dissolution deed the plaintiff and defendant each continued to manufacture for himself the articles which had previously been manufactured by the partnership; but about the month of November, 1873, the plaintiff discovered that the defendant had been going about to the different customers of the plaintiff asserting that the plaintiff was infringing the defendant's patents, and threatening them with legal proceedings in case they continued purchasing from the plaintiff; also that lithographed circulars, purporting to be signed by the defendant's solicitor, were being sent round to the plaintiff's customers containing similar threats. The plaintiff then filed the bill in this suit to restrain the defendant from pursuing this course of conduct.

The plaintiff stated in his bill, and also in his affidavit in support of the present motion, that he had only recently discovered for the first time that the patent of 1864 was in fact invalid, and submitted that he had accordingly an equal right with the defendant to manufacture the articles intended to be protected thereby; and that with regard to the articles protected by the patent of 1868 the defendant could not, in the face of the agreement of the 14th of October, 1873, dispute the plaintiff's right to manufacture them.

The plaintiff now moved for an injunction in the terms above mentioned.

Mr. Cotton and *Mr. Romer*, for the plaintiff, relied on

Rollins v. Hinks (*ubi supra*),

where it was held that a patentee is not entitled to publish statements of his intention to institute legal proceedings in order to deter persons from purchasing alleged infringements of his patent unless he has a *bona fide* intention of following up his threats by taking such proceedings. Moreover, the patent of 1864 was an

invalid one, and the defendant had no exclusive rights under it, and it was clear from the agreement of the 14th of October, 1873, that he had no exclusive right to the patent of 1868.

Mr. Glasse and Mr. Jason Smith, for the defendant.—In

Rollins v. Hinks (ubi supra) the plaintiff and defendant were strangers, but here they were partners for seven years, and the plaintiff, as well as the defendant, during the whole of that period continued to assert the validity of the patent of 1864. The plaintiff cannot therefore now set up its invalidity—

Crossley v. Dixon, 10 H. L. Cas. 293; s. c. 32 Law J. Rep. (N.S.) Chanc. 617;

Chambers v. Crichley, 33 Beav. 374. Besides, it is contrary to the practice of the Court to grant an injunction before the patent right has been established.

Mr. Cotton, in reply, was stopped by the Court.

MALINS, V.C.—If the plaintiff and the defendant had been mere strangers to each other and had never had any connexion in business, then the case would be covered by my decision in the case of *Rollins v. Hinks (ubi supra)*—to the principles of which I now adhere—that where a man is a patentee and he accuses other persons of infringing his patent, he is not at liberty to go on threatening proceedings, unless he follows up those threats by proceedings to establish the validity of his patent. I there stated, as I think, on broad principles of justice—“If this were not so,” that is, if the alleged patentee could not be restrained from continuing to use those threats, “a man by taking out a patent for something old might issue circulars to prevent another man from selling an article which was sold twenty years ago, before the patent was taken out. That, in my opinion, would not be proper.” *Mr. Glasse* said that if this case were *Rollins v. Hinks (ubi supra)* he could not dispute the law there laid down, and in fact could not defend the proceedings of the defendant. The argument has turned upon the question whether this case is or is not distinguishable from *Rollins v. Hinks (ubi*

supra). Now this is a case in which the plaintiff and defendant have not been mere strangers, for it appears that they went on together in partnership from 1866 to 1873 in working the patent of 1864, and during that time it is distinctly proved that the plaintiff, in concurrence with the defendant, continued to assert the validity of the patent. Therefore for seven years the plaintiff had been actually, and the defendant also, asserting that this was a valid patent. It may be that the plaintiff believed in its validity at that time, although subsequent events have led him to entertain a different opinion. However, on the 2nd of July, 1873, the partnership was dissolved, nothing then being said as to the patent rights of 1864, and the plaintiff having reserved to himself no rights in that patent; it being assumed on both sides, and I think correctly, that the patent rights, whatever they might be, were in the defendant Lund, and he has all the rights, and only the rights, of a patentee. Is his patent valid or invalid? Upon that I give no opinion; that is not the question before me. There seems very strong reason from what has been stated to doubt the validity of the patent; but as I have already said, I shall give no opinion upon its validity. Under all the circumstances, then, the patent, such as it is, having reverted to the defendant upon the dissolution of the partnership, if it is a valid patent, of course he is entitled to restrain any person from manufacturing any article covered by it. If, on the other hand, it is an invalid patent, he has no right to use these threats to the public, which are calculated, not only as to the plaintiff, but as to anybody else, to destroy business. We know that persons get greatly alarmed at threats of proceedings for infringement of a patent, and many persons would immediately cease selling the alleged patent article rather than run the risk of being drawn into a litigation, which is sometimes of a very formidable character. If a man who has got a patent asserts the validity of the patent and warns the public generally against the use of the alleged patent article, that is a practice fraught with the utmost danger

to the public, because a man might take out a patent for a thing notoriously of great antiquity and get it covered by a patent; and by issuing circulars to the trade he might monopolise a very large trade, and destroy the trade of others in an article that had been manufactured long before the patent was taken out. Therefore I think it is of the utmost importance that threatening letters of this sort should only be issued within justifiable limits. Now the question really is, has this plaintiff so conducted himself, as between himself and the defendant, as conclusively to admit the validity of the patent? Whether he has admitted it since the expiration of the partnership is a question which I cannot decide now. If the defendant Lund thinks that the plaintiff has conclusively bound himself to admit the validity of the patent, his proper course is now to take some proceedings against Mr. Axmann, the plaintiff, to restrain him from disputing the validity of the patent; or, if he brings an action against him to put in an admission to say, "Whatever other persons may say, you are precluded from and cannot dispute the validity of the patent." That would be a very distinct proceeding. But because the defendant says it is a valid patent, although it may be invalid, for him to issue these threatening letters which might actually destroy the trade of the plaintiff, is a thing not to be justified. The terms of the notice threatening proceedings are, in my opinion, wholly unjustifiable. [His Honour then read and commented on one of the circulars which had been put in evidence, and continued.] Now, has the plaintiff conclusively bound himself to admit the validity of the patent? There is no doubt whatever that a man who takes out a license to use a patent cannot dispute its validity as between himself and the patentee during the currency of the license, just in the same way as a tenant is estopped from disputing the title of his landlord during the currency of his tenancy. It is clear that at the expiration of the license he is at liberty to dispute it just as if he had never had a license at all, just as a landlord's title may be disputed by a tenant

after the tenancy has expired. What does the plaintiff do? Undoubtedly, during the currency of the partnership, he had precluded himself by contract; the patent rights were for the benefit of the plaintiff and defendant; the plaintiff was in fact a licensee of the patent during the partnership, and therefore, according to *Crossley v. Dixon* (*ubi supra*), he is precluded from disputing the validity of the patent during that time. But is he precluded from disputing it after the expiration of the partnership? He may have discovered new facts that were unknown to him during the continuance of the partnership which may have been carefully concealed from him by the defendant. I do not suggest that it was so in this case; but looking at how things are in general, the patentee may have concealed things from him which he well knew invalidated the patent, and that the plaintiff after the dissolution of the partnership discovered the truth. It is said that because the plaintiff admitted the validity of the patent during the continuance of the partnership and asserted it—and he may have done so, as far as I know, in good faith—after the termination of the partnership he is no longer at liberty to dispute its validity. Mr. Glasse relied upon the well-known rule of the Court, never to grant an injunction till the patent has been established at law, unless it is of old date; where it is of old date, and there is long acquiescence on the part of the public in the use of it, the Court will sometimes grant an injunction pending the trial, but even there the validity of the patent has to be tested by an action at law. Then what is the result of all this? My opinion is that the plaintiff did, during the partnership, preclude himself from any right to dispute the validity of the patent. After the expiration of the partnership he became at liberty, just as much as any of the rest of her Majesty's subjects, to dispute the validity of the patent; but having consented to the exclusive use of it by the defendant, if it was the defendant's right, the plaintiff, like the rest of her Majesty's subjects, is subject to any proceedings being taken against him by

the defendant to establish the validity of the patent; and if the defendant establishes the validity of the patent, the plaintiff will be answerable in damages for the infringement of it. I have asked the question whether the defendant will undertake to take proceedings at law to establish the validity of the patent, but he declines to do so. As he will not follow up the rights he asserts by proceeding to establish the validity of the patent, I retain the opinion I expressed in the case of *Rollins v. Hinks* (*ubi supra*), and shall follow that decision; and I therefore grant an injunction against the defendant in the terms of the notice of motion. The order will be, "the defendant declining to undertake to take any proceedings against the plaintiff to establish the validity of his patent, injunction in the terms of the notice of motion."

Solicitors—Messrs. Lettley & Hart, for plaintiff;
Mr. S. J. Robinson, for defendant.

JESSEL, M.R. }
1874. } GRAVELY v. BARNARD.
July 17. }

Bond—Restraint of Trade—Sufficiency of Consideration.

In the year 1864 R. G., a surgeon, apothecary and man-midwife, engaged T. B., a medical student, as his assistant, at a salary.

*In 1870, T. B., at R. G.'s request, executed a bond by which he bound himself to pay R. G. the penal sum of 1,000*l.* The bond then recited that R. G. some time since took T. B. into his employ and confidence as an assistant in his profession or business, which employment was to continue so long as the parties to the bond should agree, and that for the aforesaid consideration T. B. had agreed to enter into the same bond. The condition of the bond was that it should be void in case T. B. did not carry on the business of a surgeon, apothecary or man-midwife within the parish of N. or within*

ten miles thereof (excepting at L.) during so long as R. G. or his successors in the business should carry on the same. Later in 1870 R. G. discharged T. B. from his employment, and in 1874, T. B. having qualified himself to practise as a surgeon, apothecary and man-midwife, commenced business about four miles from N.

On motion for an injunction by R. G. :—Held, that there was sufficient consideration to support the bond, and injunction granted.

In March, 1864, Richard Gravely, the plaintiff in this suit, who was then practising as a surgeon, apothecary and man-midwife at Newick, in Sussex, engaged Thomas Barnard, the defendant, as his assistant, at an annual salary of 80*l.*, which was subsequently increased to 90*l.*

In 1870, the defendant being about to go up for examination in order to practise the business of a surgeon, apothecary and man-midwife, was requested by the plaintiff to execute, and did execute, to the plaintiff a bond in the following words and figures—

"Know all men by these presents that I, Thomas Barnard, of Newick, in the county of Sussex, surgeon's assistant, am held and firmly bound to Richard Gravely, of Newick, aforesaid, surgeon, apothecary and man-midwife, in the penal sum of one thousand pounds sterling to be paid to the said Richard Gravely, or to his certain attorney, executors, administrators or assigns, for which payment to be well and truly made, I bind myself, my heirs, executors and administrators, and every of them, firmly by these presents, sealed with my seal, dated the twelfth day of March, one thousand eight hundred and seventy.

"Whereas the said Richard Gravely some time since took the above-bounden Thomas Barnard into his employ and confidence as an assistant in his profession or business of surgeon, apothecary and man-midwife, which he now carries on, and has for some time past carried on, at Newick aforesaid, which employment was to continue so long as the said parties should agree. And whereas the said Thomas Barnard, at the time of such engagement, did not, nor does he at present, hold the requisite qualifications to

enable him to practise the professions aforesaid, or any of them, but being now about to apply for a certificate from the Society of Apothecaries of London, on obtaining which he will possess the requisite qualifications to practise his profession, the said Richard Gravely hath requested him, the said Thomas Barnard, to enter into the above written bond or obligation with the condition for making void the same, which is hereunder written. And for the consideration aforesaid, the said Thomas Barnard hath agreed to enter into such bond or obligation, with such condition for making void the same as is hereinafter contained. Now, therefore, the condition of the above written bond or obligation is such that if the above bounden Thomas Barnard shall not, nor will at any time or times hereafter set up, practise, carry on or exercise, directly or indirectly, either for himself alone or in partnership or in collusion with any other person or persons whomsoever except the said Richard Gravely, or in any manner whatsoever, the said several professions or businesses of a surgeon, apothecary or man-midwife, or any or either of them, or any similar or like profession or business within the said parish of Newick or within the distance of ten miles thereof (the town of Lewes in the said county excepted), during so long a time as the said Richard Gravely or any person or persons to whom he shall sell or dispose of his said business of a surgeon, apothecary or man-midwife, or to whom he may assign or make over the same, shall carry on, practise or exercise the same professions or businesses, or any or either of them, then the above written bond or obligation shall be void, otherwise the same shall remain in full force and virtue."

It was stated in the seventh paragraph of the plaintiff's bill, and sworn in his affidavit, though denied on oath by the defendant, that the plaintiff assisted the defendant to prepare for his examinations, and that he lent him books and advanced him money to pay his examination fees.

The defendant failed to pass his examinations at that time, and the plaintiff soon afterwards gave him notice to leave his employ, and he left in June, 1870.

In 1874 the defendant passed his examinations, and commenced practising as a surgeon-apothecary and man-midwife about four miles from Newick.

The plaintiff thereupon filed a bill against the defendant for an injunction and an account of profits made by him in his business. The bill contained an offer to waive the pecuniary penalty under the bond. The plaintiff now moved to have the defendant restrained from practising.

Mr. Waller and Mr. Horton Smith, for the plaintiff, referred to—

Clarkson v. Edge, 33 Beav. 227; s. c.

33 Law J. Rep. (N.S.) Chanc. 443;

Fox v. Scard, 33 Beav. 327;

French v. Macale, 2 Dr. & War. 269;

s. c. 1 Con. & L. 459; s. c. 1 Ir.

Eq. Rep. 573;

Cole v. Sims, 5 De Gex, M. & G. 1;

s. c. 23 Law J. Rep. (N.S.) Chanc.

258, affirming *Kay* 56; s. c. 23 Law

J. Rep. (N.S.) Chanc. 37;

Saintier v. Fergusson, 7 Com. B. Rep.

716; s. c. 18 Law J. Rep. (N.S.)

C.P. 217 (1849);

Howard v. Woodward, 34 Law J.

Rep. (N.S.) Chanc. 47 (1865).

Mr. Southgate and Mr. Locock Webb for the defendant.—The agreement by the plaintiff to employ the defendant as his assistant is worthless, because it might have been terminated by the plaintiff the moment after the bond was executed. There is, therefore, no consideration for this bond, and it is void as in restraint of trade—

Mitchel v. Reynolds, 1 P. Wms. 181;

1 Smith's L.C. (6th ed.) 356;

and the past employment is no consideration. This is incidentally decided in—

Young v. Timmins, 1 Cr. & J. 331;

s. c. 1 Tyrw. 226; s. c. 9 Law J.

Rep. (O.S.) Exch. 68 (1831).

[THE MASTER OF THE ROLLS said

Young v. Timmins (*ubi supra*)

was over-ruled in

Hitchcock v. Coker, 6 Ad. & E. 438;

s. c. 1 N. & P. 796; s. c. 6 Law J.

Rep. (N.S.) Exch. 266,

he also cited—

Davis v. Mason, 5 Term Rep. 118.]

Chesman v. Nainby, 1 Br. Parl. Ca.

Toml. ed., 234; s. c. 2 Str. 739;

Homer v. Ashford, 3 Bing. 322.

THE MASTER OF THE ROLLS said.—The sole question to be decided is whether there was sufficient consideration for the bond. It was finally decided in *Hitchcock v. Coker* (*ubi supra*) that it is enough if there be actual consideration, provided that it be legal and of some value. If the bond shews valuable consideration, however small, it is enough for an injunction. The Court does not take on itself to say what is sufficient value, the parties must settle that. Now, as to what is valuable consideration *Davis v. Mason* (*ubi supra*) decided that taking an assistant into a medical man's employ by itself, as long as he should please, was enough. The Court did not decide why it was sufficient, but left it to the parties to settle that. Is there any difference between taking, for so long a time as he should please, and continuing for so long a time as the parties should please? I can see none. If the statements are true which are contained in paragraph seven of the bill, and if, as a condition of employment, the plaintiff said you must give a bond, then there is enough consideration. All that remains is, to ascertain if the agreement alleged appears on the face of the bond. Counsel suggested that no meaning could be given to the words of the recitals. [The Master of the Rolls here read them through.] Now what does it all mean? The defendant says—Nothing at all. But is it not really this? The plaintiff says—You, the defendant, are going to learn a profession which may cut away my trade, but if you will give the bond you may go on as long as I please. Can this be inferred from the bond? In *Mitchel v. Reynolds* (*ubi supra*) no consideration was stated, it was inferred. So in *Davis v. Mason* (*ubi supra*). Looking at these two cases I do the same as was done in them, and infer the consideration. The Court is bound to interfere, and I grant an injunction.

Solicitors—Mr. H.M. Phillips, agent for Mr. Henry John Jones, Lewes, for the plaintiff; Mr. James Mote, for the defendant.

JESSEL, M.R. }
1874. } REUTER'S TELEGRAM CO. v.
July 23. } BYRON.

Confidential Communication — Agent — Correspondent — Telegram — Cypher.

The plaintiffs, a telegram company in London, made an arrangement with the defendants, being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names and addresses of the principal customers; and the defendants were described as the plaintiffs' agents. In a little time the parties quarrelled, and one of the defendants came to England to carry on an independent telegram business with his partner in Australia, and sent circulars to the plaintiffs' customers, mentioning that he had their cyphers. On motion to restrain him from using the cyphers,—Held, that there was nothing confidential in the cyphers, and that he was entitled to use them.

This bill was filed by Reuter's Telegram Company against two defendants, named Byron and Pince, who were both formerly in Australia, but of whom the first-named was now in England.

The plaintiffs, or their predecessors in title, had for some time acted as transmitters of telegrams, and made a profit in two ways. Firstly, many telegraph companies had a minimum charge for twenty words, but the plaintiff accepted shorter telegrams, and crammed several of them into one message of twenty words. Secondly, the telegraph companies charged for the name and address of the sender and the name and address of the recipient; but the plaintiffs had agents in the distant countries, with whom they arranged that some one word should indicate the name and address of each person who frequently sent or received telegrams, and the agent then forwarded the telegram to the person so indicated.

For some time the defendants or their predecessor in the business, Mr. Richard Greville, had acted as the plaintiffs' agents or correspondents in Australia, and they always described themselves as "Reuter's, agents." The business had commenced before the cable was laid to Australia, the

telegrams being then sent by telegraph as far as the telegraphs extended, and then forwarded by post.

At first Greville received from the plaintiffs a commission of six shillings on each message received or sent, and accounted to the plaintiffs for all sums received by him from persons in Australia sending messages to England. This arrangement continued till the telegraph was opened to Galle, after which he charged a guinea on every message forwarded by him from Australia. When the cable was laid to Australia, another alteration was made, and it was arranged that he should charge only ten shillings per message, and that the plaintiffs should allow him 20 per cent. on the nett profits derived by them from the messages sent from Australia. Greville then transferred his business to the defendants, who demanded better terms of the plaintiffs, and failing to get them, one of the defendants came to England, and opened business as an agent for sending telegrams to Australia in partnership with the other defendant in Australia. He then sent circulars to all the plaintiff's customers whose names and cyphers he knew, stating that he had their cyphers, and solicited their business. It appeared that the total number of cyphers used in the trade was about 1,700, of which more than 1,100 had been invented by the plaintiffs, and denoted persons or firms in England. Rather more than 400 denoted persons or firms in Australia, and had been invented either by Richard Greville, or the defendants, or the parties themselves. The plaintiffs thereupon filed this bill, and moved to restrain Byron from using any cypher which had been communicated to him, or his partner, Greville, in confidence by the plaintiffs. The bill also prayed that Byron might be ordered to deliver up all documents relating to the telegram business, and might be restrained from keeping copies of them.

Mr. Southgate and *Mr. Macnaghten*, for the plaintiffs.—The defendants were our agents, and we communicated the cyphers to them in confidence. We are therefore entitled to restrain them from making use of that knowledge to our prejudice.

Mr. Ohitty and *Mr. Frestling*, for the

defendants.—We were the plaintiffs' correspondents rather than agents, our relations being mutual. There is nothing secret about the cyphers; they were merely matters of knowledge common to both of us in the trade. There was no confidence in the communication of them; they were not communicated in confidence that we would not disclose them. No one would be either harmed or benefited if they were all published in the *Times*—

Morison v. Moat, 9 Hare 241; s. c. 20 Law J. Rep. (N.S.) Chanc. 513; s. c. on App. 21 Law J. Rep. (N.S.) Chanc. 248;

Yovatt v. Wineyard, 1 J. & W. 394; *Abernethy v. Hutchinson*, 3 Law J. Rep. (O.S.) Chanc. 209;

James v. James, 41 Law J. Rep. (N.S.) Chanc. 353; s. c. Law Rep. 13 Eq. 421.

Mr. Southgate, in reply.

THE MASTER OF THE ROLLS.—This is an application for an injunction on interlocutory motion, with a view to prevent the defendant from carrying on his business. In order to enable the plaintiffs to succeed on such a motion they must shew a clear title in equity to restrain the act complained of, and that they will be injured by the refusal of the injunction. It is not the proper province of the Court to give a final judgment on a motion, but before granting an injunction the Court must be satisfied there is a clear case, and I am not so satisfied.

The bill is a singular one. The ground on which the equity is based in the bill is quite different from what has been argued. The plaintiffs are a telegram company, and the defendants also carry on business as a telegraph firm. The defendants have acted as a sort of commission agents for the plaintiffs. They have forwarded telegrams in Australia which they received from the plaintiffs, and from Australia to the plaintiffs in England; they received twenty per cent. on the profits of the business, and they seem always to have been an independent firm, keeping their own books. Many of the employers of the plaintiffs' company packed their telegrams, that is to say, they sent as few

words as possible, so as to reduce the charge, and had a cypher for their names and addresses, a fancy word being generally used, and its object being merely to distinguish the name of the person, and not for any purpose of secrecy. It would not have mattered if the cyphers had been published in the *Times*; their object was merely to reduce the charge. Then the way the defendants acquired knowledge of the words was this: In the ordinary course of business, when the word was sent to the plaintiffs' firm first, the plaintiffs were bound to communicate to the defendants; and when the communication first came from Australia, the word was communicated from the defendants to the plaintiffs, in order that they might deliver the telegrams. There was no confidence in the matter; each party, no doubt, wrote letters to the other, containing in parallel columns the names and addresses of the customers, and the words used to denote them. The only object was the saving expense in transmitting messages. I am of opinion that this was not a confidential communication, because no harm would be done by disclosing it. Then the parties quarrel, and the Australian company start business on their own account in England. They ask the customers of the English firm to do business with the Australian house. There is nothing to prevent them from doing so; they have not been under any contract in the matter. But they go on to write to each of the customers, and say, "Your cypher has been duly registered in this office." That is said to be a breach of confidence. But each customer knew his own cypher, and this was not a divulging or publication of it, if such an act could be restrained, which I think it could not. Then it is said that the defendants having acquired this knowledge in the course of business with the plaintiffs, have no right to tell the persons who know it already, and say, "Therefore you can send your messages through us without the trouble of telling us your cypher again," because the trouble of telling the defendants the cyphers would be so great, that these customers would certainly continue to deal with the plaintiffs, in order to save it. I think myself that if the defendants

had asked for new cyphers, it would not have made any difference. They would merely have had to say, "The first time you send your messages by us, tell us what your cypher will be."

But what the plaintiffs seek by their bill is much more than this. In paragraph 23 it is said that the cyphers belong to the plaintiff company, and were invented by them; the customers do not claim any right. Now that is not the fact. It is the customers' cypher, and they have the right to use it for sending telegrams by any other company. The notion of property is entirely imaginary. The bill asks that the defendants may be ordered to deliver up to the plaintiffs all lists of the customers and other books, and that they may be restrained from making any copies of them, and from registering any cyphers the knowledge of which was communicated in confidence, and for damages. The whole case proceeds on the notion of property. It was argued on the ground that commission agents of this kind making entries in their own books were guilty of a breach of confidence in telling the customers the names used, and a number of cases were cited in which a defendant was restrained from divulging a secret.

Morison v. Moat (ubi supra) sums up the law on the subject. The Court will always restrain a man from publishing or divulging that which has been communicated to him in confidence. But this is a totally different case. The plaintiffs here do not seek to restrain the defendant from publishing anything, but from making use of knowledge acquired while the relation of principal and agent subsisted, after that relation has terminated. Now I am not aware of any authority in which this has been done in the absence of a contract expressed or implied. And that being so, the jurisdiction of the Court cannot be stretched on an interlocutory application. I do not mean to say it cannot be done at all, but at present the only order I make is to make the costs costs in the cause.

Solicitors—Messrs. Upton, Johnson, Upton & Budd, for plaintiffs; Mr. A. R. Oldman, for defendants.

HALL, V.C. }
1874. }
July 1. }

WATSON v. ROW.

Solicitor—Several Defendants—Bill of Costs.—Severance.

Though a solicitor who accidentally (or upon separate retainers) represents two or more parties ought to distinguish the charges incurred for each separate party, yet where there is a joint retainer (as by trustees not severing in their defence) he can enforce the whole bill of costs incurred against either of the parties.

Re Colquhoun (5 De Gex, M. & G. 35; s. c. 1 Sm. & Giff. App. i.; s. c. 22 Law J. Rep. (N.S.) Chanc. 484; 23 ibid. 515); and Harmer v. Harris (1 Russ. 155) considered.

Two trustees gave a joint retainer in a suit to administer the trust estate. One became insolvent and was indebted to the estate:—Held, that the surviving trustee should have the whole costs of himself and his co-trustee allowed out of the estate without any set-off in respect of the estate.

This was a suit to administer the trusts of a will.

The defendants Row and Woodman, trustees of the will, gave a written retainer to Messrs. Leadbitter and Flux. The retainer was not "joint and several," but was simply in the following terms—"We require and authorise you to act for us in the above suit."

Woodman became insolvent and owed a debt to the estate.

The plaintiff contended that the taxing master ought, as against the estate, to separate the costs of the plaintiffs Row and Woodman, and set off the amount due from the estate to Row against the debt due from him to the estate.

The consequence of such a taxation would be that the solicitors would have to lose half their costs, or get from Row the portion which Woodman could not pay; while Row would only get from the estate half the amount of the costs incurred, the remainder being set off against Woodman's debt.

Mr. E. K. Karlake and Mr. Kekewich, for the plaintiff, claimed to set off the costs that would be due to Woodman

from the estate against his debt, and relied on—

Harmer v. Harris (ubi supra);

Re Colquhoun (ubi supra).

Mr. Methold, for an infant in the same interest.

Mr. Eddis and Mr. C. T. Simpson, for the defendant Row, cited—

Frazer v. Thompson, 1 Giff. 337; s. c.

4 De Gex & J. 659; s. c. 29 Law

J. Rep. (N.S.) Chanc. 402,

where Stuart, V.C., said, the case of Re Colquhoun (ubi supra), was decided on the question of retainer—

Anderson v. Boynton, 13 Q.B. Rep.

308; s. c. 19 Law J. Rep. (N.S.)

Q.B. 42;

Bailey v. Birchall, 2 Hem. & M. 371,

where a solicitor was allowed his lien for costs upon property the subject of an administration suit, though his client turned out to be a debtor to the estate.

HALL, V.C., said that he did not mean to give a decision in variance with *Re Colquhoun (ubi supra)* and *Harmer v. Harris (ubi supra)*. Those cases did not cover the present one, where there was a joint retainer and a joint liability of both executors to the whole demand. In *Re Colquhoun (ubi supra)*, as appeared in both reports, it was left uncertain whether there was or was not a joint retainer; but he should rather infer from what was stated in the reports that there was a separate retainer. It seemed to be a case of the same solicitor accidentally representing four parties. The Vice-Chancellor on the first hearing of that case said—"There is no evidence to shew whether Mr. Colquhoun received a joint or separate retainer from the defendants." On appeal there was nothing in the report in opposition to this view, and in the certificate of Master Follett, which was very full and detailed, the retainer was treated as a separate one. The judgments, both of the Vice-Chancellor and on appeal, were quite consistent and amounted to this, that where there was a separate retainer the solicitor, in making out his bill of costs, ought to distinguish the charges incurred for each separate party, and must divide them among those for whom they had been incurred. There

might be difficulties and cases of hardship to the solicitor in this rule; but, on the other hand, there was no need to depart from what was settled practice. *Harmer v. Harris* (*ubi supra*) was not at variance with the payment out of a fund of the costs of a trustee, which he had incurred jointly with another who was indebted to it. [The Vice-Chancellor then read the judgment in that case.] In the case now before him it was said the solvent trustee, who had done his duty, must only have half the costs for which he was liable to his solicitor, and must therefore pay the other half out of his own pocket. This would be contrary to his view of the law of the Court of Chancery in accordance with which a trustee who had acted properly got out of the fund all the costs for which he was liable.

He was of opinion that Mr. Row was liable under the retainer in this case to pay the whole of the solicitor's bill, and therefore he should allow the whole out of the fund. If it should appear that any costs had been incurred on Woodman's account alone, they would not of course be allowed.

Solicitors—Messrs. Gregory, Rowcliffes & Co., for plaintiff; Messrs. Flux & Leadbitter, agents for Mr. Benjamin Woodman, Morpeth, for defendant.

MALINS, V.C. }
1873.
Dec. 18.

CLOVER v. ROYDEN.

Injunction—Injury to Property—True Statement—Fair Expression of Opinion—Published Registry of Ships—Suspension of Classification.

An association formed to supply, through an annual published register, information as to iron ships to members and subscribers, and reserving the right to make periodical surveys of ships registered, objected to certain alterations made in a ship of their highest classification, inserted the words "class suspended" opposite her name in their list, and refused either to omit those words or to withdraw her name from the

NEW SERIES, 43.—CHANC.

list:—Held, that there being no proof of malice, falsehood or unfair dealing, the association were entitled to publish their bona fide opinion, although it was injurious to the property of the shipowners, and a motion by the shipowners to restrain publication of the words "class suspended," and to compel the withdrawal of the ship from the list, refused with costs.

This was a motion on behalf of Messrs. Clover, Girvin & James, merchants and shipowners at Liverpool, for an injunction to restrain the defendants, the chairman and committee of an association at Liverpool called "The Underwriter's Registry for Iron Vessels," from printing or selling any copy of their list of iron vessels having the words "class suspended 1871" placed opposite or so as to apply to a ship belonging to the plaintiffs called the *Tyne Queen*. The association in question, which was formed in 1862, is one of a character somewhat similar to "Lloyd's," the principal differences between them being that while Lloyd's List embraces all vessels, whether built of iron or wood, which have obtained a certificate from Lloyd's surveyors, the defendants' list is not confined to certificated ships, but extends to all vessels throughout the world, whether steam or sailing vessels, which are built of iron, and they publish an annual list of all such vessels, which contain particulars for the information of underwriters and others who subscribe the annual sum of 2*l.* 2*s.* as to the ship, its classification, equipment and history, so far as such particulars can be obtained.

The *Tyne Queen* was an iron steamship of 1,000 tons burden, built at Newcastle in the year 1865, and she was purchased by the plaintiffs for the Liverpool trade in 1870. At the time of the purchase she was marked in the defendants' list with their highest mark, viz., 20, in red letters, indicating that she was a first-class vessel, and good for twenty years, this "twenty years red" certificate being equivalent to the class "A 1" at Lloyd's. The 7th rule of the defendants' association was as follows—

"A thorough survey will be required once in every four years for vessels with

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a red certificate for twenty years, and once in every three years for vessels with a red certificate for less than twenty years; vessels with a black certificate for less than twenty years to be surveyed every two years. When vessels are abroad at the time they become due for survey, they must be thoroughly examined on their return to the United Kingdom. The surveyors are at all times to have free access to examine vessels holding a certificate from this committee; and in case of defects reported by them not being made good the classification of the ship shall be revised."

And another of the rules was this—"Vessels due for periodical survey, which leave the United Kingdom without being duly surveyed and passed by the surveyors to this registry, will have their class suspended until such survey has been properly made. Notice of such suspension of class will be given in the first monthly supplement issued after the sailing of the vessel. Vessels remaining abroad for two years after they become due for periodical survey will have their class suspended, until they have been re-surveyed."

In the year 1870 the plaintiffs lengthened the *Tyne Queen*; and in September, 1872, they added to the "awning" or "spar" deck over the engine-room so as to make it cover the whole length of the main deck of the ship. This last alteration, and the manner in which it was carried out, was approved by the surveyors of the London Lloyd's, but was objected to by the defendants, on the ground that although the addition of such spar deck gave the vessel a higher freeboard, it gave her weak upper sides; and in the next publication of their list of iron ships for the year from September, 1872, to August, 1873, the vessel appeared with the words "class suspended, 1871," printed in the margin under the figures "20" red. The plaintiffs then asked for an explanation, when the defendants offered to reinstate the vessel to her former class if she were strengthened by the addition of certain bracket plates and angle irons. The plaintiffs then (having their Lloyd's certificate) replied on the 3rd of September, 1873, that they were unable to comply with the defendants'

request, and requested them in the meantime to withdraw the vessel altogether from their book of classification. The defendants declined either to strike out the words objected to or to withdraw the name of the ship, and they continued to publish their list with the words "class suspended, 1871," opposite the name of the *Tyne Queen*.

The plaintiffs then filed the present bill, and now moved for an injunction in terms of the prayer as above mentioned. The character of the evidence will sufficiently appear from the arguments and the judgment of Malins, V.C.

Mr. Glasse, Mr. W. F. Robinson and Mr. R. G. Williams (of the Common Law bar), for the plaintiffs. The plaintiffs had the clear right to require the defendants to withdraw the name of the *Tyne Queen* from their register. In the present list numerous vessels are marked as so withdrawn. Our evidence shews that it is the practice of the defendants to accede to requests for withdrawals, and the *Tyne Queen* is the only vessel against which the words "class suspended" have been entered in their list. The vessel is a first-class vessel, and that the alterations have not rendered her less seaworthy is shewn by the fact that she now has the A 1 certificate of Lloyd's. It is a mere difference in the opinion of surveyors. Even if it is the honest opinion of the defendants' surveyors that the ship requires strengthening, the defendants have no right to insist on retaining the ship on their list, and at the same time affixing the stigma of "class suspended." Our evidence shews that what the defendants have done has damaged the character of the ship, and rendered it difficult for the plaintiffs to obtain the same rate of freight, or even charterers for their ship, and the plaintiffs are entitled to call upon the Court to interfere and to restrain the defendants from further publication, on the ground of injury to property—

Dixon v. Holden, Law Rep. 7 Eq. 488;

The Springhead Spinning Company v. Riley, 37 Law J. Rep. (N.S.) Chanc.

889; s. c. Law Rep. 6 Eq. 551;

Maxwell v. Hogg, 36 Law J. Rep.

(N.S.) Chanc. 433; s. c. Law Rep. 2 Chanc. 307-310.

Mr. Cotton, Mr. Cohen (of the Common Law Bar) and *Mr. F. Thompson*, for the defendants.—The register of the defendants is established for the express purpose of giving all information respecting iron ships, and the only requisite is that such information must be true. There is a *bona fide* difference of opinion as to the effect of the alterations in the plaintiffs' ship. No malice is alleged against the defendants, and they have a perfect right to state their own opinions fairly to their subscribers. Many of those persons who are most anxious for the character and safety of our mercantile marine are of opinion that there should be no further governmental interference, but that the remedy lies in public associations, like the defendants'. The existence of such associations would be impossible if on a *bona fide* allegation that a ship was unseaworthy the owner was held entitled to an injunction. The Court of Chancery never interferes by injunction, unless some legal right has been violated or threatened, or unless there has been breach of contract or tort, and the cases cited on the other side do not conflict with this proposition. If an act, being illegal, tends to the destruction of property, the fact that the act is of a criminal character will not prevent the Court of Chancery from interfering. That was the principle of the decision in

The Springhead Spinning Company v. Riley (*ubi supra*);

and in

Dixon v. Holden (*ubi supra*), the publication was libellous, and an action would have lain. So here, if the defendants' publication had been a libel, tending to the destruction of property, an injunction might, upon the authorities, have been granted, but that is not the case, and it cannot be contended that any legal right has been violated or threatened. There is no breach of contract; there is no tort, for there is neither malice nor falsehood. Again, there is no right of action for slander of title, unless the statement is false or malicious—

Pater v. Baker, 3 Com. B. Rep. 831; s. c. 16 Law J. Rep. (N.S.) C.P. 124.

It is a very important and vexed question whether spar-deck vessels are as safe as others. They have a high freeboard; but if the ship is loaded deep so as to be immersed below the line of the main deck, then her top sides not being originally constructed to carry a deck, may not be sufficiently strong in all weathers. It is then a case of a *bona fide* difference in opinion between two great associations; and if the defendants' association, holding their opinion, were not to publish it, they would be deluding the public. No injunction lies to prevent a person from speaking the truth; and if a person once has a right to make a statement, he may repeat it as often as he likes. The certificate is here suspended because the plaintiffs would not spend 200*l.*, the costs of the repairs which the defendants thought necessary, on a ship worth 25,000*l.* On every ground the plaintiffs' motion must fail.

They also referred to

Starkie on Evidence, pp. 41, 42, 108.

Mr. Glasse, in reply.

MALINS, V.C.—The plaintiffs have adduced a large body of evidence by underwriters and shipbuilders of great experience to prove two things—first, that the *Tyne Queen* is a first-class vessel; that she is registered at Lloyd's as A 1, which means a very first-class vessel; and that what has been done is not calculated to weaken her or render her less worthy as a seagoing vessel than she was before; and they have also proved that the entry in the registry complained of is calculated to injure the plaintiffs. They have also the evidence of many persons, and, amongst others, the last charterers of the vessel, to prove that it has injured the vessel to such an extent that upon her coming home, making her last voyage from Canada to Liverpool, there was very great difficulty in obtaining a freight. That the entry is calculated therefore to injure the plaintiffs, and does injure them, I can, upon the result of the evidence, entertain no doubt. Still there remains the question whether the plaintiffs have any right to complain in this Court, and ask for an injunction to restrain the continuance of that entry. Now, what is the

meaning of the entry? This is an association which everybody joining it must, I think, understand to be one based upon the principle that those who conduct its affairs are to form their own opinion, and to class the vessels as they think fit. They exercise their discretion by putting the vessel into the very first class. Could the owners have complained if they had exercised their discretion by putting her in a lower class? That the surveyors exercised honestly their discretion I entertain no doubt whatever. Mr. Glasse admits they have exercised their discretion honestly, but he has suggested that the object was to give the surveyor of the association an additional fee. It is merely a question whether he should have the surveyor's fee or somebody else. Now Mr. Wimshurst, the surveyor of the association, swears, and I believe correctly, that "the committee, in refusing to make the alterations in the register as required by the plaintiffs, were not influenced by any personal motives towards the said plaintiffs, but were actuated solely by a desire to perform their duty towards underwriters and subscribers to the registry, who rely upon the statements contained in the said registry and solely with a view to the interests of subscribers and underwriters, and also of the shipping community in general who, in questions as to the character and seaworthiness of vessels, place very great reliance upon the information contained in the said list." Now, does the entry, "class suspended, 1871," mean anything more than that those who conduct the affairs of this association have not, as things now exist, made up their minds in which class she shall now be placed, whether she was to remain "twenty years" or something lower than "twenty years." If that is their opinion, I am at a loss to see upon what ground they are not at liberty to record it. I cannot help thinking that the plaintiffs have bound themselves to give the defendants the liberty of forming an opinion, and that their own acts in 1871 and again in 1872 are conclusive that they did admit the right of this association to form their opinion as to the classification of the ship; because in 1871 they submitted their alterations to the

surveyors of the association; again in 1872, not upon their own application undoubtedly, but upon the application of the defendants, they gave an order to survey the ship under which she was surveyed, which is again submitting to the propriety of the defendants forming their own opinion.

Again, considering that the class of this vessel was suspended in December, 1871, that she has been employed, as I understand, ever since, and that the plaintiffs never found out this grievous evil which they have suffered until very lately—the time (if I were to go upon the question of time) which has been allowed to elapse would be a fatal bar to my granting them an injunction upon an interlocutory application. If the defendants are to exist, as with the concurrence of the plaintiffs they do, for the purpose of their protection, as well as for the protection of the mercantile class, and indeed society at large, I cannot conceive anything more straightforward or honest than the course they have adopted. If their agents, upon whose opinions they must act, have fairly and honestly come to the conclusion that unless the works of this vessel, after the alterations which have been made, are strengthened in the manner they prescribe, they cannot class her as "20 years, red," surely they must be justified in entering in their own books, as their own opinion, that the class is suspended; that is, that until these works are done they cannot make up their minds, and they suspend their opinion as to what class she shall belong. The whole book is but a matter of opinion. The plaintiffs have become members of the association, and supported it because they knew that opinions were recorded in that book as to what class a vessel belongs to. If they took advantage, as they did, of this registry by having the *Tyne Queen* recorded as being a ship of the very first class, I think they have no right to complain that the same body, exercising an honest discretion (for of course my observation would not apply if there had been any malice or improper conduct, or any improper motive had actuated them), acting upon the reports of those who must be their advisers, namely, the sur-

veyors, have come to the conclusion that this vessel cannot any longer be ranked as belonging to the first class until the alterations or improvements required in the report are made. I think they were perfectly justified in entering in that registry, "class suspended." If the plaintiffs join a registry of this kind, are they not bound by it? The committee are not bound to say that the ship is "20 years, red," unless they think so. They are entitled to express their opinion, and they have expressed it. There is no malice; there is no impropriety; there is no want of truth; there is no want of fair dealing. Nothing unreasonable was required from the plaintiffs. As I collect from the evidence, this vessel is worth 25,000*l.*, and an expenditure of 200*l.* or thereabouts would have satisfied the requirements of this association, in which case these words would never have been inserted, and the ship would have remained as belonging to class "20 years, red," and all these evils of which the plaintiffs complain would have been avoided. Therefore, although I am satisfied they have sustained damage—and the evidence is distinct on that subject—I am clearly of opinion that it is an evil that they have brought upon themselves. I think a little more forbearing conduct might have remedied it. No case has been established by this bill for the interference of the Court. If it is a case of injury, I think it is not a case for injunction. They may have a remedy elsewhere. Therefore, not only upon the merits, but upon the ground of the long delay and their long acquiescence, I come to the conclusion that a case for an injunction is not established, and the motion must be refused.

My first impression upon the opening of this case was, that it was rather an arbitrary exercise of the defendants' discretion. But having heard the elaborate and able arguments which have been addressed to me, I have no reason whatever to blame the defendants for the course they have taken. Nor do I see the slightest ground for coming to the conclusion that in this transaction they have been actuated by any other desire than faithfully to perform that duty

which they have undertaken towards shipowners and the public in general. Under these circumstances I cannot do otherwise than refuse the motion with costs. It has entirely failed in my opinion, and therefore the usual consequences must follow.

Solicitors—Messrs. G. P. L. Eyre & Co., agents for Garnett & Tarbet, Liverpool, for the plaintiffs; Messrs. Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for the defendants.

JESSEL, M.R. }
1874. } BELLAIRS v. BELLAIRS.
July 3, 16. }

Will and Codicil—Trust for Sale and Conversion of Real and Personal Estate—Gift of Share in Proceeds—Condition in Restraint of Marriage.

H. B. by his will devised and bequeathed his residuary real and personal estate to his two sons, H. W. B. and C. B., in trust for sale and conversion, and for investment on various securities; and he directed his trustees to divide the annual income of the trust fund, after certain deductions, among his seven other children, during their lives, in specified shares, of which his two daughters, L. P. B. and N. M. S. B., were to have ten each; and he further directed that after the death of the survivor of his said seven children, the trust fund should be divisible between his two sons, H. W. B. and C. B., and their respective executors, administrators and assigns, in equal shares.

By a codicil to his will H. B. declared that on the marriage of either of his daughters, L. P. B. and N. M. S. B., the bequests of shares made to them by his will should be void; and in lieu of the same he gave to such one of them as should have married four shares only for her separate use; and he gave such one of them as should remain unmarried thirteen of the same shares, and directed that on one of his said daughters being married the three overplus shares, and in case of both of his said daughters marrying the twelve overplus shares should fall into and form part of his residuary estate, and be divided as in his will was mentioned.

L. P. B. married after the death of H.B. :—

Held, that the condition reducing her shares in case of marriage was void, and that she was, although married, entitled to the ten shares of the income of the trust fund during her life.

The Rev. Henry Bellairs by his will, dated the 14th of January, 1861, after appointing to his two sons, Henry Walford Bellairs and Charles Bellairs, under a power contained in his marriage settlement, a sum of 6,000*l.* in equal shares, on condition nevertheless that they should, in case they preferred to accept in lieu thereof a freehold estate in the county of Lincoln (and which he in that case devised to them as tenants in common), release the trustees of his marriage settlement from the above mentioned sum, devised and bequeathed all the residue of his real and personal estate, except estates vested in him upon trust or by way of mortgage, unto the said Henry Walford Bellairs and Charles Bellairs, upon trust that they should with all convenient speed sell his real estate and convert into money his personal estate, and stand possessed of the moneys to arise from such sale and conversion upon trust thereout, to pay his debts, funeral and testamentary expenses, and certain sums of money therein mentioned, and to invest the residue on the securities therein mentioned, and out of the annual income of the trust fund to pay a certain annuity, and subject thereto to pay and distribute during the respective lives of his seven children thereafter named, or until any of them should do any act whereby his or her shares might be forfeited or vested in any other person or persons, the said income unto and between his said seven children in the shares following, that was to say :—

To his daughter Laura Parker Price, by her then name of Laura Parker Bellairs, ten shares thereof.

To his daughter Nona Maria Stevenson Bellairs, ten shares thereof.

To his daughter Frances Lake Brown, four shares thereof.

To his daughter Agnes Hulbert, four shares thereof.

To his son William Oswald Mackenzie Bellairs, three shares thereof.

To his son Arthur Heathcote Bellairs, six shares thereof.

To his son George Byng Bellairs, three shares thereof.

And he directed that from and after the decease of any one or more of his said seven children, the share or shares of him or her so dying should be paid to and divided between his said two sons Henry Walford Bellairs and Charles Bellairs and their respective executors or administrators equally, and from and after the decease of the survivor of them his said seven children, he directed that his said trustees or trustee should hold the trust fund in trust for his said two sons Henry Walford Bellairs and Charles Bellairs and their respective executors, administrators and assigns, as tenants in common in equal shares.

The testator made two codicils to his will, of which the first is immaterial, but the second ran as follows—

“I, Henry Bellairs, late rector of the parish of Bedworth, in the county of Warwick, but now residing at Belle Vue House, in the parish of Paington, in the county of Devon, do declare this to be a second codicil to my last will and testament, which last will and testament bears date the 14th day of January, 1861, whereby I have directed that the income of my residuary estate be divided into certain shares, parts or proportions, and that such shares shall be paid by way of annuities or otherwise as in my said will and codicil is mentioned; and whereas by my said will I have given to my daughter Laura Parker Bellairs ten of such shares, and have also given to my daughter Nona Maria Stevenson Bellairs the like number of ten shares; now I do hereby declare that on the marriage of either of my said daughters, the bequests of the said shares so given to them and each of them as aforesaid shall absolutely cease and be void, and in lieu and substitution thereof I give and bequeath to such one of them as shall have so married four shares only of my said residuary estate, the same to be paid into the proper hands of my said daughter, for her sole and separate use, free from the debts, control or engage-

ments of her husband; and I declare that the receipts or receipt of my said daughter, notwithstanding her coverture, shall be a sufficient and effectual discharge to the person or persons paying the same. And I give and bequeath to such one of my said daughters, so long as she shall remain unmarried, thirteen of the said shares in my said residuary estate; but I direct that the same be reduced to four shares only on her marriage, the same to be held for her sole and separate use and otherwise as declared of and concerning the aforesaid four shares of her said sister, as if the same had been here repeated; and I hereby direct that on one of my said daughters being married, the three over-plus shares, and in case of both of my said daughters marrying, the twelve over-plus shares shall fall into and form part of my said residuary estate, and be divided as in my said will is mentioned."

The testator died on the 17th of April, 1872, and on the 9th of July, 1872, Laura Parker Price intermarried with John Adolphus Pope Price.

In 1873 Nona Maria Stevenson Bellairs filed a bill for the administration of the real and personal estate of the testator, and a decree was made in the cause, and on the cause coming on to be heard on farther consideration, the question arose whether or not the declaration contained in the second codicil to the testator's will took effect on the marriage of Laura Parker Price.

Mr. Marten and *Mr. B. B. Rogers*, for the plaintiff.—The rule that conditions in restraint of marriage are void is only applied in equity to gifts of personal estate. In applying the rule equity follows the canon, which in its turn follows the civil law. It has never been attempted to hold conditions in restraint of marriage void, except in relation to such property as the Ecclesiastical Courts originally had jurisdiction over, viz., pecuniary legacies—

Scott v. Tyler, 2 Bro. C.C. 431;

White and Tudor's Leading Cases in Equity, 4th ed. vol. 2, 144;

Harvey v. Aston, 1 Atk. 361;

Reynish v. Martin, 3 Atk. 330.

No such rule prevails even at common law as to real estate, except where the

condition follows an estate tail, and then on the ground of repugnancy only—

Jenkins, Cent. Case 26; s. c. *Dyer*, vol. iii. 342 B.

But reading the will and codicil together this is a conditional limitation and not a forfeiture, and such conditional limitation is good—

Heath v. Lewis, 3 De Gex, M. & G. 954; s. c. 22 Law J. Rep. (N.S.) Chanc. 721;

Evans v. Rosser, 2 Hem. & M. 190; and the present case is distinguishable from other cases when the condition has been held inoperative by reason of the testator's having made a substantial gift in case of marriage.

[THE MASTER OF THE ROLLS.—The rule that conditions in restraint of marriage are void, is a rule in equity whencesoever derived. You have to shew it does not apply to real estate. The rule in equity is not the same as in the canon law. It does not apply to condition precedent or marriage with consent. It was adopted from the canon law with modification.]

Mr. Bagshawe and *Mr. Kekewich*, for persons having a reversionary interest in the trust fund.—Charges on land and proceeds of the sale of land follow the rule of the common law.

Poulet v. Poulet, 1 Vern. 204, is an authority that the Court does not apply civil law rules to the case of the vesting of legacies charged on real estate, and the analogy holds good in the case of conditions in restraint of marriage.

[THE MASTER OF THE ROLLS referred to *In re Hart's Trusts*, 3 De Gex & J. 195; s. c. 28 Law J. Rep. (N.S.) Chanc. 7.]

Mr. Chitty and *Mr. Dyne*, for the next-of-kin of the testator.—If the will and codicil be read together, the words in question amount to a limitation until marriage, and not to a condition in restraint of marriage—

Rochford v. Hackman, 9 Hare, 475; s. c. 21 Law J. Rep. (N.S.) Chanc. 511.

Mr. Wilbraham Ford, for the brothers and sisters of the plaintiff.

THE MASTER OF THE ROLLS.—It is no part of my business to make new law,

that is the province of the legislature. I am bound to follow the law as I find it, not to evade it or bring in subtle distinctions. The law as I understand it stands thus: a general prohibition of marriage is void as a condition defeating a gift of purely personal estate. I consider this part of the law of these Courts; the source whence it is derived is perhaps not material. But in fact it was derived from the Crown or civil law, and hence personal estate is subject to the rule in question, while land and charges on land follow the rule of the common law. But in this case the gift is not within either definition, it is neither land nor fixed personal estate. It is a trust for sale of real estate and conversion of personal estate, and a gift of the income of the proceeds. It gives rise to two considerations or questions—First. What is the rule in this Court as to legacies out of moneys arising from the sale of land? Second. What is the rule as to mixed funds? There is a preliminary question of construction, viz., what is the construction of this gift, is it or not a condition which comes within the rule stated? On this point the case is very plain. [His Honour here read portions of the will, including the direction to pay and distribute the income in shares until the events provided against.] The testator has used the word "until" in his will, shewing that he knew the difference between a condition and a limitation. The contention that it is a conditional limitation is scarcely arguable. On this question of construction as to whether it is a condition or not, two cases have a direct bearing—*Lloyd v. Lloyd* (1) and *Morley v. Renoldson* (2). In the last case it was held that a legacy recognised by a codicil, and made conditional on the legatee's not marrying, was in restraint of marriage. On the point of construction, therefore, there is authority for my view. As to the question of law there is no contest as to the rule applicable to personalty or as to the rule applicable to land or charges on land. And as to the

proceeds of the sale of land I hold the law is the same as it is with regard to personal estate. The rule was derived from the canon or civil law, but this Court did not consider itself bound by the limitations of that law. When this Court took the rule it departed from it in cases of conditions precedent, and conditions restraining marriage under a particular or given age, or without consent. It adopted a modified rule, which was brought into this Court from the Ecclesiastical Court as the rule applying to legacies of personal estate. Other rules were brought in in the same way, e. g., the rule that when a legacy was given and made payable at a future time, on the legatee dying under the age, his executor took the legacy. Now the question is as to the mode in which a fund lying between the two, pure realty and pure personalty, and found by a Court of Equity as money, is to be treated. This question was discussed in *In re Hart's Trusts* (*ubi supra*), and it was decided that this money was, for the purposes of construction, to be considered as falling within the meaning of personal estate. Lord Justice Knight Bruce says, as I understand him, that the property had become money by reason of a valid trust for sale. And Lord Justice Turner says in the same way that the laws of personal estate apply. It is said that this is mere analogy, but it is a very close one, and if it were merely a question of money arising from real estate I should hold the rule was the same as with regard to personal estate. But it is a mixed fund. Now the rule has been to govern mixed funds by the rules of personalty. And as to this rule applying to a mixed fund of proceeds of sale of realty and personalty, I am not left to any notion of my own. Vice-Chancellor Kindersley decided the exact point in *Lloyd v. Lloyd* (*ubi supra*). He could not have missed it. It is precisely to the point. Therefore whatever my opinion may be of the law I am bound by authority, and must hold that the condition is void.

(1) 2 Sim. N.S. 255; s. c. 21 Law J. Rep. (N.S.) Chanc. 596.

(2) 1 Hare, 570; s. c. 12 Law J. Rep. (N.S.) Chanc. 373.

Solicitors—Messrs. W. & A. Ranken Ford, for all parties.

HALL, V.C.

1874.

June 11, 12. }

TEWART v. LAWSON.

Tenant for Life, and Remainderman—Direction to accumulate Rents till all Debts paid—Perpetuity—Receiver discharged—Tenant for Life admitted to Possession of Estates.

A testator died in 1844, having by his will directed his trustees, out of the rents and profits of his real estates, to pay all his debts, including a sum of 8,000*l.* charged on part of his realty. The testator also directed that "no person to whom any estate for life or in tail was given by the will should be entitled to the rents and profits of the estate, or any part of them, until they were totally disencumbered and clear of debt." The trustees were to invest the moneys to come to their hands under the trusts of the will, until applied by them in any payment under it.

All the debts had been paid except the 8,000*l.*, and there was stock enough in Court to meet that. The payment of the debts had been effected by a sale of part of the realty, under orders of the Court; and a receiver had been appointed.

In 1874 a summons was taken out by the tenant for life to discharge the receiver, and to be let into possession of the estates:—

Held, that the receiver must be discharged, and the tenant for life admitted to the estates.

The summons in this case was taken out by the plaintiff for an order to discharge the receiver in the cause, and to let the plaintiff into the possession of the real estate, which formed the subject matter of the suit. The facts of the case were shortly these:

John Tewart, the testator in the suit, died on the 19th of April, 1844, having by his will, dated the 26th of March, 1842, devised to trustees a moiety of his real estates at Swinhoe, upon certain trusts in his will mentioned, and subject thereto, to his son for life, with remainder to his grandson J. E. Tewart (the plaintiff) for life, with remainder to the plaintiff's first and other sons in tail, with remainders over.

The will contained the following

NEW SERIES, 43.—CHANC.

clause—"And upon trust to pay and discharge and satisfy my funeral expenses, and all such debts and sum and sums of money as I shall be justly owing or indebted in at the time of my decease unto any persons or person whomsoever on mortgage bond or otherwise (including the said sum of 8,000*l.* so charged upon my said estate at Swinhoe by the said settlement)—And I do hereby further declare that it is my express will and meaning that the rents and profits of my said real estate shall, from time to time, be received by my said trustees, and be applied in liquidation of the debts I may be owing at the time of my decease until the whole of the debts of every description now due by me (including the said sum of 8,000*l.* so charged upon my said estate at Swinhoe by the said indenture of settlement) shall be fully paid off and discharged:—And that no person to whom any estate for life or in tail is limited or intended to be limited, by or in pursuance of this my will, shall be entitled to the rents and profits of the same estates, or of any part thereof, until such estates are totally disencumbered and clear of debt; and I do hereby direct that my said trustees shall, from time to time, place out and invest the moneys which may come to their hands by virtue of the trusts of this my will in or upon Government security at interest, and from time to time call in the money so to be placed out or invested, and so place out or invest the same in or upon new or other securities of the like nature at interest, until the same shall be applied by them in any payment to be made under the trusts and directions of this my will."

All the testator's debts had been paid except the mortgage of 8,000*l.*; and to meet that there was an ample sum of stock in Court. The debts had been satisfied by sales, made from time to time of portions of the real estates, by order of the Court. A receiver had been appointed, and the above summons had been adjourned into Court.

Mr. Joshua Williams and Mr. Fencers, for the plaintiff.—The principal objection taken to the summons is this: that, inasmuch as the testator's debts have been

paid by the produce of the sales of part of the real estates, there should be a sum of money put by to recoup the residue of that property. The validity of that objection depends, first, on the answer to this question, whether the direction to apply the rents and profits to the payment of the debts and the postponement of the possession of the estates till the debts are all paid do not together amount to a direction to accumulate, which may be in excess of the prescribed period, and therefore void *ab initio*? Trusts for the payment of debts out of rents and profits may be good; accumulations of the rents and profits for the same purpose resemble trusts; and will be good within the limits, and void only for the excess—

Wilson v. Halliley, 1 R. & M. 590;
s. c. 8 Law J. Rep. (o.s.) Chanc.
171;

Hawkins on Wills, 120 & 122;
[and other cases there referred to.]

Jarman on Wills, vol. 1, 286-7, 3rd ed.

Here the sales were made by the orders of the Court under a trust which authorized such sales. The sales cannot, of course, be now disturbed, and as the estates are, as a matter of fact, disencumbered, the receiver should be discharged and the plaintiff let into possession—

Lewis on Perpetuities, 637;
Bacon v. Proctor, 1 Turn. 31;
Bateman v. Hotchkin, 10 Beav. 426;
s. c. 16 Law J. Rep. (n.s.) Chanc.
514.

But in the next place: if the direction in the will does not amount to a trust for accumulation which is void as tending to create a perpetuity, then we say the case falls within the first section of the *Thellusson Act*, 39 & 40 Geo. 3. c. 98, and not within the exception in the second section. Wherever the provisions of a will are such as that to carry them out there must be an accumulation beyond the prescribed period, the case comes within the spirit of the Act. If this testator had said in so many words that the accumulations were to go on "till the estate was recouped," that would have been void on the face of it. What he does say is this: "Till all the debts are paid, no tenant for life shall have the possession." But that

makes the direction to be one that is within the mischief contemplated by the first section; and inasmuch as it is something more than a mere direction to pay debts, it is not within the exception in the second section; so far as it is "that something more," we say it is a trust for recouping the estate, and therefore void. But if the Court is against us in that respect, then we shall insist that beyond the time allowed by the Act, viz., twenty-one years from the testator's death (which time has already expired), the accumulations cannot go on.

Mr. Dickinson and *Mr. Peto*, for the parties entitled to the corpus of the estates.—The testator's intentions in this case are clear. But the question is, whether there is a trust created by him, the effect of which is to keep persons entitled otherwise to the possession of the estates out of that possession for a longer time than the law allows? We say that, *ab initio*, there was no such trust created. The testator's position was this: he had considerable estates, over which he had given his mortgage and specialty creditors powers of sale and disposition, for payment of what was secured to them. All that he owed might, in the nature of things, have been paid soon after his death. He wished, however, without interfering with the powers given to his creditors, to assure the estates to the persons beneficially entitled to them free from the incumbrances. He therefore directed that no person should take the estates till all the debts were paid out of the rents and profits; by which means he really only gave his creditors an additional security for their money—

Lord Southampton v. The Marquis of Hertford, 2 Ves. & B. 54.

The Courts have held that such a trust as that is good, to the extent that it enables the trustees to receive the rents and profits. But if so, why not good to the extent of enabling them to apply them in paying the debts? In this very case the Court ordered the sale of the estates for payment of the debts; and when it did so, must have had regard to the accumulation clause. The Court, therefore, acted on the assumed validity of this trust for accumulation; and we crave the

benefit of those orders of the Court in aid of our argument. The trust, therefore, is *not* void *ab initio*. But if not void *ab initio*, it has clearly not been in any way invalidated; in fact, it has been acted on—and by the Court itself since—and ought to be strictly carried out. But what has been done here? The direction in the will applies to “all” the estates, and some only have been sold. Why was that? To clear “all,” and so get earlier possession of the unsold portions. But in equity the case should be treated “as if all” the estates had contributed; and as they have not, in that point of view (and even in that alone), the unsold portions should contribute to recoup the others. This trust was either good or bad from the first; and the question is not one as to whether the “excess” is bad under the statute. Suppose, instead of a sale of part of the estates, there had been a mortgage of them? Then, the estates not being disencumbered, the trusts must have been continued, and the tenant for life kept out of the possession. We say that, apart from the statute, the trust was good at first, and so good entirely. A trust for creditors, apparently void as infringing against the rules as to perpetuities, is good, because the creditors may enforce their rights, and so accelerate the possession. Provided the possession of the estates can, from the nature of the trust, be accelerated, it is immaterial how, or by whose acts, that can be accomplished. Here, in fact, the parties beneficially interested might long ago have paid the debts, and so produced the same result—

Lord Southampton v. The Marquis of Hertford (ubi supra).

Brought, as these estates were, into the market, the trust, as between the testator's estate and the persons claiming under his will, still remains good. On that hypothesis we ask the Court to administer the trusts of the will, and to give the beneficiaries the property as the testator gave it to them.

Bateman v. Hotchkiss (ubi supra), is really in our favour. In conclusion, we submit that this summons should be dismissed with costs; or, in the alternative, that the plaintiff ought not to be let

into the possession without some provision being made out of the rents and profits for recouping the remaindermen what the corpus of their estate has contributed—

Bennett v. Wyndham, 23 Beav. 521;

Varlo v. Faden, 27 Beav. 255; s. c.

1 De Gex, F. & J. 211; s. c. 29

Law J. Rep. (N.S.) Chanc. 230.

HALL, V.C.—Mr. Williams, I will not call upon you to reply in this case.

The testator devised certain real estates to trustees upon trust that they should receive and take the rents, issues and profits of the devised estates, and from time to time pay and apply the same to and for the purposes thereafter mentioned and expressed until the trusts thereafter declared of and concerning the money to arise therefrom should be fully satisfied and performed:—“And from and immediately after, and so soon as the trusts thereafter declared shall have been performed, to the use of my said son:”—Then follow a series of limitations in strict settlement. The trusts which are there referred to as trusts of the rents and profits, “until the trusts hereinafter declared of and concerning the money to arise therefrom shall have been fully satisfied and performed,” were trusts that the trustees should pay, discharge and satisfy his “funeral expenses and all such debts and sum and sums of money as shall be justly owing by me at the time of my decease unto any person or persons whomsoever on mortgage, bond or otherwise, including the said sum of 8,000*l.* so charged upon my said estate at Swinhoe by the said settlement.” He then proceeds to declare that the rents and profits shall from time to time be received by the trustees and be applied in the liquidation of the debts that were owing at the time of his death, until the whole of the debts of every description, including the 8,000*l.*, should have been fully paid off and discharged,—“and that no person to whom any estate for life or in tail is limited or intended to be limited by or in pursuance of my said will shall be entitled to the rents and profits of the same estates or of any part thereof until such estates are totally disencumbered and clear of debt.”

Upon the construction of the parts of the will which I have read, I think it clear in this case that the testator designed and contemplated that the annual rents and profits would be applied for the purpose of clearing the estate from debt in the way which he has expressed; and that he did not intend by this form of direction to authorise the trustees in any way to resort to the *corpus* for the purpose of paying the debts. On the contrary, the testator clearly, as I think, negatives that, and designs payment of the debts by applying the annual rents and profits, however long it might take.

But though that was the scheme of the testator, that scheme was necessarily subservient to the rights of the creditors to get paid in a different way. The testator does not by his will at all attempt to make any provision for that state of things arising. He leaves that to take its chance, and he creates a trust of the rents and profits to pay the debts; so that they would be paid in that way, and that way only, unless the creditors came and availed themselves of their legal rights to be paid in a different way, or unless in any way consistent with the law of the country, including the administrations of estates in this Court, the debts came to be paid off otherwise than in the way indicated.

If we therefore look to the language of the will in the events which have happened, the trust has come to an end, and the debts have in fact been paid. The rents and profits were only to be applied for those purposes until the debts were actually paid.

That being the case, I am now asked in reality to create a new trust and a new scheme—to say what might have been attempted to have been said by the testator, viz., “Provided that if any of the estates should be sold at the instance of the creditors or otherwise, or if any of the estates which might be in mortgage should be foreclosed, then you must go on accumulating until you have got together a fund equal to the value of the property so sold, or the equity of redemption of that which has been foreclosed, and then you are to deal with that property, and let it constitute part of the estate which is to be subject to the limi-

tations of this will.” However, the testator has not said that, and I cannot take upon myself to say, that that course must be adopted; seeing that such a course as that certainly would, to say the least of it, raise a very grave question indeed whether such a provision as that could be valid. It was with reference to that that I referred to what the Master of the Rolls said in the case of *Bateman v. Hotchkin* (*ubi supra*), for it was not the decision itself that I referred to. No doubt the trust is a perfectly good trust, as the cases of *Lord Southampton v. The Marquis of Hertford* (*ubi supra*), *Marshall v. Holloway* (1) and a variety of cases of the same kind, establish. But though the trust is a perfectly valid trust so far as regards payment of the debts, it is a totally different question whether, when the trust cannot any longer be performed and is no longer required, this Court is to create another trust to take the place of that which has come to an end; and come to an end in a manner which we must consider the testator cannot have disregarded, cannot have been ignorant of, and which if he could have, we must take it he would have, provided for.

Having said so much as I have, and having, as I consider, said enough for the purpose of determining the question upon the construction of the will, still if the question had to be determined with reference to an express provision (supposing there had been an express provision), I certainly should consider, myself, that such a provision as that could not be sustained in point of law. It seems to me to be directly in the teeth of the principles upon which the accumulations of rents and profits have been held invalid with reference to the rights of the parties taking under the settlement; that is to say, *Marshall v. Holloway* (*ubi supra*) and *Holloway v. Holloway*; *Holloway v. Webber* (2), and all those cases which hold the trusts to be perfectly good for the purpose of paying debts (it is a mode of paying the debts) at the same time say—“you cannot go beyond that,

(1) 2 Swanst. 432.

(2) 37 Law J. Rep. (N.S.) Chanc. 865; s. c. Law Rep. 6 Eq. 523.

and if you are to accumulate beyond the time when all the debts are paid and to accumulate for the benefit of the persons who will take under the limitations, that is bad." That is bad notwithstanding this, that the limitations of the estates themselves might be perfectly valid; and valid with reference to any shifting clause which might be contained in the settlement, although there might be a succession of minorities, and therefore incapacity to bar the entail. Although those are perfectly valid notwithstanding that state of things, still they have said accumulating is a different thing. You are not to create a property in that way. It is obvious that by a scheme of this kind a man might buy an estate for 100,000*l.*, and he might pay 95,000*l.* for it, and in that sort of way he might go on accumulating through a succession of minorities to pay off the debt; and if the creditors did not claim their money the result would be that the man might in that way create an estate which at his death would have had no real existence. I should have thought myself that such a trust as that would be invalid. But in this particular case I rather go upon the particular language of this will; and I hold that I am not at liberty to create a trust for the purpose of raising that which has already been paid off and discharged, and properly paid off and discharged, although it has been paid off and discharged through the assistance of this Court.

Therefore the result will be that the plaintiff will be let into possession.

Solicitors—Messrs. Gray & Mounsey, for plaintiff;
Messrs. Markby, Tarry & Stewart, for defendants.

MALINS, V.C. }
1874. }
Jan. 20, 21. }

CAPRON v. CAPRON.

Apportionment Act, 1870—Rents of Real Estate specifically devised—Devisee—Executor—Apportionment.

A testator seized in fee specifically devised real estate by a will made before the Appor-

tionment Act, 1870. By a codicil made after the Act he confirmed his will, and he subsequently died between the half yearly days on which the rents of the devised estate were payable:—Held, that, under the Apportionment Act, 1870, the rents of the devised estate were apportionable between the devisee and the personal representative of the testator.

Observations upon the Apportionment Act, 1870, and upon Jones v. Ogle (42 Law J. Rep. (N.S.) Chanc. 334; s. c. Law Rep. 8 Chanc. 192).

The late Mr. George Capron by his will, dated April 2nd, 1866, amongst other things bequeathed certain life annuities payable quarterly, the first payment to be made at the expiration of three months after his death; and directed that a proportionate part of such annuities should be payable up to the day of the determination thereof, in case the same respectively should determine on any other than the quarterly days of payment; and charged the said annuities upon, and made them payable out of the rents and profits of his hereditaments in the county of Northampton, in exoneration of all his other real and personal estate. The said testator then devised his said hereditaments in the county of Northampton to trustees, their heirs and assigns, upon trust, to raise by mortgage such sums of money as should be required for the payment of such of his debts and legacies, and other capital moneys by his will directed to be paid, as his personal estate should be insufficient to satisfy; and, subject thereto, the said trustees were to settle and assure the said hereditaments, subject to and after making due provision for securing the payment out of the rents and profits thereof of the annual sums thereinbefore directed to be paid thereout, to the use of the testator's then eldest son, the defendant, George Halliley Capron, during his life, with divers remainders over in strict settlement, and an ultimate remainder to his own right heirs. The said testator then bequeathed all his residuary personal estate to trustees, upon trust for sale and conversion; and, after payment of his debts, funeral expenses and legacies, to invest the proceeds in the

purchase of hereditaments, to be settled upon the same trusts as the said hereditaments in the county of Northampton.

The testator by a codicil, dated the 1st day of July, 1871, after giving an interest which he had purchased in certain trust funds, and making certain bequests and giving certain directions respecting the discontinuance of certain allowances made by him as therein mentioned, in all other respects thereby ratified and confirmed his said will.

The testator died on August 24th, 1872, and a settlement was afterwards duly executed in accordance with the terms of his will. The rents of such parts of the testator's real estate in the county of Northampton as were let to tenants at the time of his death were payable half-yearly, on Lady-day and Michaelmas; and the whole rents which became due for the half-year commencing on Lady-day, 1872, and ending on September 29th, 1872, amounting to the sum of 2,820*l.* 17*s.* 5*d.*, having been paid to the tenant for life, a question was raised by the trustees of the settlement, on behalf of the persons interested in the residuary personal estate, whether such half-year's rents ought not to be apportioned under the Act of 1870, as between such persons and the tenant for life.

The Apportionment Act of 1870 came into operation on the 1st of August, 1870, i.e., between the date of the will and that of the codicil, and that Act in section 2 enacts as follows—

"From and after the passing of this Act, all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Mr. Cotton and *Mr. O. A. Saunders*, for the infant remaindermen under the settlement, the plaintiffs in the special case.—The moneys in question are rents of the devised estates. The testator, by a codicil to his will, executed after the passing of the Apportionment Act, confirmed his will, thereby making it an instrument published after the passing of the Act,

and the Act, under which all rents are apportionable, clearly applies. This is the first case in which the question has really arisen. In

Whitehead v. Whitehead, 16 Eq. 528, all that was decided was that a dividend on a specific legacy of shares in a limited liability company was not apportionable under the Act; and

Jones v. Ogle (*ubi supra*), was the case of a division of profits under a private trading partnership, which were held, under the circumstances, not to be "periodical payments," within the meaning of the Act.

The 6th section of the Act, providing that nothing therein contained should render apportionable annual sums made payable in policies of assurance, shews how extensive its operation was supposed to be.

Mr. Everitt and *Mr. Kekewich*, for the tenant for life.—Both

Whitehead v. Whitehead (*ubi supra*), and

Jones v. Ogle (*ubi supra*) are authorities in our favour. The marginal note in

Whitehead v. Whitehead (*ubi supra*) is that income arising from personality specifically bequeathed is not apportionable under the Act of 1870 between the specific legatees and the estate of the testator, and a specific devise of real estate must be treated on the same footing as a specific bequest of personality. In

Jones v. Ogle (*ubi supra*), Lord Selborne, L.C., said that he should have great difficulty in holding that the Act was intended to alter the proper construction of words contained in a will made before the Act passed, and that the construction of the words of a specific gift would generally be taken according to the meaning of them at the period when the will was made. Here the will was made before the Act, and though the testator died after the Act, under the Wills Act (7 Will. 4 and 1 Vict. c. 26), a will only operates from the death of the testator with reference to the real and personal estate which passes thereunder, while the codicil, which is said to have had the effect of republishing the will, was made for another purpose, and in no way affects the

question of the construction of the will; and, for the purpose of interpreting the meaning of the testator's gifts, his will must be treated as if he had died in 1866. The will shews that the testator, who must be taken to have known what the law then was and that the rents were not then apportionable, intended to provide for the payment of the annuities he bequeathed out of the rents of the devised estates. In fact, he expressly charges them on those rents, making the first payment, which the devisee has in fact to make, payable three months after his death. By

Jones v. Ogle (ubi supra)

the words of the will must be read according to the law in force when the will was made. Here the testator must be taken to have given the rents to the person who was to succeed him and to pay the annuities, and the Court will not allow the Act to have the effect of disappointing or altering the intention of the testator.

[MALINS, V.C.—Your argument is, that if the testator had died the day after his will was executed, the devisee for life would have taken these rents, and the testator must be considered to have known the state of the law, and to have intended what the law carried out; and it comes to this—that the Act cannot apply to any will made before the Act passed.]

Not to any will where there are provisions and a specific devise of this character.

[*Mr. Rawlins*, for the trustees, referred to

Roseingrave v. Burke, 1 Irish Rep. Eq. 186.]

That was a case decided in Chambers in Ireland, and it will not be followed by the Court here, where there is a case before the Court of Appeal which is applicable and in conflict with it.

Mr. Rawlins, for the trustees.

Mr. Cotton, in reply.—The words of the Act of 1870 are of the most comprehensive character. Rent cannot, in itself, be looked upon as one entire thing due on the rent-day, but as a number of units coming due *de die in diem*. It is admitted that if the will had been after the Act the argument of the other side would fall to the ground. The confirming the

will by the codicil has had the same effect.

Jones v. Ogle (ubi supra)

is not material as to the effect of a gift, though it is as to construction. Here there are no words which give the rents to the devisee as a matter of construction. Moreover, the last section of the Act is, in fact, retrospective, and applies to instruments then already in existence.

MALINS, V.C.—The point raised by this special case is one of very great and general importance on the construction of the Apportionment Act, 1870, which has been the subject of difference of opinion, and has, in the absence of judicial construction, caused many persons difficulty in administering estates.

A testator seised in fee devises estates for life, with remainder over in strict settlement; but, in considering the question, it makes no difference whether the devise is in strict settlement or to a person in fee, and the question is, in effect, the simple one whether, in the case of a testator seised in fee dying between the half-yearly or other days of periodical payment there should be an apportionment of the rents in favour of his personal representative, or whether the devisee, who will be the owner of the estate when the next half-yearly or periodical payment becomes due, is to have the entire rent. The law before this Act was passed was perfectly plain. In all cases of money lent on mortgage, with interest falling due from day to day, if the mortgage debt was given, the personal representative would have the interest, or so many days' interest as, taking it from day to day, would have accrued up to the day of the testator's death; but in this particular case, there would not be an apportionment between the estate of the devisor and the devisee. The estate of the devisor would have had no portion of the accruing rent, and the devisee, who was owner of the estate when the debt became actually due, would have had the whole half-yearly or periodical payment. This being a very defective state of things, this Act of 1870 was passed, having for its object, as I understood at the time, and as I collect from its terms, the making of apportion-

ments generally. It is an Act intituled, "For the Better Apportionment of Rents and other Periodical Payments," and after reciting—"Whereas rents, and some other periodical payments, are not apportionable (like interest on money lent), in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed." And proceeding—"Whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences," it enacts in its 2nd section as follows—[His Honour here read the 2nd section, stated above, and continued,]

Now, therefore, as I read it, the intention of the legislature is to assimilate rent to money lent. If this testator had been the owner of money lent on mortgage, the interest of such money would have been undoubtedly apportionable, and I take it that the enactment I have just read is a general provision applicable to this very case. Here the testator devised his estate, and without a word about the accruing rent. The accruing rents fall due from day to day—every day a fresh sum falls due; and consequently as many days' interest as have elapsed since the last quarterly or half-yearly payment became due, in my opinion are apportionable, and go to the general personal representative of the testator, and not to the devisee of the estates. This would have been my interpretation of the statute independently of authority; but the Vice-Chancellor of Ireland, in a fully considered judgment, in the case of *Roseingrave v. Burke* (*ubi supra*), has arrived at the same conclusion. It was objected that that case had been decided in Chambers; but it is the carefully considered opinion of an able Judge, reported with his sanction. It is in exact accordance with the opinion I had come to on the terms of the Act, and although it was argued in Chambers, yet being argued by counsel, I do not think it entitled to the less consideration because it was delivered in one room rather than another. I think, therefore, it is a good authority.

Then it is said that the decision of the full Court of Appeal in *Jones v. Ogle* (*ubi supra*) has an important bearing upon the question. Of course, I need not say

that if the point had been decided by the Court of Appeal I should have followed the decision; but the point was not decided in *Jones v. Ogle* (*ubi supra*). That case turned upon the particular words of the will, which were—"As to the share and interest which I have in the Lilleshall Iron Company, I bequeath the dividends and income thereof to my uncle, J. T. Ogle, for his life, and after his death the same share and interest shall belong to his two daughters, in equal shares;" and the decision of the Court of Appeal, affirming the view of the Master of the Rolls, turned on the effect of these words. Now, if a man says, "I give all the dividends I am able to give," does not that include the whole of the dividends, irrespective of any apportionment? So, in this case, the testator could do what he pleased with his property, and if he had used the words, "I give my lands, and all the rents accruing for or in respect thereof," that would have been, like *Jones v. Ogle* (*ubi supra*), an express gift of accruing rents; and I should have held it so, the cardinal point in construing wills being to ascertain the testator's intention.

But I am bound to say there are some observations of the Lord Chancellor which seem rather to imply a doubt whether the Act of 1870 is to apply to wills already made, or made before the passing of the Act. There is, however, no decision on the subject, and therefore I cannot regard it as fettering my discretion in this case, and I think the true answer is this—that if the legislature had intended the Act not to apply to instruments already executed, they would probably have said so. But the words of the Act are very general; it takes effect from the time of its passing, and its general enactment in section 2 to my mind was clearly intended to apply to all instruments which, at all events, should come into operation after the passing of the Act, and the will does come into operation after the passing of the Act, supposing the testator dies after it passed. Every testator is presumed to know the law. This testator made his will in 1866, but he made his codicil after the passing of the Act. So that, as this testator confirms and republishes his will by the codicil in 1871, I think he

must be considered as repeating every word of his will at that time. In that sense, therefore, the will is made after the passing of the Act. It is very material to observe that the Apportionment Act, 4 & 5 Will. 4. c. 22, does provide that it shall apply to all payments coming due at a fixed period, under any instrument to be executed after the passing of that Act, or (being a will or testamentary instrument) that shall come into operation after the passing of that Act; in other words, where the testator shall die after the passing of the Act. That Act expressly provides that it shall apply to all wills, at whatever period they come into operation after the passing of the Act. It is to the last degree improbable that the legislature should have intended an Act, expressed in the most general terms, to have had the limited operation contended for.

Therefore, upon the ground that the enactment is most general, my opinion is that it must apply to all cases, at whatever times the instrument is executed, provided it comes into operation after the passing of the Act; and that being so, the Act applies in this case, and the rent must be taken just the same as interest accruing from day to day, and, consequently, I am of opinion that there must be an apportionment between the devisee and the personal representative of the testator.

Solicitors—Messrs. Clarke, Son & Rawlins, for all parties.

JESSEL, M.R. }
1874. } WELLS v. WELLS.
July 24. }

Will—Construction—Nephews and Nieces—Husband's Sister's Children.

A testatrix by her will made a bequest as follows: "I give to my niece A. B. my large china dish and basin and three china plates." A. B. was not the niece by blood of the testatrix, but of the testatrix's husband. The will also contained other specific bequests to nephews and nieces who were the testatrix's nieces by blood. The

NEW SERIES, 43.—CHANC.

testatrix also bequeathed a sum of 600l. to two trustees upon trusts for investment and for payment of the income to her sister E. B. for life, and after her decease she bequeathed the capital equally amongst the whole of her nephews and nieces who should be living at her decease, declaring that in case any nephew or niece should have died before the period of distribution leaving issue, the share of such nephew or niece was to go to such issue; and the testatrix directed her trustees to divide the residue of her household furniture and effects amongst, and gave and bequeathed all the residue of her personal estate and effects to, all her nephews and nieces who should be living at the time of her decease in equal shares.

The testatrix died, leaving eleven nephews and nieces by blood, seven being the children of a sister and four the children of a brother.

At the date of the will, and also at the death of the testatrix, there were nine nephews and nieces by blood of her husband living, eight of them (including A. B.) being children of one, and one being a child of another of the testatrix's husband's sisters:—

Held, that neither A. B. nor the other children of the testatrix's husband's sisters were entitled to share in the household furniture or residuary estate.

Catherine Field, widow, by her will dated the 12th of October, 1871, made several specific bequests; among others a bequest in the following terms—
"I give to my niece, Ann Burman, my large china dish and basin, and three china plates." Ann Burman was not a niece by blood of the testatrix, but was the daughter of a sister of her husband. Some of the other specific bequests were to nephews and nieces who were such by blood. After the specific bequests the testatrix proceeded as follows—

"I give and bequeath to my said nephews, Thomas Wells and Edward Lloyd, of Hatton, engineer, their executors, administrators and assigns, the sum of 600l., now owing to me on mortgage, upon trust, that they, my said trustees or the survivor of them, his executors or administrators, shall and do lay out and invest the same in the parliamentary

stocks or funds of Great Britain, or at interest on good freehold securities in England, or else to permit the same to remain on its present security, and upon trust to pay the interest, dividends and annual produce arising from such money and securities unto my said sister, Elizabeth Bolton (who had been previously mentioned), and her assigns, for and during the term of her natural life, or else to permit her to receive the same for her own absolute use and benefit. And from and immediately after her decease, I give and bequeath unto the whole of my nephews and nieces who shall be living at her decease the said capital or principal sum of 600*l.*, to be equally divided between and amongst them, share and share alike, for their own absolute use and benefit; but in case any or either of my said nephews or nieces shall die before such division as aforesaid, leaving any issue him, her or them surviving, then, I direct that the share of him, her or them, my said nephews or nieces so dying as aforesaid, shall go to and be equally divided amongst such children, if more than one, and if only one such child, then to such only child absolutely; such child or children to take their parents' share only. I direct my said trustees to divide all the residue of my household furniture and effects amongst all my nephews and nieces who shall be living at my decease equally, share and share alike, for their own respective absolute use and benefit. I give and bequeath all the residue of my personal estate and effects, of whatsoever kind and wheresoever situate, unto all my nephews and nieces who shall be living at the time of my decease, to be equally divided between them, share and share alike, for their own respective absolute use;" and the testatrix appointed Thomas Wells and Edward Lloyd trustees and executors of her will.

The said testatrix left eleven nephews and nieces by blood her surviving, and no more (that is to say), seven children of the testatrix's sister, Mary Wells, and four children of the testatrix's brother, Benjamin Kemp.

At the respective times of the date of the said will, and of the death of the said testatrix, there were nine ne-

phews and nieces by blood of her husband, and no more living, that is to say, eight children of Mary Burman, a sister of the testatrix's husband (amongst whom was Ann Burman), and one child of Esther Kemp, another sister of the testatrix's husband.

The trustees filed a bill for the execution of the trusts of the will and for administration, and the cause coming on to be heard on further consideration, the question arose whether Ann Burman and the other the nephews and nieces of the testatrix's husband took any part in the bequests of the residuary furniture and effects and in the general residue of the testatrix's personal estate.

Mr. Speed, for the trustees.

Mr. Giffard, for the nephews and nieces of the testatrix's husband, argued that the testatrix having in the previous part of the will described one of her husband's nieces by blood as her niece, she must have intended to include all her husband's nephews and nieces in the gifts in question. He cited

Grant v. Grant, 39 Law J. Rep. (N.S.) C.P. 140 (Ex. Ch.) *ibid.* 272; s. c. Law Rep. 5 C.P. 380 (Ex. Ch.) *ibid.* 727;

James v. Smith, 14 Sim. 214;

Owen v. Bryant, 2 De Gex, M. & G. 697; s. c. 21 Law J. Rep. (N.S.) Chanc. 860.

[*THE MASTER OF THE ROLLS* referred to

In re Blower's Trusts, Law Rep. 6 Chanc. App. 351.]

Mr. Henderson, for the nephews and nieces by blood of the testatrix, was not called upon.

THE MASTER OF THE ROLLS said—I think *Mr. Giffard* has argued exceedingly well. I thought the principle was well established that when a word has a primary signification, those who allege another meaning are not allowed extrinsic evidence to shew that meaning. Here is a gift to nephews and nieces. Now have these words a primary and ordinary signification? The Court of Appeal in Chancery decided that they had. Lord Justice Mellish in his judgment in the case of *In re Blower's Trusts* (*ubi supra*)

said in two passages, that nephew or niece meant child of brother or sister. If that is so, they must take unless there is something in the context to give the words a contrary meaning. Now the context is, that in a former part of the will, where Ann Burman is described as the testatrix's niece, the testatrix's husband's niece is called "niece." It is said that having used the word there in a secondary meaning, it is to have a secondary meaning in the residuary gift. I agree with Lord Hatherley's judgment in *Smith v. Lidiard* (1). But *Grant v. Grant* (*ubi supra*) creates a difficulty. I think the Court laid down no proposition of law there, but laid down, contrary to the Lords Justices, that a wife's brother's child was a nephew or niece. This is not a question of law but of the English language, and I must decide between the two Courts. I have no doubt that the primary meaning is "child of brother or sister," and the Court of Appeal in Chancery is to be preferred to the Exchequer Chamber, neither having decided a point of law but a point of language. That being my view, as it was that of Lord Hatherley, I hold that nephews and nieces by blood alone are entitled.

Solicitors—Messrs. Taylor, Hoare & Taylor, agents for Mr. R. C. Heath, Warwick, for all parties.

LORDS JUSTICES. } In re THE LONDON, BOMBAY
1874. AND MEDITERRANEAN
May 27. } BANK.

Company—Winding up—Proof—Mutual Acceptances—Cross Transactions—Date of carrying in Claim—Realisation of Security—Creditor's Right to retain Proceeds and prove.

A bank, carrying on business in Bombay and London, sold to "C. & Sons," of Bombay, their acceptances for 25,000*l.*, payable in London three and four months after sight. In payment, "C. & Sons" gave the bank bills for 20,000*l.*, drawn on C. & Co.,

(1) 3 Kay & J. 252.

payable six months after sight, and 5,000*l.* in cash, together with a further sum, by way of discount, in respect of the difference of times when the bills became due. "C. & Co." accepted the bills drawn on them, and "C. & Sons" indorsed to "C. & Co." the bank's acceptances for 25,000*l.* The bank being unable to meet some of their acceptances, gave "C. & Co." a security for the payment thereof. Subsequently the bank became insolvent, and was ordered to be wound up. Both "C. & Co." and "C. & Sons" executed assignments for the benefit of their creditors. All the acceptances of "C. & Co." had been dealt with by the bank, and were in the hands of third parties, but "C. & Co." were the holders of the bank's acceptances to the extent of 19,000*l.* The representatives of "C. & Co.," acting on the erroneous assumption that the bank held their acceptances for 20,000*l.*, sent in a claim in the winding up of the bank for 5,000*l.* only. Subsequently, upon discovering the fact that the bank had parted with all their acceptances, they claimed to be admitted to prove to the full amount of 19,000*l.* They had in the meantime realised their security:—Held, that the representatives of "C. & Co.," as indorsees for value, were entitled to prove against the bank in respect of the acceptances held by them; and that since the claim for 5,000*l.* had been made on an assumption of facts shown to be erroneous by the affidavit made in support of it, the case should be treated as if the claim for the whole 19,000*l.* had been made at the time when the original claim for 5,000*l.* was carried in, and that being before "C. & Co." had realised their security, they were entitled to retain the amount so realised as well as to prove for the whole amount in the winding up.

This was an appeal by the official liquidator of the above-named bank from a decision of Hall, V.C.

Bomanjee Framjee Cama carried on business alone at Bombay under the firm of "Cama, Sons & Co." He also carried on business in London in partnership with Bomanjee Pestonjee under the firm of "Cama & Co." The above-named bank carried on business at Bombay and in London. In January, 1866, the Bombay branch of the bank sold to Cama,

Sons & Co., of Bombay, ten bills of exchange for 1,000*l.* each, payable three months after sight, and drawn by the manager of the Bombay branch upon the London branch of the bank. As a consideration for these bills, Cama, Sons & Co., of Bombay, gave the bank two bills of exchange for 5,000*l.* each, drawn upon Cama & Co., of London, and payable six months after sight. All these bills were duly accepted. The acceptances of the bank became due on the 23rd of May; those of Cama & Co. on the 23rd of August, 1866. In February, 1866, other bills of exchange, amounting altogether to 15,000*l.*, drawn by the manager of the Bombay branch on the London branch of the bank, and payable four months after sight, were sold by the Bombay branch to Cama, Sons & Co., of Bombay, for 5,000*l.*, paid in cash, and 10,000*l.*, in several bills of exchange, drawn on Cama & Co., of London, and payable six months after sight. All these bills were duly accepted. Those given by the bank became due on the 11th of July and the 29th of July, 1866. Those given in exchange by Cama, Sons & Co. became due on the 11th and 29th of September, 1866. In addition to the consideration thus given by them for the bank's acceptances, Cama, Sons & Co. paid to the bank a further sum, in respect of the exchange, by way of discount on account of the difference of the dates at which the bills given by them and those given by the bank became due.

All the acceptances of the bank were indorsed over by Cama, Sons & Co., of Bombay, to Cama & Co., of London. And the bank having failed to meet their acceptances for 10,000*l.* which became due on the 23rd of May, 1866, on the 1st of June, 1866, assigned to Cama & Co., of London, a promissory note of Messrs. Landau & Co. for 10,000*l.* for securing the payment of such overdue acceptances by two instalments payable on the 20th of June and the 27th of July, 1866, respectively. Default was made by the bank in the payment of the first of these instalments; and on the 20th of July, 1866, the bank was ordered to be wound up by an order dating back to the 9th of July, 1866. In August, 1866,

both the firms of Cama & Co. and Cama, Sons & Co. suspended payment. On the 6th of August, 1866, Cama, on behalf of the Bombay firm of Cama, Sons & Co., executed a trust deed for the benefit of his creditors. On the 22nd of August, 1866, Pestonjee in London executed a similar deed on behalf of Cama & Co., of London. The trustees under these two deeds were different persons and there was no joint assignment executed for the benefit of the creditors of both houses.

On the 19th of January, 1867, the trustees under the deed executed by Pestonjee carried in a claim for 5,000*l.* in the winding up of the bank. The affidavit in support of this claim was made by a Mr. J. B. Brown, a clerk to the accountants, in whose hands the affairs of Cama & Co., of London, had been placed, and the amount therein claimed was made out by crediting the estate of the bank with the acceptances of Cama & Co., of London, to the amount of 20,000*l.*, under the supposition that such acceptances were still in the hands of the bank, and debiting the bank with the bank's acceptances to the amount of 25,000*l.* The affidavit stated the facts, shewing the nature of the transactions on which the claim arose. No decision was come to on that claim; but on the 18th of April, 1869, the chief clerk made his certificate in the winding up, stating who were the creditors of the bank, and he thereby certified that Cama & Co. were creditors to the amount of 25,000*l.* as mentioned in Brown's affidavit.

It now appeared that in fact the bank had discounted or deposited with third parties all Cama & Co.'s acceptances for the 20,000*l.*, and that dividends to the amount of 970*l.* had been paid by the bank in the winding up on account of these acceptances. It also appeared that Cama, Sons & Co., of Bombay, had paid 3,200*l.* on the same bills, but the London firm of Cama & Co. had paid nothing upon them. Cama & Co., of London, had discounted the acceptances of the bank to the amount of 6,000*l.*, and were the holders of such acceptances to the amount of 19,000*l.* After sending in their claim for 5,000*l.*, the trustees under Cama &

Co.'s deed of assignment had realised Landau's promissory note, and had received about 8,200*l.* on account of it.

In July, 1873, the trustees of the London and the Bombay firm of Cama, acting together as the representatives of the London firm, took out a summons to be admitted to prove in the winding up of the bank for the 19,000*l.*, due on the acceptances of the bank in the hands of the London firm of Cama & Co. Upon the summons, which had been adjourned into Court, being heard, Hall, V.C., held, first, that this was a case in which the London firm of Cama & Co. should be admitted to prove in the winding up in respect of the bank's acceptances in their hands; and, secondly, that in proving they were not bound to give credit for the amount received by them for the realisation of Landau's promissory note.

The official liquidator of the bank appealed from this decision.

Mr. Dickinson and *Mr. H. Lake* in support of the appeal.—The transaction between the firm of Cama & Sons and the bank was merely an exchange of acceptances for the mutual accommodation of both houses. They seek to prove under the bank's acceptances, whilst the bank holds acceptances of theirs. If this proof were allowed, there would be a double proof. The bank has already paid dividends upon Cama & Co.'s acceptances, and under this proof it would be called upon to pay dividends also upon its own acceptances which formed the consideration for Cama's acceptances. The case is governed by the rule laid down in

Ex parte Walker, 4 Ves. 373.

If the proof were allowed, Cama & Co. would be proving in competition with their own creditors, and that the Court will not permit—

Ex parte Rawson, Jacob 274, 278;

Ex parte Macredie, 42 Law J. Rep. (N.S.) Bankr. 90; s. c. Law Rep. 8 Chanc. 535;

Byles on Bills (10th ed.), 450;

Ex parte Solarte, 2 Deac. & C. 261.

Secondly, the original claim sent in on behalf of Cama & Co. was for 5,000*l.* only, and the Court will not now extend it. At the time of making the claim Cama & Co. must have known that the bills were

in the hands of third parties, and that they were entitled then to claim to prove for the whole amount without reference to their securities. Not having done so, their proof cannot now be amended—

Kellock's Case, 39 Law J. Rep. (N.S.)

Chanc. 112; s. c. Law Rep. 3 Chanc. 769.

Mr. Lindley and *Mr. Kekewich* were called upon only upon the second point, namely, whether, in consequence of the claim by Cama & Co. having been in the first instance for 5,000*l.* only, their representatives were precluded from proving for the whole amount of 19,000*l.* They argued that under the General Order (of the 11th of November, 1862), under the Companies Act, 1862, rules 20, 21 and 22, creditors were not bound to prove their debts or claims in the winding up of a company, unless they were required so to do by notice from the official liquidator. It was not usual for creditors to make formal claims until they were required to do so. In this case the chief clerk's certificate of the 18th of April, 1869, stated all the facts. (They were stopped by the Court.)

MELLISH, L.J., said—He was of opinion that the decision of the Vice Chancellor was correct upon both points. The first question was, whether the trustees representing the London firm of Cama & Co. were entitled to prove against the bank in respect of the bills of exchange given by the bank to Cama, Sons & Co., of Bombay, and which had been indorsed by the Bombay firm to the London firm of Cama & Co., those two firms not consisting precisely of the same persons, there being a partner in the London firm who was not a partner in the Bombay firm. It was quite clear that if none of the parties had been insolvent an action at law could have been maintained by the London firm of Cama & Co. against the bank in respect of these bills. The transaction was this—the representatives of the bank at Bombay sold bills to the Bombay firm of Cama & Co. These bills were at three months' sight. In payment for the first set of bills for 10,000*l.* the Bombay firm of Cama & Co. gave to the bank bills, drawn

upon the London firm of Cama, Sons & Co., payable at six months' sight, and paid in cash the discount representing the difference between the times which the bills had to run. The second transaction was of a similar kind, except that 5,000*l.* was paid in cash. The London firm of Cama & Co. accepted the bills drawn upon them by the Bombay firm, and the Bombay firm indorsed and sent to the London firm the acceptances of the bank. In so far as appears, it must be taken that the endorsement was for value; *prima facie* there was a presumption that the endorsement was for value, unless the contrary were shewn to be the fact, and here it rather appeared that in the accounts between the two firms a balance was due from the Bombay firm to the London firm of Cama & Co. That being so, an action at law would lie by Cama & Co. against the bank. The transaction was not an exchange of accommodation acceptances, but was rather a purchase of bills; and although these were in great part paid for by bills of different dates, still they were not accommodation acceptances in respect of which no action at law could lie by the drawers against the acceptors, but these bills were indorsed apparently for value, and this claim was made by the indorsees for value. The case of *Ex parte Walker* (*ubi supra*) did not apply where the firm seeking to prove on the bills was not the same firm as that which entered into the arrangement for the exchange of the bills, and therefore had no application to this case. His Lordship doubted whether he was right in saying, as he had said in *Ex parte Macredie* (*ubi supra*), that possibly the doctrine of *Ex parte Walker* (*ubi supra*) might apply not only to a case where there was an exchange of accommodation acceptances, but also to a case where one bill was, in some respects, the consideration for another bill. The real test was that stated by Selborne, L.C., in *Ex parte Macredie* (*ubi supra*), namely, whether an action at law could be brought upon the bills by the party seeking to prove. In this case it was plain that an action at law upon the bills could be maintained by the London firm of Cama & Co., who were indorsees for

value, and therefore they are entitled to prove in respect of them.

The second question depended on this, when was the claim first made against the bank by the representatives of the London firm of Cama & Co.? If the claim was not made until after they had realised their security on Landau's note, they were not bound to give credit for the amount realised so that they did not receive more than 20*s.* in the pound on that part of the claim, namely, the first 10,000*l.*, in respect of which Landau's note was given. But if the claim was not made till after they had realised their security they must give credit for the amount received under it. The claim must be treated as made when the account was first sent in, accompanied by Brown's affidavit. It was true that the claim then made was incorrect, but the affidavit sufficiently stated the facts, and enabled the Court to see what the mistake was. It was a mistake of fact, because Brown had supposed that all the acceptances of Cama & Co. for 20,000*l.* were in the possession of the bank; and on that false assumption, he gave the bank credit for those acceptances, and debited them with 25,000*l.* Then having made this claim before Landau's note was realised, they discovered subsequently that the assumption was erroneous, and that the acceptances were not in the hands of the bank. Accordingly they now sought to amend their proof. This they were entitled to do. The decision of the Vice-Chancellor was therefore right on both points, and the appeal must be dismissed with costs.

JAMES, L.J., concurred.

Solicitors — Messrs. Waller & Handson, for claimants; Messrs. Lewis, Munns & Co., for appellants.

JESSEL, M.R. }

1874. }

March 7. }

STEED v. PREECE.

Partition—Infant's Costs—Conversion—Sale of more than is required.

When real estate of an infant is ordered to be sold for payment of costs or any other special purpose, and more is sold than is required, the surplus proceeds of sale are converted into personal estate, and on the death of the infant go to his personal representatives.

Jermey v. Preston (13 Sim. 356) and Cooke v. Dealey (22 Beav. 196) questioned.

A petition was presented in the above suit under the following circumstances—

By an indenture dated the 29th day of May, 1857, and made between Thomas Allsop of the first part, Francis Davis of the second part, and the same Francis Davis and Sarah Steed (then Sarah Preece, spinster) of the third part, in consideration of the sum of 550*l.* certain real estates in the county of Hereford were appointed and granted by Thomas Allsop unto and to the use of Francis Davis and Sarah Steed, their heirs and assigns, upon trust for the petitioner, John Preece, who was then ten years of age or thereabouts, and Edward Edwin Preece, who was then aged two years or thereabouts (the said John Preece and Edward Edwin Preece being the illegitimate children of Sarah Steed, and Francis Davis being their reputed father), and the heirs of the respective bodies of the petitioner and Edward Edwin Preece, in equal shares as tenants in common; and it was declared that if either of them, the petitioner and Edward Edwin Preece, should die without issue, then the entirety of the premises should be held upon trust for the other of them, and the heirs of his body.

John Preece and Edward Edwin Preece were illegitimate. Francis Davis died in 1866. Sarah Steed subsequently (in 1867) married Joseph Steed, and in the year 1868 a suit was instituted by her, as surviving trustee of the indenture, and her husband against the petitioner, John Preece, who had attained twenty-one, and Edward Edwin Preece, who was

an infant, for the execution of the trusts, and, if necessary, for a partition of the estates.

On the 19th of June, 1868, a decree was made in the suit, whereby it was declared that the trusts of the indenture ought to be performed, and after ordering certain accounts of rents and profits, proceeded as follows—

“And his Lordship being of opinion that it will be for the benefit of the infant defendant that the premises comprised in the said indenture should be sold, and the defendant, John Preece, consenting thereto, doth order that the same be sold with the approbation of the Judge, the defendant, John Preece, being at liberty to bid and become the purchaser thereof. And it is ordered that the money to arise from such sale be paid into the bank, with the privity of the accountant-general of this Court, to the credit of this cause, *Steed v. Preece*, 1868, S. 1. And his Lordship doth declare that the costs of the said infant defendant are to be a charge upon his share of the said premises, and the further consideration of this cause is adjourned, and any of the parties are to be at liberty to apply as they may be advised.”

In pursuance of this decree a sale was made of the whole of the premises comprised in the indenture, and afterwards by a decretal order on the 19th of December, 1868, it was ordered that the cost of the suit, and of enrolling the conveyance to the purchaser should be taxed, and that out of one moiety of the purchase moneys (then in Court) the costs of so enrolling the conveyance should be paid to the solicitor of the petitioner, and the remainder of such moiety to the petitioner, and that the remaining moiety of the said cash should be invested in Bank 3 per cent. Annuities in trust in the cause, and that the interest thereof should be paid to the guardian of Edward Edwin Preece.

A moiety of the funds remaining after payment of costs was accordingly invested in 3 per cent. annuities and carried to the account directed by the order of the 19th of December, 1868. The other moiety was paid out to John Preece.

Edward Edwin Preece died in January, 1874, under age and without issue. At

the time of his death there was standing to the credit of the cause and to his account the sum of 160*l.* 9*s.* 5*d.* Bank 3 per cent Annuities.

By an indenture dated the 9th day of February, 1874, and enrolled in Chancery, made between the petitioner of the one part, and John Gwillim of the other part, the petitioner affected to bar his estate tail in the 160*l.* 9*s.* 5*d.* Bank 3 per cent. Annuities, which sum he claimed as representing land in equity.

The petition prayed that it might be referred to the taxing master to tax the costs of the petitioner of and relating to the petition, and the deed of the 9th of February, 1874, and that the Paymaster-General might sell the 160*l.* 9*s.* 5*d.* 3 per cent. Bank Annuities, and thereout pay the costs and succession duty, and pay the residue to the petitioner.

The Attorney-General was served for the Crown by direction of the Court.

Mr. Blackmore, for the petitioner.—The Court had no power to order a sale simply for the benefit of an infant—

Calvert v. Godfrey, 6 Beav. 97; s. c. 12 Law J. Rep. (N.S.) Chanc. 305.

The only power to sell, if any, was for costs—

Cox v. Cox, 3 Kay & J. 554;

Hubbard v. Hubbard, 2 Hem. & M. 38;

Thackeray v. Parker, 1 N.R. 567;

Davis v. Turvey, 32 Beav. 554;

and therefore either the sale was wholly invalid or the surplus money is to be treated as real estate—

Cooke v. Dealey (*ubi supra*);

Jerny v. Preston (*ubi supra*).

[THE MASTER OF THE ROLLS.—The cases are collected in the 3rd edition of *White and Tudor's Leading Cases in Equity*, note to *Ackroyd v. Smithson*, 801. The principle of them is, that a sale unnecessarily made by trustees will not vary the rights of parties. But every sale rightfully made operates as a conversion.]

Only to the extent to which the sale is necessary—

Cooke v. Dealey (*ubi supra*),

approved in

Dyer v. Dyer, 34 Beav. 504; s. c. 34 Law J. Rep. (N.S.) Chanc. 513.

The result is that, although the decree

of the Court was good so far as to give the purchaser of the property sold a good title, it was not effectual to change the rights of parties with regard to the surplus money.

Johnson v. Webster, 4 De Gex, M. & G. 474; s. c. 24 Law J. Rep. (N.S.) Chanc. 300; reversing 2 Sm. & G. 136; s. c. 23 Law J. Rep. (N.S.) Chanc. 480;

Flanagan v. Flanagan, cited in 1 Bro. C.C. 500,

and

Oxenden v. Lord Compton, 2 Ves. jun. 69; s. c. 4 Bro. C.C. 231,

were also referred to.

Mr. Hemming appeared for the Attorney-General.

THE MASTER OF THE ROLLS said—This particular case does not raise all the questions which have been argued. The facts are very simple. [After stating them, and reading the part of the decree above quoted, he continued]—The estate was sold under the decree, and by a further order one-half of the purchase money was paid to the adult, and the other half carried to the ordinary account of the infant, and to it the infant would have become absolutely entitled on attaining twenty-one. The infant however died under twenty-one, and the present petition is by the adult to have the money paid to him. He says that notwithstanding the decree and order I have mentioned, the proceeds of the sale must be treated as realty, and that he is entitled as remainderman in tail. The answer is simple. The estate was sold and turned into money; it was sold in a suit to which the adult was a party, and under a decree to which the adult consented. He cannot now be heard to say that the decree was wrong. I am bound by the decree, and I cannot say it is wrong. It is clear that the estate has been converted. The real and personal representatives must take it as they find it, according to the rule of the Court as laid down in *Oxenden v. Lord Compton* (*ubi supra*). It is suggested that the Court had only power to sell for raising costs. But I cannot say the decree is even partially wrong. The judgment in *Flanagan v. Flanagan* (*ubi supra*) is on

this point unanswerable. I am aware there are other decisions in *Jermey v. Preston* (*ubi supra*) and *Cooke v. Dealey* (*ubi supra*). In *Jermey v. Preston* (*ubi supra*) I have not the trusts of the term set out. As regards *Cook v. Dealey* (*ubi supra*), that seems to have turned on the assumption that the point was already decided in *Ackroyd v. Smithson* (*ubi supra*); but *Ackroyd v. Smithson* (*ubi supra*) did not say that if the Court or a trustee *bona fide* sells, and sells no more than in its judgment is sufficient, and it turns out there is a surplus, there is anything but a conversion. The principle is that where a sale is rightly made conversion must follow, and there is no right in the heir to take the property in any other way except as converted. This therefore is personal estate and will go to the personal representatives. The costs will come out of the fund.

The decree was as follows—

The Judge being of opinion that the purchase money arising from the sale of the premises sold under the said decree forms part of the personal estate of the defendant, Edward Edwin Preece, deceased, and that the petitioner is not entitled thereto under the limitations contained in the said indenture, dated the 29th day of May, 1857, doth order that the costs of the petitioner of and relating to the said petition, and of the said indenture dated the 9th day of February, 1874, and the costs of Her Majesty's Attorney-General, of and relating to this petition, be taxed by the taxing master; and that the 160*l.* 9*s.* 5*d.* Consolidated 3*l.* per cent. Annuities in Court to the credit of this cause, *Steed v. Preece*, 1868, S. 1, the account of the infant defendant, Edward Edwin Preece, be sold. And it is ordered that out of the money to arise by the said sale, and any dividends to accrue on the said annuities, the costs of the petitioner be paid to Mr. Thomas Fortune, his solicitor, and the costs of Her Majesty's Attorney-General to Mr. Henry Taylor Raven, his solicitor; and thereout also It is ordered what shall be assessed and verified for the duty payable in respect of the said money be, upon the requisition of the Commissioners of Inland Revenue, transferred to the account of the public moneys of the Receiver-General of Inland Revenue at the Bank, and the residue of the said money and dividends (if any) be paid to the legal personal representative of the said defendant, Edward Edwin Preece.

Solicitors—Mr. Fortune, for petitioner; Messrs. Raven & Bradley, for the Attorney General.

BACON, V.C. }
1874. } KEMPSON v. ASHBEE.
June 19. }

Undue Influence—Setting aside Security—Confidential Relation—Stepfather—Confirmation.

In a transaction with a person who is known to be under the influence and control of a father or mother (in this case the relationship was that of stepfather and stepdaughter), it is the duty of the person who is to reap the benefit of the transaction to see that everything that is done is fair and aboveboard, and that full explanation is given to the person conferring the benefit; otherwise the transaction will not be upheld.

Where security for a debt is given, by a person who is under age, through undue influence, and is therefore invalid, a bond given some years afterwards in respect of the same debt will not amount to confirmation of the security.

A stepdaughter, who was living with her stepfather, joined him, while she was still under age, in a promissory note, to secure a loan from A. to the stepfather. Subsequently, when she was aged respectively twenty-two and twenty-nine, and while she was still living with her stepfather, she joined in two bonds securing to A. the same loan and the interest which had accrued. A. knew of the relationship between the obligors:—Held, that as the promissory note was invalid, it did not create any debt, and that the subsequent bonds could not render that valid which was originally invalid, or amount to a confirmation.

The plaintiff in this suit, Elizabeth Hammick Kempson, was born in the year 1837. Under the will of her father, Cateret John Kempson, who died in 1849, she became entitled to a life interest in an undivided moiety of certain copyhold lands, and a sum of 6,000*l.*, the annual income of her share being about 195*l.*

In 1851 her mother, E. L. Kempson, intermarried with one Charles Sladden. The plaintiff lived and had her home with her mother till the second marriage of the latter, and afterwards with her mother and Mr. Sladden, and was only absent for the purpose of education. In

1854 she left school, and from that time resided permanently with her mother and Mr. Sladden. It appeared that she paid regularly 100*l.* a year for her board and lodging.

In 1857 Charles Sladden was indebted to the defendant, William Ashbee, whom he had known for many years, and who was a farmer near Herne Bay, in the sum of 100*l.* Sladden was then in pecuniary difficulties, and was anxious to borrow a further sum of 350*l.* from Ashbee, who however declined to lend him this sum without having further security, and it was arranged that Sladden and the plaintiff should give a joint promissory note for the aggregate amount which would then be owing to Ashbee, namely, 450*l.* The plaintiff accordingly signed this note, but she was then under twenty-one years of age. Both the defendant and Sladden acted in this matter under the advice of Mr. De Lasaux, a solicitor at Canterbury.

In 1859 the defendant required payment of the amount owing to him under the promissory note, but agreed to forbear to press for payment for six years, on obtaining from the plaintiff and Sladden a joint and several bond for the amount due to him for principal, interest and costs. The plaintiff, who was then twenty-two years of age, at first refused to sign the bond, but being assured it was only a matter of form, eventually agreed to do so. Accordingly, on the 13th of September, 1859, the plaintiff met Mr. De Lasaux and Sladden at Folkstone, and there executed a bond to secure 600*l.* and interest at five per cent. per annum. The bond was delivered to Mr. De Lasaux as solicitor to the defendant.

This first bond was payable in September, 1865, and in February, 1866, the defendant pressed for payment, and recovered judgment against Sladden for the amount due to him. Sladden was still unable to pay, and came to the plaintiff to induce her to execute another bond for 705*l.*, the amount due under the judgment. This the plaintiff, who was then about twenty-nine years of age, refused to do, and in a letter written by her to Sladden about that time, a part of which was produced by the defendant,

the rest having been torn off and destroyed, she said, "I have an objection to signing another paper. I am quite aware that one is not legally binding, but it is so morally, and I should not consider myself more bound by another than I do by that. Mr. Ashbee was contented at the time, and he must remain so now. I am sure you know me well enough to feel sure, dear Charles, that if you require my assistance, I shall always render you all that lies in my power. Uncle told me never to put my name to any paper when I was of age, and I cannot do it. If you are vexed with me you will quite misunderstand my motives." The plaintiff's uncle was Mr. G. S. Kempson, a solicitor in London, who was one of the executors of her father's will, and was her guardian.

The plaintiff, however, being, as she stated, very much pressed by Sladden, at length consented to execute a second bond.

Accordingly, on the 9th of March, 1866, the plaintiff and Sladden again met Mr. De Lasaux, who acted both for the defendant and Sladden, and executed the second bond. The plaintiff still continued to reside with Sladden and her mother, but she received no consideration for the execution of either of the bonds.

Mr. De Lasaux, by an affidavit, stated that on the occasion of the signing by the plaintiff of the promissory note, and also on the execution by her of both the first and second bond, he fully and carefully explained to her the nature of the documents she was about to execute, and the liability she incurred by such execution; but he did not say that he read the words over to her.

In 1867 the defendant tried to obtain payment of the amount due under the bond, or of a part of it, but was unable to do so, and from that time he could not find either the plaintiff or Sladden till the year 1872. In the latter year he discovered that she was residing with her uncle, Mr. G. S. Kempson, and he caused to be left for her at her uncle's house a notice in bankruptcy, and a writ in an action at law.

In February, 1873, the bill in this suit was filed to obtain a declaration that the

bonds were improperly obtained from the plaintiff, and were, as against her, fraudulent and void, and for an injunction to restrain the defendant from prosecuting his action at law. In July, 1873, on a motion by the plaintiff for an injunction to restrain the action, an order was taken by consent that the plaintiff should give judgment in the action for the amount due on the bond of the 9th of March, 1866, to be dealt with as the Court should direct on the hearing.

Mr. Kay and *Mr. Phear* appeared for the plaintiff.—The defendant knew Sladden very well, and knew that the plaintiff was living with him, and that he stood to her *in loco parentis*; it was therefore his duty to see that she was properly protected, and as he failed to do that, the security cannot stand. All the transactions sprang from the first security given by the promissory note, and it is not material that the second bond was executed when the plaintiff was twenty-nine. Undue influence may be exercised over persons who have long ceased to be minors—

Maitland v. Irving, 15 Sim. 437; s. c.

16 Law J. Rep. (N.S.) Chanc. 95;

Maitland v. Backhouse, 16 Sim. 58;

s. c. 17 Law J. Rep. (N.S.) Chanc. 121;

Baker v. Bradley, 7 De Gex, M. &

G. 597; s. c. 2 Sm. & G. 531; s. c.

25 Law J. Rep. (N.S.) Chanc. 7;

Espey v. Lake, 10 Ha. 260; s. c. 22

Law J. Rep. (N.S.) Chanc. 336;

Berdoe v. Dawson, 34 Beav. 603.

The age of the person conferring the benefit is not of importance where confidential relationship has been proved—

Rhodes v. Bate, 35 Law J. Rep. (N.S.)

Chanc. 267; s. c. Law Rep. 1

Chanc. 252.

In that case the plaintiff was about fifty years of age.

Mr. Eddis and *Mr. Speed*, for the defendant.—The plaintiff was during the whole time these transactions lasted paying Sladden 100l. a year for her board and lodging. She was therefore quite independent of him. *Mr. Kempson*, her guardian, was alive, so that *Mr. Sladden* did not stand to her *in loco parentis*.

It is clear the plaintiff knew the promissory note was not binding upon her,

and there is no magic in employing a solicitor for her protection.

The protection the Court has thrown over persons who have just attained their majority has never been extended to the mature age of twenty-nine.

They then went through the cases cited for the plaintiff, and contended that the question of principle was whether since attaining twenty-one, complete emancipation from the control of the parent or person benefited had taken place, and that in the present case it clearly had.

In the cases cited for the plaintiff there had been no confirmation, but in this case there was, and that is sufficient to render the transactions valid—

Wright v. Vanderplank, 8 De Gex,

M. & G. 133; s. c. 2 Kay & J. 1;

s. c. 25 Law J. Rep. (N.S.) Chanc. 753.

BACON, V.C., said—It seems to me the plaintiff has established her case.

The principles of the case are established by the authorities which have been referred to, and those principles have now become sufficiently familiar, and indeed so familiar, as to be without any kind of question. A dealing with an infant of course comes to nothing; a dealing with a person who is under the control and influence of a father or mother, may be impeached; and the person who is to reap the benefit of the transaction is bound to shew that everything that was done was fair and aboveboard, and that full explanation was given. That is what should be done, and the *onus* in this case is cast upon the defendant. Now the defendant here says in his answer that he knew who and what the plaintiff was, and knew she was the daughter of his friend *Mr. Sladden's* wife. He must have known, indeed he does not say he did not, that Sladden owing him money, had promised to get him the security of this very young person (whether having attained the age of twenty-one or not), who was living at that time in his house. That he says in his answer he knew perfectly well.

The first transaction between the defendant and the plaintiff consists of the promissory note which this young woman, who was then living in the house and

under the control and influence of Mr. Sladden, was induced to join in, for the purpose of securing a sum of money—no debt due from her—no obligation of hers—but a promissory note which she was induced to join in, because of the importunity (to put it no stronger than that) which Mr. Sladden had practised towards her.

In 1857 Mr. Sladden, it appears, was in embarrassed circumstances. There was an execution in his house; an advance of money became necessary, and Sladden applied to the defendant for that advance.

And here I may mention that the defendant himself says he knew perfectly well that Miss Kempson was living in the same house with her stepfather Sladden, and that he knew from Sladden's representations to him that she was entitled to certain property. And then it is, and without any application made by the defendant to the plaintiff herself, that the attorney, Mr. De Lasaux, is directed to prepare the security, which he did.

Now nobody can say, in the face of the authorities, that Mr. Sladden himself could have taken any such benefit as the promissory note represented from his *quasi* ward. And if Sladden himself could not do it, what equitable right, or legal right, can the defendant have acquired since, or can he have got through Sladden's agency to entitle him to enforce a security given by her under these circumstances? He says it was offered to him. We need not at present enlarge upon that. It was incumbent in that view of the case for the defendant to have seen not only that De Lasaux explained to her what he says it had been his practice for sixty years to do—and I wish it to be understood that I do not in the slightest degree impute any improper motives to him—but it is clear and beyond all doubt that he was acting in the interest of the defendant, who wanted to get a security for his loan, and so got this young lady to sign a promissory note, and that without any word of explanation which I can find in the evidence, except the vague general statement that De Lasaux told her what the consequences of doing so were or might be.

Now that is the beginning of the transaction, and this young lady is involved to the extent of some 400*l.* or 500*l.* in respect of this debt, which Sladden had contracted, for the purpose of rescuing him from the embarrassed condition in which he then was.

Well, now, if Sladden himself could not claim this, how can the defendant do so? He has omitted those duties which, according to the principles of this Court, are incumbent on a man who takes from a young and inexperienced person a suretyship for a debt of another. That duty applies equally to the lender as to the borrower. What the borrower cannot do, the lender cannot do, unless he fulfils every one of the conditions which this Court has held to be incumbent on the borrower.

Well, that is the first transaction, and everything that follows is in keeping with it. Mr. Eddis has argued very ably, as he always does, that confirmation is strong in this case, and that it deprives the plaintiff of what might have otherwise been her right. That is doubtless true in some cases, but here in this case I have looked very attentively, and I cannot find anything like confirmation. I find the original taint, so to call it, the means by which the defendant got his first security, prevailing all through, for in 1859 she is called upon to execute a bond, and she does so. At that time, no doubt, she had attained the age of twenty-one years; but at that time there was no explanation given to her. There is De Lasaux's evidence, which shews clearly that no explanation was given, and nothing like such an explanation as Ashbee was bound to give her. He was bound to satisfy himself that she knew what she was doing, and that she had, after a full and clear explanation, a fixed, deliberate and unbiassed intention to do the thing she did. But I do not find that. I find, on the contrary, that she is left entirely in the hands of Sladden, with no explanation given her but that vague explanation which De Lasaux speaks of, and in that way she is induced to sign this bond.

Now it is a very singular feature in this case, the production of that multi-

lated letter, and it is impossible to tell exactly from the state of that letter what is its real construction; but there is enough to shew that some importunity had been addressed to her on the part of Sladden to induce her to execute some security to Ashbee, and that she refused to do so, because she refers to some further security made by her, which, she says, is not legally though it may be morally binding, and she declines to execute any other security, reminding Sladden that her uncle had cautioned her not to sign any paper after she became of age. In that letter she positively refuses to do what he requires, and that letter finds its way to the defendant, because he produces it; therefore he must have been aware at the time of receiving this letter that her refusal was clear and distinct, and her reasons for it equally distinct. Then, I ask, what was it incumbent upon him to do on receiving such a letter as that? If he intended to press the matter, he ought at once to have put himself in immediate communication with the lady herself. There is no trace in his evidence, or in the evidence of Mr. De Lasaux, of anything having been done in that respect. It may be, and that was Mr. Phear's theory, that this mutilated letter was communicated to the defendant with the view of shewing him that all hopes of getting Miss Kempson to join in the security were at an end, because she positively refused to do so. I cannot say that I myself come exactly to that conclusion, but it is not at all impossible that it was so. There are only two sources to which I can look for an explanation of this: first, I have the defendant, who says he never said a word to her about it; and next, Sladden, whose influence over her seems to have been complete; if it happened that after having refused, she was afterwards over-persuaded, and ultimately did actually sign it, that would of course invalidate the thing.

Is it any better, when we come to 1866? That is a continuation of the very same transaction. In 1866 she was still, as the defendant in his answer says, living in Sladden's house. The defendant, it appears, had brought an action against

Sladden; he had obtained judgment against him, and his property was in danger of being taken, and in the 64th paragraph the defendant says this: "I admit that I had in the early part of the year 1866, and previously to the aforesaid interview between me and the plaintiff and the said Sladden and his wife, recovered judgment against the said Sladden, in an action upon the said bond of the 30th of September, 1859; but save that at the urgent request of the said Charles Sladden, made in the presence of the plaintiff at their said interview with me, I consented to give further time for payment of the amount of principal, interest and costs due to me, upon the plaintiff joining the said Charles Sladden in the necessary security as before, I did not signify to the said Charles Sladden I would abstain from issuing execution upon the said judgment if he would cause the plaintiff to execute another bond, or any other instrument to me, whereby she should make herself liable for the payment to me of the whole amount due for principal, interest and costs upon the said judgment, with interest upon that amount, or make any arrangement with respect to the procuring by the latter of the plaintiff's execution of the said bond of the 9th of March, 1866."

So that it is at his instance and knowledge, and under these circumstances, that he procured the second bond to be executed.

The second bond was for the original debt, and if there were no original debt or note, how could there be any validity in that which was given in 1866, and how can that be called confirmation? The defendant, in his answer at paragraph 53, says, "It is not the fact that the plaintiff never received any consideration for executing the said bond of the 30th of September, 1859, but on the contrary, six years' time was thereby given to her and the said Charles Sladden by me for payment of the amount of the principal and interest then due on the second promissory note."

So that the only consideration given for that bond and for the other bond was forbearance on the part of the defendant

to enforce that debt which had been contracted, as he says, on or very soon after she attained the age of twenty-one.

This is confirmation, Mr. Eddis says, by the second bond of the first security. But that does not appear to me to be the case. So far from considering this transaction as anything like a confirmation which would give validity to the original transaction, I think it shews plainly they did not consider her more strictly bound by the second than the first, and that they wished and expected that by exercising forbearance, it would have the effect of rendering it a measure impossible, and certainly unnecessary, for her to dispute the debt.

Then it is urged that if the plaintiff's case was the true one, how is it she did not take proceedings sooner? But why should she? She has never been assailed. No proceedings have been taken against her until a very recent period, when she was sued for this debt, and then she comes to this Court. But before that she was under no obligation to take proceedings at all.

Then there is an allegation that she had absconded, and that they could not find her. That is also disproved. There is nothing to shew it, and even if there were, in my opinion it is not material to the question, which is whether this debt, the promissory note, which is the origin of the transaction, and the second bond which was a continuation of it, whether that debt, by itself or by means of these two bonds, can be enforced against her. In my opinion it would be impossible, having regard to the cases that have been referred to, to say that this defendant, who claims through Sladden, who could not claim at all but on the condition of his making everything clear and explicit and plain to the plaintiff, and on getting her full consent to the original transaction, and afterwards upon clear explanation of the effects of the second bond, obtaining the full and free confirmation of it by the plaintiff, it is impossible, I say, for the defendant, whose rights are no greater than Sladden would have had, to claim against her the security of these two bonds or either of them.

Therefore the plaintiff is entitled to

the relief claimed by the bill, and to a declaration that the two bonds are fraudulent and void as against her, and to an injunction restraining further proceedings in the action. The defendant must pay the costs both of the suit and the motion.

Solicitors—Messrs. G. Ashley & Tee, for plaintiff;
Messrs. Wilkins, Blyth & Marsland, for defendant.

JESSEL, M.R. }
1874. } MUMFORD v. STOHWASSER.
June 18. }

Conflicting Equities—Priority of Time—Legal Estate—Notice.

B., a builder, entitled to an agreement for a lease, sold a house to M., and subsequently obtained a lease from the ground landlord, which he deposited with Stohwasser, by way of equitable mortgage, to secure an advance from Stohwasser. Stohwasser, at the time of his advance, had no notice of B.'s title. Stohwasser subsequently took a legal mortgage of the house from B., to secure his previous advance. At the time of taking such legal mortgage a tenant of M. was in occupation of the house:—Held, that the fact that a tenant of M. was in possession, gave constructive notice to Stohwasser of M.'s title.

Held further, that Stohwasser obtained no priority over M. by taking the legal estate.

Semble, that the result would have been the same if, at the time of taking the legal estate, he had had no notice of M.'s claim.

Semble, that a person advancing money on an equitable security which is subject to a prior equity, of which he has not notice either actual or constructive, does not, by subsequently getting the legal estate from a trustee who knows that he is a trustee, obtain priority, whether at the time he gets the legal estate he has or has not constructive notice of the prior equity.

In 1868 T. J. Barnett, a builder, obtained from Magdalen College, Oxford, an

agreement for a lease or leases of ninety-nine years, from September 29, 1868, of a piece of land at Wandsworth. The agreement contained the ordinary provisions for granting separate leases of houses to be erected on the property as they should be completed. Barnett verbally agreed to build for Mumford, for 575*l.*, a house on a portion of the land, and to grant an underlease of the same for the remainder of his term, less ten days, at 14*l.* a year.

The house was completed, and possession given to Mumford in March, 1869, and the last instalment of the purchase money was paid by him on June 7th, 1869. On the 24th of September, 1869, Mumford was dangerously ill, and the following memorandum of the said verbal agreement was hurriedly reduced to writing, and signed by the said T. J. Barnett (that is to say)—

"Thomas John Barnett has this 24th day of September, 1869, agreed to grant a lease of a piece of land, situate and being on All Farthing Piece, Wandsworth, to George Mumford, of No. 8, Down Street, Piccadilly, St. George, Hanover Square, county of Middlesex, for a term of ninety-nine years, less ten days, from September 29th, 1868; ground rent to commence March 25th, 1869, according to lease being drawn up by the solicitors of the estate, with plan annexed.

"Witness. Thomas John Barnett.

"W. Mumford."

On September 29th, 1869, Mumford died, leaving a will, under which the plaintiffs became entitled to the house.

On December 9th, 1869, Barnett obtained a lease from Magdalen College of the portion of the said piece of land on which the said house was built, at a rent of 13*l.* per annum, but the plaintiffs never had notice that such lease had been granted.

In September, 1870, Barnett—who was also a house agent—on behalf of the plaintiffs, let the house to Mr. Winter, who remained in possession till nearly September 29th, 1871, paying rent to the plaintiffs. At or before September 29th, 1871, the house became vacant.

On October 2nd, 1871, Barnett, having the lease in his possession, deposited it

with the defendant, Stohwasser, by way of equitable mortgage, to secure 1,020*l.*, without giving him notice of the sale to Mumford.

The house was at this time untenanted; and the defendant stated that he visited the house on September 30th or October 2nd, and found it empty, and a bill in the window, directing application for it to be made to Barnett.

In March, 1872, the plaintiff, through Barnett, let the house to Stammwitz. Stammwitz had notice that the plaintiffs were the owners of the house, and paid his rent to them.

On December 27th, 1872 (Stammwitz being then in possession as tenant of the plaintiff), Barnett gave a legal mortgage of the property to Stohwasser, to secure the previous advance of 1,020*l.* Barnett informed Stohwasser and Stohwasser's solicitor, that he had let part of the house; but neither Stohwasser, nor his solicitor, made any further inquiry, believing, as they stated, that Barnett meant that he had let the house to a lodger. Subsequently, Barnett became bankrupt.

In June, 1873, the plaintiffs filed the bill in this suit against Stohwasser and the trustee in bankruptcy of Barnett, and prayed for a declaration that the defendant took the legal estate, subject to the agreement of the 24th of September, 1869 (the informal memorandum above quoted), and for specific performance of the said agreement, referring to it again as the said agreement of the 24th of September, 1869.

Mr. Southgate and Mr. T. L. Wilkinson, for the plaintiffs.—The defendant took the legal estate from Barnett, who had entered into a previous agreement to convey for value with the predecessor in title of the plaintiffs, and the defendant consequently took the legal estate from him, subject to the same equities as it was subject to when he took it, whether he had or had not notice at the time that he obtained a conveyance that Barnett was a trustee—

Sharples v. Adams, 32 Beav. 213;

Mazfield v. Burton, ante, p. 46; s. c.

Law Rep. 17 Eq. 15.

This doctrine has been doubted in some cases, but all the cases shew that the legal estate is no protection when it is

taken by a person who has, at the time he takes it, notice, actual or constructive, that the person from whom he takes it is in the position of a trustee, and such trustee has himself notice of the trust or equity affecting the property—

Carter v. Carter, 3 Kay & J. 617; s. c.

27 Law J. Rep. (N.S.) Chanc. 74;

Pilcher v. Rawlins, 40 Law J. Rep.

(N.S.) Chanc. 105; s. c. on app.

41 Ibid. 485; s. c. Law Rep. 7

Chanc. 259,

which, as we contend, is the case here, as Stohwasser had, at least, constructive notice, by the fact of the house being in the possession of the plaintiff's tenant.

Mr. Fry and *Mr. Chauncy Beale*, for the defendant.—Barnett was not a trustee for the plaintiff. The agreement of the 24th of September, 1869, is not a valid agreement; it omits material terms, specific performance of it could not be obtained, and for specific performance of that agreement, and that only, the bill prays, and the whole case of the plaintiff is founded thereon.

Sharples v. Adams (*ubi supra*)

does not apply. Nor does

Maxfield v. Burton (*ubi supra*).

In that case the judgment proceeded upon the fact that the defendant had constructive notice at the time of his equity arising.

Here it is plain that the defendant advanced his money without notice, actual or constructive, therefore there is nothing unconscionable in his defending himself by obtaining the legal estate. Whether, when he obtained the legal estate, he had or had not notice is immaterial, but, in fact, he had no notice.

Pilcher v. Rawlins (*ubi supra*)

is in our favour, and the other cases cited do not apply. Besides, the plaintiffs and their testator have, by their conduct, enabled Barnett to commit a fraud, and contributed to it themselves, and on this ground they cannot have relief in equity.

Mr. Southgate was only called on to reply on the question of costs.

THE MASTER OF THE ROLLS.—I cannot say that I feel any doubt upon the law of the case now that we have got the facts, which are very few and very simple.

It appears that Barnett, a builder, in the year 1868 entered into an agreement with Magdalen College, Oxford, to build some houses on a piece of land at Wandsworth, and to take a lease from the college for ninety-nine years, from the 29th of September, 1868. Mumford agreed with Barnett to buy one of the plots of land and to take a sub-lease from Barnett of the house to be erected on that plot for a term ten days short of the ninety-nine years' term, at a rent of 14*l.* a year. That was a verbal agreement. Nothing appears to have been said in that agreement about the covenants, but of course the covenants would follow the original lease. Therefore that is a complete agreement. There is the term, the rent and the covenants all agreed to. Upon that Barnett, being a builder, builds a house for Mumford on the piece of land in question and is paid for it. Thereupon Mumford takes possession and lets it to a tenant. It appears that Mumford falling ill on the 24th of September, was minded to put the agreement into writing, but it was put into writing very badly. It says that "Thos. John Barnett has this 24th day of September, 1869, agreed to grant a lease of a piece of land situate" and so on, describing it "for a term of ninety-nine years, less ten days, from September 29th, 1868, ground rent to commence from March 25th, 1869, according to lease being drawn up by the solicitors of the estate with plan annexed." The odd fact of the matter is that the rent of 14*l.* a year is left out of this memorandum, and therefore that alone would not constitute an agreement. The agreement must rest upon the verbal agreement, although the existence of that agreement is corroborated by the written document. This fact and the prayer of the bill have led to Mr. Fry's argument as to there being no valid agreement, because the bill asks for the specific performance of "the agreement of the 24th of September, 1869," which is in itself imperfect. It does not give the rent which has to be found out by other evidence, nor does it shew anywhere what was the lease that was being drawn up. Now it is immaterial whether it was being drawn up or not, because the lease referred to as "being drawn up by the

solicitors to the estate," was evidently the original lease granted by the college. Whether it was being drawn up or to be drawn up, I have no doubt it was sufficiently referred to, and without any reference to it in the agreement the underlease would contain covenants similar to those in the original lease. So that I cannot see any uncertainty, more particularly seeing that the money had been paid and the purchaser had entered into possession. Therefore I should hold that it was clear, as between Mumford if he had been alive, and Barnett if he had been the defendant, that Mumford would have a right to say that Barnett was a trustee for him to the extent of the underlease agreed to be granted by Barnett.

Now what happened after this? Why, Barnett (and there is no use attempting to describe it in any other way) committed a fraud. Concealing from Stohwasser the fact that he had sold the house, and concealing from Mumford the fact that he had got the lease from the college, and therefore was bound to grant the underlease, he deposits this lease, which was granted on the 9th of December, 1869, by the college, with Stohwasser the defendant as a security. At that time the tenant who had originally been let into possession had gone away and the house was shut up and vacant, and at that time therefore there were no means of finding out by enquiry from the tenant as to whose the house was. Mr. Stohwasser therefore advanced his money believing that he had a good title, and without any notice actual or constructive that he had a bad title. The lease was deposited with him and the house was empty. Afterwards the house is let to the present tenant Mr. Stammwitz, and this tenant has been in possession certainly since March, 1872. He has paid his rent to Mr. Mumford through the agency of Barnett, and he was undoubtedly Mr. Mumford's tenant. On the 27th of December, 1872, Barnett assigns the legal estate to Stohwasser, but the mistake which Stohwasser made or his advisers made, was in not taking that assignment when he advanced his money. Then he might have been safe, but he delayed taking that as-

signment until December, 1872, and at that time the house was undoubtedly in the possession of Stammwitz, who was undoubtedly the tenant of Mumford, and therefore he had constructive notice of the tenancy of Stammwitz, and consequently notice of Mumford's title. It was therefore his duty upon taking the title to enquire of the tenant of whom he held, not having done that he got constructive notice that the person assigning to him was a trustee. In other words he took an assignment of the legal estate from a person whom he knew to be a trustee for other persons. I take it to be clearly settled from very ancient times that such an assignment will not avail the person taking it to get rid of a prior equity. That is very old law.

There is a second point raised, on which I have a word to say, although I think it does not arise in this case. I mean the question what the effect would be if the defendant had no notice of the trust? I say I do not think it is necessary to decide it, because I hold that he had notice. As to this second point there has been a great conflict of opinion, but I must express my opinion that even without notice he could not have acquired title. There is probably no point on which there has been as I said before greater difference of opinion, and it is hardly necessary to go through the cases on the subject, but I entirely subscribe to what Lord Justice James said in the case of *Pilcher v. Rawlings* (*ubi supra*), as regards the old cases—in which a trustee of a term to attend the inheritance, was allowed to assign in such a manner as to give a preference—being contrary to all principle. Those were cases of really constructive notice, because the person taking there must have known that the person assigning was a trustee for some one. What Lord Justice James says is this—"Those cases where a person seeking the conveyance knew the fact that the trustee was a trustee for somebody else, and could not convey without a breach of trust while the trustees were left in ignorance, those cases I say involve a principle which I have never been able to understand." I repeat that there are many cases which it would not

be in my power to over-rule, although I think they are contrary to principle, but this is not within those cases. This is the converse case. This is the sort of case—I do not mean this actual case, because I hold that the mortgagee had notice—but, supposing that I did not so hold, this would be the case of a trustee, knowing that he was a trustee, assigning over the legal estate to a person who did not know that he was a trustee, that person having acquired a prior equitable interest, and I should hold, if that neat point came for decision, which I think it does not in this case, that the second equitable incumbrancer or purchaser of the equity did not thereby gain any priority; in other words, that a person knowing that he was a trustee cannot, by committing a breach of trust, deprive of right his own *cestui que trust*. As I said before, the only point I have to decide is, whether a person, with notice at the time he takes the legal estate, that the person assigning it is a trustee of the estate, can get priority. I think that has been long since settled. I will refer to two or three cases, and two or three cases only. In the old case of *Saunders v. Dehew* (1) the Court said this, “Though a purchaser may buy an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by taking a conveyance from a trustee after he has notice of the trust”—that is the purchaser—“for, by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust.” I think that states the law about as concisely as it can be stated. The exact point that I have to deal with came before Vice-Chancellor Wigram in the case of *Allen v. Knight* (2). That was a very singular case. It may be stated shortly in this way. There was a first mortgage, then a second mortgage, both equitable, then the second mortgage, who had no notice of the first, purchased the equity of redemption, and then got in the legal estate. At the time he got in the legal estate he had notice of the first

mortgage, although he had no notice at the time he was advancing his money on the second. The Vice-Chancellor held that he could not, by getting in the legal estate, oust the first mortgagee, he having notice of the first equitable mortgage at the time he got in the legal estate. That was mere contract, as this is. He says, “the first question is, whether the conveyance of the legal estate, by means of the surrender and the admittance thereunder, has altered the relative position of the parties. Charles Allen at that time filled different characters. He was trustee under the will of Hallis of the 1,050*l.* stock, of the equitable mortgage for securing it, and of the legal estate by which the equitable mortgage was protected. He was, in addition to his character of mortgagor, bound by express contract with two of the trustees of Hallis’s will. They were the persons entitled to the equitable mortgage. The question is, could the defendants, the Smiths, either as purchasers for value, or as second mortgagees, and having notice of Charles Allen’s obligations to his *cestui que trusts*, insist upon holding the legal estate as against those parties with notice of whose rights that estate was taken. I think they could not, and that they must hold the legal estate precisely as Charles Allen held it, for which the case of *Saunders v. Dehew* (*ubi supra*) is an authority, if authority were wanting. My opinion, therefore, is that the change of the legal estate made no difference in the position of the parties.” That is a distinct authority, therefore, in favour of my decision in this case, and I must hold, therefore, that the defendant, Stohwasser, is bound to execute a proper underlease to the plaintiff, at the rent of 14*l.* a year, and subject to proper covenants, having regard to the covenants in the original lease. If there is any dispute that must be referred to chambers.

As regards the costs, certainly anything more careless than the conduct of the late Mr. Mumford, one cannot well imagine. He enters into a verbal agreement with a speculative builder, and when he takes a written agreement he does not take it in the proper form. Although he knew that a lease was soon to

(1) 2 Vern. 271.

(2) 5 Hare, 272; s. c. 15 Law J. Rep. (N.S.) Chanc. 430, affirmed 16 Law J. Rep. (N.S.) Chanc. 370.

be granted, or ought to have been granted, he gives no notice to the college, nor makes any attempt to prevent that speculative builder getting possession of the lease. He, knowing from the nature of the case that the lease would be granted to him, takes no steps to prevent this man committing a fraud, and I might almost say tempting him to commit a fraud by taking no step. I do not use the word tempt in one sense, although I do in another. On the other hand, the defendant is in the unfortunate position of a person who chose to take an equitable mortgage. He lent his money, as the City Bank had done before, on this very lease, a thing which bankers are in the habit of doing, but if they do lend their money to speculative builders on deposit of leases, knowing, or being bound to know, that there might be some other equitable title created on the part of the persons depositing, which might have priority over theirs, such persons lending money must not complain in the present state of the law that they lose their security; but I do not think in a case of this kind, where two innocent parties have been defrauded, and where both have been guilty, to some extent, of negligence, that I ought to visit the person losing his money with the costs of the suit, and although I entertain great respect for the rule that a successful litigant should have his costs as a part of the fruits of his litigation, yet I think this is not a case of that sort, and therefore I shall make a decree without costs.

Mr. Southgate.—The decree will be generally for a lease in accordance with the parol agreement.

THE MASTER OF THE ROLLS.—Yes.

Mr. Southgate.—And it had better be “by the defendants.”

THE MASTER OF THE ROLLS.—Yes, to be settled in chambers if the parties differ.

Mr. Southgate.—Yes.

Solicitors—Mr. L. W. Gregory, for plaintiffs;
Messrs. Pike & Son, for defendant.

LOORDS JUSTICES. { *In re* THE ORIENTAL IN-
1874. LAND STEAM COMPANY
July 1. (LIMITED).

Company registered in England—Business and Assets in Foreign Country—Winding up in England—Jurisdiction—Foreign Judgment and Execution—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 87 and 163.

A company registered in England under the Companies Act, 1862, with an office in London, but carrying on business and having property in India, was ordered to be wound up compulsorily by an order of the Court in England. Another English company, also carrying on business in India, had, prior to the winding up order, obtained in India a judgment against the first-mentioned company in respect of a debt, and subsequently to the winding up order issued execution upon the judgment against the property in India of the debtor company. The property was subsequently sold under an order of the Court here, and a portion of the proceeds were paid to the creditor company on account of their debt, on their undertaking to refund the same if they were not entitled thereto:—Held, that the creditor company were not entitled to retain the proceeds, but must hand over the same to the official liquidator of the debtor company, for equal distribution among the creditors.

This was an appeal from an order of Malins, V.C., made upon an adjourned summons taken out on behalf of the official liquidator of the above-named company to obtain the repayment by the Scinde Railway Company of a sum of 19,813 rupees, which had been paid to them under the following circumstances—

The Oriental Steam Company was a limited company, incorporated under the Companies Act, 1862, and having its registered office in London, but carrying on business in India, and possessed of property there of considerable value. The Scinde Railway Company was also an English company, incorporated by a special Act of Parliament, for the purpose of making and maintaining certain railways in India.

On the 23rd of May, 1867, the Scinde Railway Company obtained, in the Kur-

rachee District Court in India, a judgment against the Oriental Steam Company for above 40,000 rupees, in respect of a debt, on account of which they subsequently carried in a claim in the winding up of the Oriental Steam Company. For the purpose of recovering this debt the Scinde Railway Company issued in India five attachments against the property there of the Oriental Steam Company. Three of these attachments were dated respectively the 16th of July, 23rd of July and 3rd of August, 1867, prior to the order for winding up the Oriental Steam Company; the other two attachments both were dated respectively the 28th of January, 1869. An order for winding up the Oriental Steam Company was made by the Court of Chancery in England on the 8th of November, 1867, upon a petition dated the 12th of August, 1867. In April and March, 1868, the Scinde Railway Company sold the property comprised in the first three attachments, and thereby realised sums amounting to 28,248 rupees, which they retained in part payment of their debt.

In May, 1868, the whole of the Indian property of the Oriental Steam Company, not already attached by the Scinde Railway Company, was seized under an attachment issued by the Government of Bombay, who claimed to be creditors of the company.

By an order, dated the 28th of July, 1868, made by Malins, V.C. in the winding up of the Oriental Steam Company, a sale was directed of all the property of the company then remaining unsold. Before this order could be carried out the attachment issued by the Government of Bombay was removed, under an arrangement made between the Government of Bombay and the official liquidator of the company. Thereupon, on the 28th of January, 1869, the Scinde Railway Company issued the two attachments of that date, solely for the purpose of seizing all the property of the Oriental Steam Company then remaining unattached. The one of those attachments attached a factory at Kotree, in India, belonging to the company; the other attached any moveable property of the company within the jurisdiction of the Court in India.

By an order made by Malins, V.C., in the winding up of the Oriental Steam Company, and dated the 4th of March, 1869, it was ordered that, without prejudice to any question or any right whatever, an injunction should be awarded to restrain the Scinde Railway Company, and their officers, &c., until further order, from selling or disposing of, and from keeping or continuing in possession of the factory and property of the Oriental Steam Company at Kurrachee, Kotree, or elsewhere in India, which had been seized under the said last-mentioned attachments; and that the Scinde Railway Company should forthwith direct their agent at Kurrachee to withdraw the said attachment, and give notice to prevent the sale of the property which had been advertised for sale; and that the official liquidator of the Oriental Steam Company should, out of the first proceeds of the sale directed by the said order of the 28th of July, 1868, satisfy the claims of a certain Indian creditor of the company; and in the next place, upon the Scinde Railway Company undertaking to abide by any order the Court might make in the winding up of the Oriental Steam Company as to refunding the whole or any portion of what should be paid to them, as thereafter directed, in case they should not be found entitled thereto, should pay to the Scinde Railway Company the amount of principal, interest and costs claimed by them under the said attachment.

Accordingly, the Scinde Railway Company gave the requisite undertaking, and the sum of 19,813 rupees was paid to them under the last-mentioned order.

On the 6th of August, 1873, the official liquidator of the Oriental Steam Company took out this summons, to have this amount refunded to him by the Scinde Railway Company, and Malins, V.C., made an order in the terms of the application. The Scinde Railway Company now appealed from that order.

Mr. J. Pearson and Mr. A. G. Marten, for the appellants.—The estate of a company in a winding up did not become vested in the official liquidator in like manner as the estate of a bankrupt became vested in his trustee, and there being no assignment of it for the benefit



of all the creditors, the company's estate abroad was not affected by the winding up—

Ex parte Egyptian Commercial and Trading Company; in re Kelson, Law Rep. 4 Chanc. 125.

The 87th section of the Companies Act, 1862, staying actions and other proceedings after a winding up order, and the 163rd section of the same Act, making void executions, &c., subsequent to the commencement of the winding up, did not apply to proceedings and executions abroad. This had been decided by the Courts in India—

Bank of Hindustan, Case 5 Bombay H.C. 2 Rep. 83.

According to the decisions of the Indian Courts, the creditors in India were at liberty, after a winding up order here, to proceed according to the law of India. The Courts here had no powers of interference. The 98th section of the Act, relating to the collection of assets, did not extend to assets abroad. This Court had no jurisdiction to deprive the appellants of the proceeds of assets which, by the law of India, had been lawfully taken by them.

In re Piercy, 43 Law J. Rep. (N.S.) Bankr. 9; s. c. Law Rep. 9 Chanc. 33,

was also referred to.

Mr. Glasse and Mr. Whitehorne, for the official liquidator, were not called upon.

JAMES, L.J., said the order of the Vice-Chancellor was perfectly right. The winding up of the Oriental Steam Company necessarily took place in this country, where the company was incorporated. There could possibly have been an auxiliary winding up in India, under the Indian Winding up Acts, for otherwise all the assets in India would be liable to be torn up by the creditors there. But this was an English winding up. The English Act (25 & 26 Vict. c. 89) provided that all the assets should be collected and applied in discharge of the liabilities of the company, for the benefit of all the creditors. That created in the assets a beneficial interest on the part of the creditors, and made the assets trust property. The property ceased, on the winding up order being made, to be the property of the

company, and ceased to be liable to be seized by any creditor. There might, no doubt, be a difficulty in dealing, in a winding up, with the assets and creditors in a foreign country, unless the Courts abroad would assist this Court. But in this particular case there was no such difficulty, for the property had been realised, and the proceeds received, under an order of this Court. One creditor here had got hold of the property after it had become affected with a trust in favour of all the creditors of the company. He could not thereby get priority over the other creditors. The assets must be distributed here on the footing of equality, and the appeal must be dismissed.

MELLISH, L.J., was of the same opinion. He agreed with what had been said in argument that section 87 of the Companies Act, 1862, which provided that no action should be brought after the winding up order had been made, did not apply to any Courts but those in this country. Parliament was never considered to be legislating respecting the colonies, unless it was expressly so stated. Still, the general principles would apply to this case. It was said that the law in the case of a winding up was the same as in bankruptcy, but there was this distinction, that, under the Bankruptcy Act, the whole estate of the debtor, legal and beneficial, was, upon the adjudication, taken out of the debtor and vested in his trustee, while, under a winding up order, the legal estate in the property of the company ordered to be liquidated was not taken from the company, but the beneficial interest in the property was, and, under the 98th section, a trust attached for the benefit of all creditors. It had been urged that the property in a foreign country was subject to the laws of the country in which it was situate, and then it was said, that here a charge having been created by an order of the Court abroad, the property could only be dealt with subject to that charge. No doubt that would have been so if a charge had been constituted by the law of Bombay, which had priority over the trusts for the benefit of creditors under the winding up order. But in this case there was only a judgment in India

before the winding up order was obtained, and there was no pretence for saying that a judgment in Bombay could simply *qua* judgment operate as a charge on the property. The consequence was the Scinde Company had no priority in this Court, and the appeal must be dismissed with costs.

Solicitors—Messrs. Hollams, Son & Coward, for appellants; Messrs. Tilleard, Godden & Holme, for official liquidator.

LORDS JUSTICES. } *In re* NEWMAN'S SETTLED
 1874. } ESTATES.
 July 25. }

Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), s. 23 — Application of Sale Moneys — Permanent Improvements—Buildings.

Under section 23 of the Leases and Sales of Settled Estates Act, the Court has power to direct that money arising from a sale under the Act be laid out in permanent improvements of the remainder of the settled estate, such as the erection of new farm buildings.

This was a petition under the Leases and Sales of Settled Estates Act.

Jane Newman, by her will, dated the 1st of May, 1860, made in pursuance of a power contained in the settlement executed on her marriage with T. H. Newman, appointed the freehold estates comprised in the settlement to T. H. Davis and Edward Drew in fee, upon the trusts therein declared; and she declared that the trustees should stand seized of an estate, called the Yearston Estate, upon trust to receive the rents, and pay and divide the same equally between her brother and her three sisters, for and during their respective lives, and, on the death of each or either of her brother or sisters, she directed that the share of the rents of her brother or sisters so dying during the life of the other her brother or sisters, and of the survivor of them,

should be paid and divided equally amongst her four nephews and nieces (named in the will), of whom William Holt was one, with benefit of survivorship and accruer between them, and from and after the decease of the survivor of her said brother and sisters, she declared that the trustees or trustee for the time being of her will should stand seized of the Yearston Estate, upon trust for William Holt for life, without impeachment of waste, with remainder on trust for his first son in fee, with remainders over in case he should die under twenty-one.

The testatrix died on the 17th of June, 1866.

The petition was presented in 1868, by the trustees, the four tenants for life, and the four nephews and nieces, and it asked the Court to authorise the sale of certain timber on the estate, and that the proceeds of sale (after payment of costs and expenses) might be paid to the trustees, to be applied by them in the improvement of the property.

The petition was served on William T. Holt, the only child of William Holt, who was an infant.

On the 23d of January, 1869, an order was made by Lord Romilly, the then Master of the Rolls, directing an enquiry whether it was for the benefit of the estate to cut down and sell the timber (not ornamental) or any part thereof, and, if it should appear proper to do so, then it was ordered that the petitioners should be at liberty to apply in chambers for the sale of the timber, and for the application of the money arising therefrom.

The Chief Clerk afterwards gave liberty to cut and sell the timber, and this was done, and the purchase money, amounting to 792*l.*, was paid into Court.

In June, 1874, a summons was taken out by the petitioners, asking that the money paid into Court might, after payment of costs, be paid to the trustees, they undertaking to apply it in payment of the costs of certain repairs and improvements to the estate, already made and to be made. The improvements already made consisted of the building of new hop-kilns and a granary on one of the farms, and the improvements to be made were the conversion of the old hop-kilns into cottages.

The Master of the Rolls doubted whether he had jurisdiction under section 23 of the Act to sanction this application of the money, and desired the case to be mentioned to the Lords Justices.

Mr. W. Pearson and Mr. Alfred Smith, for the petitioners.—Section 23 says that the money may be applied (*inter alia*) in “the purchase of other hereditaments, to be settled in the same manner as the hereditaments in respect of which the money was paid.” These words are almost identical with those of section 69 of the Lands Clauses Consolidation Act, 1845, under which the Court has in many cases directed the purchase-money of land to be laid out in permanent improvements upon that part of the estate which remained unsold—

In re The Buckinghamshire Railway Company, 14 Jur. 1065;

Ex parte Shaw, 4 You. & C. Exch. 506; s. c. 10 Law J. Rep. (N.S.) Exch. Eq. 92;

In re Davies's Estate, 3 De Gex & J. 144; s. c. 27 Law J. Rep. (N.S.) Chanc. 712;

Ex parte The Incumbent of Whitfield, 1 Jo. & H. 610; s. c. 30 Law J. Rep. (N.S.) Chanc. 816;

Re Partington's Trust, 11 W.R. 160; *Re Dummer's Will*, 2 De Gex, J. & S. 515; s. c. 34 Law J. Rep. (N.S.) Chanc. 496;

In re Leigh's Estate, 40 Law J. Rep. (N.S.) Chanc. 687; s. c. Law Rep. 6 Chanc. 887;

In re Johnson's Settlements, Law Rep. 8 Eq. 348.

In

Ex parte The Corporation of Liverpool, 35 Law J. Rep. (N.S.) Chanc. 655; s. c. Law Rep. 1 Chanc. 596,

such an application was refused, but not on the ground of want of jurisdiction.

In

Re Rudyard's Trusts, 2 Giff. 394, the application was refused.

In

Re Clitheroe's Trusts, 17 W.R. 345, a similar application of money was directed under the Leases and Sales of Settled Estates Act.

Mr. Woodroffe, for the respondent.

JAMES, L.J., said that the principle of the decisions cited was this — that the permanent improvement of the old estate was in substance the same thing as the purchase of a new one. No mischief could now result from following those decisions.

MELLISH, L.J., said that he thought the authorities were too strong to be departed from, and indeed it would be mischievous to go counter to a long course of decisions, though he could not say that he should himself, in the absence of authority, have been disposed to come to the same conclusion.

The petition was then heard upon the evidence, and the proposed application of the money was sanctioned.

Solicitors—Messrs. Robinson & Preston, agents for Mr. A. Pointon, Birmingham, for all parties.

LOKDS JUSTICES. }

1874.

July 25.

In re BERKLEY.

Trustee Act—Appointment of New Trustee—Feme Sole—Shares with Unlimited Liability—Direction for Sale.

Order made to appoint a feme sole a trustee.

In re Campbell's Trust, 31 Beav. 176, followed.

Part of a testator's estate consisted of shares upon which there was an unlimited liability. Upon a petition to appoint a new trustee, an order was also made that one of the continuing trustees, in whose name the shares stood, should sell them, and invest the proceeds in the names of himself and the other trustees.

This was a petition, entitled in Lunacy, in the matter of the Trustee Act, and in a suit of *Berkley v. Berkley*, for the appointment of a new trustee of the will of J. J. Berkley. By his will dated the 28th of June, 1862, the testa-

tor devised his real estate, and bequeathed the residue of his personal estate, to George Wythes, G. L. Clowser, John Kershaw, and James Hurst, on certain trusts therein mentioned, and he appointed the same persons executors.

By a codicil dated the 25th of August, 1862, the testator revoked the appointment of Kershaw and Hurst as trustees and executors, and appointed his wife, Louisa Berkley, and George Berkley, trustees and executrix and executor in their stead. The testator died on the 25th of August, 1862, and his will and codicil were duly proved by all the executors except Wythes. He neither proved nor acted in the trusts. On the 11th of August, 1871, this suit was instituted to administer the trusts of the will. On the 2nd of June, 1873, Louisa Berkley was found a lunatic by inquisition. On the 10th of September, 1873, an order was made by Lord Justice James, appointing G. M. Arnold to be a trustee of the will in place of Louisa Berkley, with consequential directions as to the transfer and vesting of the property. On the 28th of April, 1874, Clowser died. The petition asked that a lady named Kate Barton should be appointed trustee in his stead. This lady was a niece of the testator, and was unmarried, and aged twenty-seven.

Part of the estate consisted of 150 shares in the Rock Life Assurance Society, of the nominal value of 5*l.* each, but on which only 5*s.* per share had been paid up. The liability on these shares was unlimited. They had not been transferred under the order of the 10th of September, 1873. The petition asked that these shares might be sold, and that the right to transfer them might be vested in George Berkley alone, he undertaking to invest the proceeds of sale in consols or other securities authorised by the will, as the Court might direct, in the names of the continuing and new trustees. He offered, if necessary, to give security for the due investment of the proceeds.

The petitioners were the lunatic (by her next friend), G. Berkley, and G. M. Arnold, who had been appointed committee of the lunatic's estate, and the petition was served on the plaintiffs in the suit.

The defendants to the suit were the lunatic, Clowser, and G. Berkley.

Mr. W. W. Karslake, for the petitioners, cited

In re Campbell's Trust, 31 Beav. 176 ;
s. c. 31 Law J. Rep. (N.S.) Chanc. 821.

Mr. Howson, for the plaintiffs in the suit.

THEIR LORDSHIPS made the order as prayed.

Solicitors — Mr. T. Sisney, for the petitioners ;
Messrs. Paterson, Snow & Burney, for plaintiffs.

HALL, V.C. }
1874. }
July 6. }

BAILEY v. PIPER.

Specific Performance—No Title as to Moiety—Right of Purchaser to take Moiety—Compensation.

Where vendors having agreed to sell the entirety of property could make a title to one moiety only,—Held, that the purchaser was entitled to have such moiety conveyed to him on payment of one moiety of the purchase money.

In this case the following short point arose, whether a purchaser who has agreed to buy the entirety of property could claim to take a moiety (to which alone the vendors could make a title), with a corresponding abatement in the purchase money.

The agreement was dated October, 1872, and was for the sale of the fee simple of certain freehold property in possession, free from incumbrances to the plaintiff.

The plaintiff entered into possession, after paying a deposit on the purchase money; and as there was delay on the part of the vendors in making out a title, he filed this bill for specific performance.

The defence was that a moiety of the property was claimed adversely in another suit, and, in fact, upon that suit coming on for hearing, it was decided that the vendors had no title as to one moiety of the property.

The plaintiff, however, offered to take the other moiety, as to which the Chief Clerk had certified that there was a good title, and to pay one half the purchase money.

The defendants (who were bankrupts, and against whose trustees in bankruptcy the suit had been revived) contended that the purchaser could not claim such moiety, without paying the full purchase money, and if he was unwilling to do so the contract must be rescinded.

Mr. Dickinson and Mr. Horton Smith, for the plaintiff, relied on—

Barnes v. Wood, 38 Law J. Rep. (N.S.) Chanc. 683; s. c. Law Rep. 8 Eq. 424;

Castle v. Wilkinson, 39 Law J. Rep. (N.S.) Chanc. 843; s. c. Law Rep. 5 Chanc. 534.

Mr. Macnaghten and Mr. Northmore Lawrence, for the trustees in bankruptcy of the several defendants, relied on

Maw v. Topham, 19 Beav. 576;

and

Fry on Specific Performance, 142.

HALL, V.C., referred to *Sugden's Vendors and Purchasers*, 14th ed. 309, where Lord St. Leonards doubted the decision in *Maw v. Topham* (*ubi supra*), and made a decree for specific performance, as asked for by the plaintiff, namely, that the defendants should convey the moiety, to which they could make a title, to the plaintiff, and should receive one moiety of the purchase money; and he said that the bargain was certainly better for the defendants than if they had been compelled to sell an undivided moiety, in which case a sale would probably not have realised so much.

Solicitors—Messrs. Ravenscroft & Hills, for plaintiff; Messrs. E. F. & B. Davis and Mr. Denny, for defendants.

HALL, V.C. }
1874.
April 29.
May 1. }

HOGG v. SCOTT.

Copyright—5 & 6 Vict. c. 45. ss. 15 and 26—*Second Edition of Defendant's Work*—*Acquiescence*—*Piracy*—*Injunction*—*Costs*.

The "offence" mentioned in the 15th section of the 5 & 6 Vict. c. 45, which gives to the proprietor of a copyright a special action on the case, is not co-extensive with the "offence" referred to in the 26th section of the same Act, with respect to which all actions, suits, bills, indictments or informations must be brought, sued and commenced within twelve calendar months next after such offence committed.

Therefore, a plaintiff who allowed a defendant to publish one edition of a work containing piracies from his works, and then, after the lapse of more than twelve months, filed a bill in equity to restrain the publication of a second edition of the defendant's work, with the same and other piracies in it, was neither compelled to proceed at law under the 15th section, nor prevented from suing in equity, by the 26th section of the statute.

Special facts constituting the piracy complained of by the plaintiff, and circumstances under which he was held not to have acquiesced in the defendant's acts; but to be entitled to an injunction with costs.

Motion for decree.

The bill in this suit prayed an injunction to restrain the defendant from printing, publishing, selling or otherwise disposing of any copy or copies of a work called the *Orchardist*, containing any passages or passage copied, taken or colourably altered from works of the plaintiff called the *Fruit Manual*, *British Pomology*, the *Gardeners' Year Book*, for 1871, 1872, or 1873, or any or either of them; that the amount of the damages sustained by the plaintiff by reason of the infringement by the defendant of the copyrights of the plaintiff in the *Fruit Manual*, *British Pomology*, and the *Gardeners' Year Book* for 1871, 1872, and 1873, or any or either of them might be ascertained by the Court, and that all pro-

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per and necessary accounts and enquiries might be taken and made for that purpose; and that the defendant might be decreed to pay such amount to the plaintiff, together with the costs of the suit.

The bill stated that the plaintiff was the author and proprietor of a book called the *Fruit Manual*, published in 1860, the third edition of which was published on the 4th of May, 1866, and which was registered under the provisions of the 5 & 6 Vict. c. 45. He was also the author and proprietor of an annual publication called the *Gardeners' Year Book, Almanack and Directory*, now called the *Gardeners' Year Book and Almanack*. The *Gardeners' Year Book, Almanack and Directory* for 1871 was published on the 1st of December, 1870, and that for 1872 on the 1st of December, 1871. The *Gardeners' Year Book and Almanack* for 1873 was published on the 1st of December, 1872. The three annual numbers of the *Year Book* were also registered under the 5 & 6 Vict. c. 45. The plaintiff was also the author and proprietor of the copyright of a work called *British Pomology: The Apple*, published on the 1st of June, 1851, and which was also registered under the 5 & 6 Vict. c. 45. In 1868 the defendant published a work called the *Orchardist, or a Cultural and Descriptive Catalogue of Fruit Trees grown for sale by John Scott, Merriott Nurseries, Crewkerne, Somersetshire*, in which he had copied from the plaintiff's *Fruit Manual*—and in particular from the third edition of it—as well in the description of particular fruits therein mentioned, as also in the synopsis of the different species of fruits therein contained; and also to a great extent and in like manner from the plaintiff's *British Pomology*. In 1869 the plaintiff was informed that the defendant had, in his *Orchardist*, alluded to the editors (of whom the plaintiff was one) of the *Journal of Horticulture*, in reference to the *Pommier de Paradis*; and the plaintiff accordingly on the 6th of October, 1869, obtained from the defendant a copy of his work. The plaintiff then read some of the personal observations at page 9 of the *Orchardist*, but nothing more of it, and on the same day, namely, the 6th of October, 1869, he wrote to the defendant thanking him for the copy of the work,

telling him that he (the plaintiff) had only just looked into it, and alluding to the defendant's remarks in it on the *Pommier de Paradis*. The plaintiff only read the article at page 9 of the *Orchardist*, the general character and appearance of which book was that of a nurseryman's catalogue, every alternate leaf of which was headed by the words, "John Scott's Catalogue." It was not until after the publication of the second edition of the *Orchardist* that the plaintiff discovered that the defendant had in it extensively copied or pirated from the *Fruit Manual* and the *British Pomology*. In the latter part of the year 1872 the defendant commenced the publication, in parts, of a work called *Scott's Orchardist, or Catalogue of Fruits cultivated at Merriott, Somerset*, second edition. It was published in six numbers—No. 1 on the 14th of October, 1872; No. 2 on the 4th of November, 1872; No. 3 on the 5th of December, 1872; No. 4 on the 23rd of December, 1872; No. 5 on the 8th of March, 1873; and No. 6 on the 7th of April, 1873; and on its completion the defendant published the whole of the work in a single volume, at the price of 7s. 6d. In that edition of the *Orchardist* the defendant republished the piracies from the *Fruit Manual* and *British Pomology* contained in the first edition of his *Orchardist*; and he also copied other parts of the third edition of the *Fruit Manual*, together with parts of the *Gardeners' Year Book* for 1871, 1872 and 1873. The plaintiff did not see or read any of the six numbers of the second edition of the *Orchardist*. In the latter part of April, 1873, the plaintiff was informed of the piracies from the *Fruit Manual*, and he then obtained from the defendant a copy of the *Orchardist*, second edition, previous to the receipt of which copy the plaintiff knew nothing of any of the piracies from his works.

The third edition of the *Fruit Manual* was out of print, and the plaintiff was preparing a new edition, which he advertised in the *Journal of Horticulture* and the *Gardeners' Year Book* for 1873. The second edition of the *Orchardist* was also advertised in the *Gardeners' Year Book* for 1873. That book, under the title of

"additions and corrections," contained descriptions of new fruits, apples and grapes. The publication of the second edition of the *Orchardist*, containing large portions of the *Fruit Manual*, being injurious to the plaintiff, he, on the 5th day of July, 1873, filed a bill against the defendant (*Hogg v. Scott*, 1873, H. No. 139) to restrain him from publishing any copies of the *Orchardist* containing passages from the *Fruit Manual*, and for other relief. But it being discovered that the *Fruit Manual* was not then properly registered under the above-named Act, that bill was on the 19th of July, 1873, dismissed by the plaintiff with costs. Some correspondence then passed between the parties, in the course of which the defendant offered to submit to a perpetual injunction in the present suit (which was then in contemplation), restraining him from publishing in his second edition of the *Orchardist* such parts of the articles on "figs and grapes" taken from the plaintiff's *Fruit Manual* as had not already appeared in the defendant's first edition, if the plaintiff would on his part agree not to object to the publication of the second edition of the defendant's *Orchardist* so altered, and to other matters of detail then specified. That offer was not accepted. Since the dismissal of the bill in the former suit, the defendant had continued to publish the *Orchardist* with passages from all the plaintiff's above-named works to the injury of the plaintiff, who therefore, on the 2nd of August, 1873, filed the bill in this suit, praying the relief above stated. On the 7th an interlocutory motion was made for an injunction, but none was granted; and the motion was ordered to be treated as a motion for a decree, and to stand over accordingly. Since that time the defendant had filed his answer in the suit. By it the defendant (among other things) raised the following objections to the bill. He contended that inasmuch as by the 15th section of the Act 5 & 6 Vict. c. 45 (to amend the Law of Copyright), it was enacted—"That if any person should, in any part of the British dominions, print or cause to be printed, either for sale or exportation, any book in which there should

be a subsisting copyright without consent in writing of the proprietor thereof . . . or knowing such book to be so unlawfully printed . . . should expose the same for sale or hire, without such consent as aforesaid, such 'offender' should be liable to a 'special action in the case' at the suit of the proprietor to be brought in any Court of record in that part of the British dominions where the offence was committed"—it followed that, unless what he had done was an offence against the Act—which he said meant some offence of a "criminal character" only—it could not be punished; and even if he had committed an offence of some sort he was only liable to a special action in the case, and not to a suit in Equity. He further contended that, as the 26th section of the same Act provided that all actions, suits, bills, indictments or informations for any offence that should be committed against the Act should be brought, sued and commenced within twelve calendar months next after such offence was committed, or else the same should be void or of none effect, it followed that the plaintiff (even if he could sue in Equity) was too late in instituting these proceedings. The defendant also relied upon the acquiescence of the plaintiff in the defendant's publication of the *Orchardist*, insisting that the plaintiff's implied sanction to the defendant by upwards of three years and a half's silence to avail himself as he did in his 1st edition of the *Orchardist* of the extracts from the plaintiff's *Fruit Manual*, should be held to deprive the plaintiff of any right against the defendant for republishing those extracts in a second edition. If that was correct, he submitted that the plaintiff's equity would only be as to the additional extracts from the *Manual* relating to figs and grapes in the second edition of the *Orchardist*. The defendant also contended that, as a matter of fact, there had been no piracy on his part. With respect to that he stated, amongst a great many other things in his answer, that the first edition of his work, though substantially a catalogue of the various trees cultivated by him at Merriott, contained also notes on the management of trees, and a short statement, descriptive

of the fruit, the produce of each tree, and its characteristics. He prepared the work in a great measure from and as the result of his own original researches and personal experience as a nurseryman. Then he alluded to previous horticultural works, and said that in preparing his first edition, and also when he introduced descriptions of additional sorts of fruit in his second edition, he did this—in describing apples, medlars, mulberries, nuts and filberts, nectarines, peaches and pears, he placed before him a specimen of each sort of fruit of his own growth or of any fruit procured by him from other sources, and then personally examined and compared the same with the description given of it by authors, including the plaintiff, in cases in which he had given descriptions. Where such descriptions were found to be exact and true, and to correspond precisely with his specimens he did, to save the useless labour of writing an entire new description for the mere sake of rewriting (and which might expose him to the imputation of colourably altering), adopt the description already at his command; but in every instance where he found any discrepancy, or other sufficient reason for so doing, he modified and corrected the descriptions so as to render his book and the descriptions which it furnished as accurate and true as possible. He never, when in possession of specimens, omitted to adopt the above course for securing accuracy, and it was indeed rarely that he had occasion to omit doing so. He then added that the descriptions in his first edition so taken from the plaintiff's works in the manner above described were inconsiderable in comparison with and relatively to the extent of the rest of that edition. He said that he was under the impression that his first edition had the plaintiff's entire sanction, and he never had the slightest intention of in any way improperly appropriating to himself any of the plaintiff's works. Indeed, on the 14th of August, 1873, the defendant stated, through his solicitors, that he did not intend, though it would be a loss to him, to dispose of any further numbers of the second edition of the *Orchardist*. He said also that he had incurred a very

great deal of expense in the publication of his works, and that he never intended to injure the plaintiff, and believed he had never injured him to the extent of a farthing.

The cause now came on upon a motion for decree.

HALL, V.C., said—He would hear the argument upon the statute first; then (if necessary) that upon the question of delay and acquiescence; and lastly that as to the piracy.

Mr. Fischer and Mr. J. C. Wood, for the plaintiff.—The question in this case depends on the construction to be placed on the 5 & 6 Vict. c. 45. ss. 1, 2, 3, 4, 10, 12, 15, 17, 23 and 26. The question itself has never arisen in this country, but it has been dealt with in Scotland—

Coppinger on Copyright, 114;

Stewart v. Black, Decisions of the Court of Sessions, 2nd series, 1846, 1847, p. 1026;

Clark v. Bell, 19 Morison's Dict. of Decisions, pp. 9, 11.

[They were then stopped by the Court.]

Mr. Dickinson (*amicus curiæ*) referred to—

The Attorney-General v. Ray, ante, 321; s. c. on app. ante, 478; s. c. Law Rep. 9 Chanc. 397.

Mr. O. Morgan and Mr. Sandys, for the defendant.—The question which the Court has now to try is, whether there has been, on the part of the defendant, an "offence" against the provisions of the statute? Supposing, for the sake of argument only (for it is not admitted), that there has been such an "offence," then section 15, taken in connection with section 26 and the others *in pari materia*, as to penalties, shews that the offence must be something of a "criminal" nature; that is to say, its essential characteristics must be felonious, or of that kind of mischief. But even then section 15 only gives the injured party an action on the case. There was no "copyright" at common law before the statutes; and as they created and protected it, it is only under them and in the adherence to their provisions that a proprietor of a copyright can proceed. The plaintiff here should therefore bring an action at law on the

case. But the acts of the defendant here are not of a criminal character. Therefore the plaintiff is in this dilemma: Either the defendant's offence against the Act (and it must be against the Act) is criminal, or it is not:—If it is, he must sue at law under the 15th section. If it is not, he is too late in filing his bill, and is barred by the 26th section. Because the evidence shews that the "piracies," as they are called, were clearly more than twelve months before the 2nd of August, 1873—

Jefferys v. Boosey, 4 H. L. Cas. 815 ;
s. c. 24 Law J. Rep. (N.S.) Exch. 81 ;

Kerr on Injunctions, 441.

The Scotch cases relied upon were prior to the 5 & 6 Vict. c. 45, and have therefore no application to the present one. Even if they had, they are not an authority for this Court.

HALL, V.C. (on April 29).—I cannot allow this objection. It appears to me that it is inapplicable in cases of this description. By the 3rd section of the Act, a property is created in an author's work which, *prima facie*, is to endure for a term certain. That property will remain in the owner of it till it is taken away from him. It was said, however, in the course of the arguments, that if a case arises for a suit in respect of the owner's right to his property, and he does not sue for twelve months after his right has been invaded, then his property is gone. If that be so, I must find it clearly expressed in the Act.

The 15th section of the Act gives the proprietor of a copyright a special action on the case; in terms it provides, that "such offender"—that is, the person who has done any of the things specified in that section—"shall be liable to a special action on the case, at the suit of the proprietor, to be brought in any Court of record in that part of the British dominions where 'the offence' was committed." The remedy so given is, apparently, a cumulative one. Whether it is so in fact is not important. The remedy is given against the person who is spoken of as the "offender," and his act is called an "offence." On that it was argued that the Court should put upon the word "offence" the same construction on that

section as it bears on the 26th section of the Act. If that were a reasonable construction, it might be adopted. But I think that it would not be consistent with the other sections in the Act which relate to penalties. If the book which is improperly published by the defendant contains matter which is in the work, and is therefore the property, of the plaintiff, I do not see how he, the owner of the copyright, is suing in respect of such an offence as the defendant would have it supposed. The owner is suing in respect of his copyright; that is, his property. The 26th section is, no doubt, not very happily worded. But I consider that on the true construction of it, and the other sections of the Act, "the offence" contemplated by it must be, the doing in contravention of its provisions, of something expressly prohibited by them. The real question is this, what is the offence intended by the Act? It is the printing for sale or exportation of any work, or any part of a work, by a person who is not the owner of the copyright of that work against the wish or without the consent of the real owner of it. The non-suing by the owner in respect of a particular edition, or part of an edition, of the defendant's work is one thing; and even if it could be said that so far the owner's remedy was barred by his own neglect, still I find nothing in the Act which says that the person who has already published the edition, or part of the edition, complained of may go on doing so; and that if he does, the owner has then no remedy for such further "offence."

Having said so much, I should add that the Scotch cases, cited by Mr. Fischer, are not to be disregarded. They were, no doubt, decided with reference to books published before the passing of the Act; but still they seem to me to be consistent with good sense, and the reasonable interpretation of the Act. The right of the owner of the copyright to it is not to cease, because one copy of his work, containing the piracies, has been sold and disposed of without any complaint on his part. He is not, on that account, to lose all his property in his own work. I ought to be, and I am, influenced by those Scotch cases; and on the whole of this

case I think that the plaintiff has not lost his right to sue, and that the arguments must therefore proceed.

Mr. Fischer and *Mr. J. C. Wood* then proceeded with the argument as to delay and acquiescence on the part of the plaintiff. The defendant would contend that a wrong-doer, who has no defence at law, is in a better position in Equity. But there is nothing in that argument. The case here is (and the evidence proves it to be true) that the plaintiff read no more of the first edition of the defendant's *Orchardist* than just those portions relating to the particular subject to which his attention had been specially called. Moreover, till he got the copy of the second edition he knew nothing of the piracies from his own works. That was in April, 1873. In June following, he filed a bill; and in August next, the bill in the present suit. Where is the acquiescence? where the delay?

Mr. O. Morgan and *Mr. Sandys*, for the defendant.—The plaintiff must be held to have acquiesced in what the defendant has done. The first edition of the defendant's work was in 1868. In 1869 the plaintiff shewed by his own letter that he had undoubted knowledge of that work. He never objected to it, and he cannot now, after four or five years, turn round on the defendant and say, "You shall not publish a second edition of that book, to the first edition of which I might have objected, but did not object"—

Lewis v. Chapman, 3 Beav. 133;
Jarrod v. Houlston, 3 Kay & J. 708;
Rundell v. Murray, Jacob 311;
Baily v. Taylor, 1 Ry. & M. 73;
Saunders v. Smith, 3 Myl. & Cr. 711;
 s. c. 7 Law J. Rep. (N.S.) Chanc. 227.

Mr. Fischer, in reply, cited—

Johnson v. Wyatt, 2 De Gex, J. & S. 18;
 s. c. 33 Law J. Rep. (N.S.) Chanc. 394;
Lewis v. Fullarton, 2 Beav. 6; s. c. 8 Law J. Rep. (N.S.) Chanc. 291.

HALL, V.C.—The case as to the acquiescence is this.—It appears to me not necessary to say what is the true conclusion to be drawn, or the true legal inference,

with reference to the knowledge of the plaintiff at the time that the copy of the defendant's book was sent to him; and as to his knowing the contents of that book more or less. Assuming that he must be taken as from the time of receiving that copy to have been fully aware of the contents of that copy, I still think that it is not a circumstance which is to deprive the plaintiff of the relief which he seeks in this suit. The position of things, supposing he had knowledge at that time, appears to me to be this—Having said what I have upon the construction of the Act of Parliament, and that being out of the question, in my view the result is this—The plaintiff was at the time that he received the letter, which is relied upon as giving him knowledge of the contents of the defendant's book, the undoubted legal owner of the copyright. It was his copyright, and he had a right to say to the defendant, "That is my property, and I do not allow you to make use of, or recognise your making use of it." He does not take any step founded upon that right of property until he files this bill. All that had taken place in the meantime, beyond that letter being sent to him, was (I am assuming this in the defendant's favour) knowledge on the part of the plaintiff that the defendant was going on publishing that book; that he published it for two years afterwards, the then existing first edition of defendant's book being advertised in one of the plaintiff's books; and moreover, he knew in October, 1872, that the defendant was about to publish a new edition of his book, which new edition was to be a book of much larger size, a much more expensive description of book, and to contain much greater materials. I think the number of specimens is said to be 5,000, and in the earlier one I think it is 2,500.

Now, up to the time of his knowledge of the new edition in October, 1872, the plaintiff was aware only that the defendant was still going on selling copies of that book, when he became aware of the defendant's intended new edition. He, at all events, had no reason to suppose or believe that, in the new edition, whatever there might be in the re-issue of the old one, there would be any new matter introduced,

which would be taken from the plaintiff's work, so far as the plaintiff's work had been resorted to (if it had been resorted to) before; and matters stood, so far as the plaintiff was concerned, exactly as they stood previously. I have, then, first of all, to consider whether the mere fact of not taking any proceedings in respect of the whole matter for any given time, would deprive the plaintiff of the right to come to this Court, on the ground of acquiescence? The not taking any proceeding, either at law or in equity, for the time during which no proceeding was taken, was not in itself such an encouragement (so it appears to me) as would amount to an equitable bar in this Court; that is to say, it does not amount to what I apprehend you must make out for the purposes of shewing that the legal right is not to be protected in this Court; that it is in this Court to be considered as given up. You must not hold that, unless such a state of circumstances has arisen as that the Court is satisfied that the plaintiff by his conduct has led the defendant to incur expense, and material expense, with reference to his own work.

Now, with respect to that,—it being taken that there is a legal right, and that at this very moment, if I am correct, the plaintiff has his legal right of action against the defendant; and, moreover, apparently that all the books published by the defendant which contained the objectionable matter are the property of the plaintiff under one of the sections of the Act of Parliament which was referred to,—the question is, what are the authorities upon which it may be said that such abstaining from a claim, such allowing a party to go on selling his book, takes away the plaintiff's rights? What was said by Lord St. Leonards in *Gerard v. O'Reilly*, 3 Dr. & War. p. 433, was this: "It must not be understood that this Court will, on light grounds, act against the legal rights of parties in cases like the present. There must be fraud or such acquiescence as in the view of this Court would make it a fraud afterwards to insist upon the legal right. The case of *Macker v. The Foundling Hospital* (1) was a very

hard case, and it was strenuously argued at the bar; yet Lord Eldon denied the relief generally. This view shews that it requires a very strong case to induce this Court to deprive a man of his right at law to prevent the particular act from being done, or his right to receive damages if it be done. No act has been shewn in this case amounting to such acquiescence. On the second ground, therefore, it cannot be sustained." Then I was referred to what was stated and put very strongly indeed by Lord Justice Turner in the case of *Johnson v. Wyatt* (*ubi supra*). There, at p. 25, Lord Justice Turner, commenting upon an interlocutory application, said—"That there was sufficient acquiescence to justify the Court in refusing to grant the injunction upon an interlocutory application, cannot, I think, be doubted; but I apprehend that, to justify the Court in refusing to interfere at the hearing of a cause, there must be a much stronger case of acquiescence than is required upon an interlocutory application; for at the hearing of a cause it is the duty of the Court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost."

Then the same subject is dealt with by Lord Cottenham in the case of *The Duke of Leeds v. The Earl of Amherst*, which is reported in 2 Phillips, p. 117; s. c. 16 Law J. Rep. (N.S.) Chanc. 5. At 2 Ph. 123, with reference to acquiescence, the Lord Chancellor says, "Now acquiescence is not a term which ought to be used. If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. In that sense, however, there is no acquiescence here, for the act was done when the present Duke was a minor; and when, if he had knowledge or means of knowledge (and he does not appear to have been of age for that) nothing of acquiescence can be imputed to him. The defence, therefore, which is really intended to be set up is, not acqui-

(1) 1 Ves. & B. 189.

essence, but release or abandonment of the party's right. For that purpose, however, it is not only necessary to shew that the plaintiff knew of the act of waste having been committed, but that he knew of the rights which they gave him against his father; and that, having that knowledge, he did some act amounting to a release of that right."

Now in this case, the plaintiff knowing that the defendant was advertising his work, which contained this objectionable matter, and that he was going on selling it, does not, as it appears to me, amount to that description of acquiescence in the defendant's dealing with the subject matter, which must be taken to deprive the plaintiff of the interference of this Court. The plaintiff, in saying as from any given time—"I am aware that you have been going on selling a book which has part of my book in it, for a certain time, but though I am aware of that I now say, as from this time I shall not let you go on; I have no reason to know one way or the other, that you have been laying out money all this time in reference to this continued sale; you may have been selling copies of the book which were already published and in your warehouse before I knew anything of it. In the first instance you did not draw my attention, or tell me you were making an expenditure and outlay in reference to this work, and continuing to do that; and it is not to be imputed to me that I must assume that you have been going on expending money upon the faith of my not taking any proceeding against you," says in effect—"I, the plaintiff, am in this position; it is my property; you have not asked me or come to me to give you that property, or in any formal or regular way to abandon my right to that property; it is my property, and I have a right to enforce my rights in respect of that property, at all events in a Court of law. I can sue you in respect of that property either to recover the thing itself, under a particular section of the Act, or at all events I can sue you at law to recover damages in respect of your taking my property, it being my property." This Court being bound now to take notice of the legal

right, to regard the legal right, and to determine whether the plaintiff has or has not a legal right, without sending the case to a Court of law to be tried there, and this Court being satisfied of the legal right, is the Court, under such a state of circumstances, to withhold that remedy by an injunction, which from the nature of the case is, under such circumstances, the real mode of giving the plaintiff satisfactory relief? To try the question of damages in an action at law, under such circumstances, would be to try questions between the two parties in a very unsatisfactory way; and whether the right amount would be ascertained, under such circumstances, must be extremely questionable. If the case was simply that of the defendant having gone on, and the plaintiff knowing that he had gone on, without more, is it altered by the fact that the plaintiff knew (assuming that he must be taken to have known) that the defendant was about to issue a new edition of his works? It would be a question whether he was to be assumed to know what the exact contents of that new edition would be, and whether it would contain all the old matter which was contained in the former edition, which was illegal at that time according to the legal right, and which the defendant had no right to do at law. Is he, from knowing that, to enquire of the defendant what he is going to put into that book? Is he to say to the defendant—"Are you going to continue to put into this new book what you put into this old one, which you have no right to do at law at this moment?" Am I to assume, as against the plaintiff, that he must be taken to have known that would be the case; and for the purpose of giving or refusing relief, am I to consider that it was incumbent on the plaintiff, under such circumstances, to communicate with the defendant, and say, "What are you going to put into that new book?" Considering the time when the advertisement came out, and the character of the advertisement itself, and considering that the plaintiff is one of the two editors of the *Horticultural Journal*, that does not, in my mind, make a sufficiently strong case of encouragement or acquiescence on the

part of the plaintiff to say that this Court shall withhold the relief from him, to which he would otherwise be entitled, leaving him with his undoubted legal right to proceed in a Court of law in respect of the same matter; that is to say, ought this Court, having determined the legal question in his favour, which it is bound to do, to send the plaintiff to a Court of law, and say, "You must get damages; we will not give you an injunction"? Under such circumstances as these, it would really be playing with justice and the forms of procedure to send the plaintiff away from this Court to a Court of law to get damages instead of giving him an injunction. That of course is really, after all, I cannot help feeling, the great point in this case; and Mr. Morgan has very ably argued that, and pressed it upon me very strongly indeed. I came to the conclusion that the plaintiff's right in this Court, or what would otherwise be his right in this Court, is not taken away by what has occurred; and, therefore, subject to the question whether there has been piracy or not, that will decide the case. I should have thought that what Mr. Morgan pressed in favour of his argument on the acquiescence, viz., that the use which was made of the plaintiff's work by the defendant was so great that it was impossible for the defendant not to have seen it and to have observed it, available as it was for him on the ground of acquiescence, was a very cogent argument against him when we come to the other part of the case. It will be for him to consider whether he really thinks he can make anything of that. I am bound to say, since the case was on before, that I have read through the defendant's answer upon this part of the case—and as I read that answer and the evidence (at present, of course I am quite open to conviction)—it seems to me that there has been that copying from the plaintiff's work (because it is called "copying" and that word is used) which is within the authorities, as I understand them. I refer particularly to the cases of

Kelly v. Morris, 35 Law J. Rep. (N.S.) Chanc. 423; s. c. Law Rep. 1 Eq. 697.

Examining, to the best of my judgment,
NEW SERIES, 43.—CHANC.

the way in which the case is put in the answer, it seems to me, as at present advised, that the case is within those authorities, but of course I am quite open to hear Mr. Morgan upon that part of the case.

Mr. Fischer and Mr. J. O. Wood, as to the piracies.—They are shewn by the evidence to have been most flagrant. Indeed the defendant by his answer admits the fact of his having copied, and shews how he copied, from the plaintiff's and other writer's works.

Mr. O. Morgan and Mr. Sandys.—There is "no piracy." The defendant worked up scientifically, as he was at perfect liberty to do, the knowledge acquired by him from other sources. He did not conceal that. His book was really, in all respects, different from the plaintiff's. The defendant's work was a catalogue, and as such necessarily would embody much that is in the plaintiff's. Indeed, in properly framing a good catalogue, you must copy. If, as the plaintiff contends, the piracies were so very glaring, and always were so, he must have known them throughout, and cannot now complain of them—

Cobbett v. Woodward, 41 Law J. Rep. (N.S.) Chanc. 656; s. c. Law Rep. 14 Eq. 407;

Kelly v. Morris (*ubi supra*).

HALL, V.C.—The defendant's case, as stated by himself, is contained in his answer. It is there described as a copying, and that he copied in certain cases. Now, what is the way in which he went about doing this, according to the statements of those paragraphs? Mr. Sandys' explanation of it entirely agrees with mine. It was not apparently in every instance that there was a specimen before him. That is not the effect of the paragraphs. He has given us a great number of specimens; but having perhaps a little too widely stated in the earlier paragraphs that his mode of operating was to place the specimens before him, he afterwards says—"I never, when in possession of specimens, omitted to adopt the above course for securing accuracy, and it was, indeed, rarely that I had occasion to omit

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doing so." So that certainly, in some cases, he had not the specimens. Then, whether he had the specimens or not, what does he tell us he did? He says that he "had recourse to, and derived assistance from, previous horticultural works, such as *Lindley's Guide to the Orchard*, a standard work of high authority, published in the early part of the present century, *MacIntosh's Orchard*, published in 1869, and various other publications, including the third edition of the plaintiff's *Fruit Manual*, and other works." Then he also says that he placed the specimens before him, and examined and compared the same with the descriptions thereof respectively, as given by the authors, including the plaintiff, in cases in which he had given descriptions. So that it is quite consistent with all that is stated there, that in all cases where the plaintiff had given a description of it, he examined it with the plaintiff's. In cases of others, which were not described by the plaintiff, he sought them in other authors, not in the plaintiff's work. At all events, and beyond doubt, it is consistent with every word that he says, and the fair construction of what he says, that in some instances (and I should infer in a very great number of instances) he was content to examine the plaintiff's description, and went to no other source. He did not go to that source to which the plaintiff himself had gone for the purpose of examining into the matter, and in some of those cases had not the specimen before him at all. Therefore, it is a clear and undoubted case of mere copying.

Then it has been said that you cannot describe the same thing except in one way. It is only sufficient to look at any one of these descriptions to see that that is not the case. To say that the English language does not admit of the same thing being described except in one particular form, seems to me to be quite absurd; although it may be that the same words, more or less, might occur in the descriptions. Whether that be so or not, this is a clear case to my mind of copying from the plaintiff's work. Then, if it be copying, it is clearly within the authorities which have been referred to, and the defendant has not done that which the

Vice-Chancellor Wood says it is essential for him to do in a work of this description. I consider this is so similar to the works described in *Kelly v. Morris* (*ubi supra*) as to be of the same character. The Vice-Chancellor says there, that in the case of a dictionary, map, guide-book or directory, where there are certain common bits of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In *Morris v. Wright*, the Lord Justice Giffard referring to *Kelly v. Morris* (*ubi supra*) and the other cases, observes upon the evidence on which that case depended—"No doubt he admits that the slips were cut out of the plaintiff's book for the purpose of guiding him to the residences of the persons who were canvassed. But he admits nothing more, and he denies copying of any kind or description. The evidence, however, did not bring it to using the slips further than for the purpose of guiding him, so that he might go and do the work himself which the other might have done." The principle of all those cases is that the defendant is not at liberty to avail himself of, and to use, the labour which the plaintiff himself has used for the purpose of producing his work. He is not at liberty to do that at all. That is merely taking away the other man's property, or attempting to do it. This case seems to me to fall entirely within the principles laid down in *Kelly v. Morris* (*ubi supra*) and in *Morris v. Wright* (1), and the other cases there referred to. Therefore it appears to me that the plaintiff is entitled to the injunction, in the same form as it was in *Lewis v. Fullerton* (*ubi supra*), which I believe is the same as in the prayer of this bill, with the exception of the word "further."

Solicitors—Messrs. Webb, Stock & Burt, for the plaintiff; Messrs. Sandys & Trevenen, agents for Messrs. J. & W. B. Sparks, Crewkerne, for the defendant.

HALL, V.C. }
1874. }
August 1. } *In re* BENTON'S POLICY
TRUSTS.

*Trustees Relief Acts, 1847 and 1849—
Fund in Court—Unfounded Claim by Re-
spondents to—Costs.*

*Respondents who make an unfounded
claim to a fund, and so occasion the pay-
ment of it into Court under the Trustees
Relief Acts, will be ordered to pay the costs
of getting the fund out of Court.*

Petition.

This was a petition for the payment
out of Court of a sum of 1,103*l.* 4*s.* 6*d.*,
paid in under the Trustees Relief Acts,
1847 and 1849. The facts of the case
were these:

In 1827 John Benton owed John Wil-
liam Dunn upwards of 1,000*l.* In July,
1827, Dunn insured Benton's life in the
Law Life Assurance Society for 1,000*l.*
Dunn died in December, 1827, intestate,
and his widow administered to his estate.
In 1829 she and Benton sold the policy
to Thomas Binns, who, in 1838, sold it
to Rowland for 200*l.* Rowland died in
June, 1869, having by his will appointed
the petitioners his executors. They in-
stituted a suit to administer his estate,
and a decree was made in the suit, under
which the policy was ordered to be sold.
The office, when applied to, informed the
petitioners of several claims to the policy
of which they had had notice, and among
them of one from Benton, given in 1867,
to the effect that, in the event of his
death, the amount of the policy was to
be paid to no other person than his exe-
cutor or executors. The result of that
was that the sale of the policy could not
be effected; and in May, 1873, the peti-
tioners were obliged to file a bill against
Benton, to compel him to withdraw his
notice, and clear the title to the policy.
Benton died on the 3rd of February,
1874, leaving his son, John Wheeldon
Benton, his executor. On the 27th of
February, 1874, John Wheeldon Benton
gave the office notice of his claim to the
property, as his father's executor. On
the 19th of March Messrs. Digby & Sons,
solicitors, gave the office notice that they
claimed the policy, as the assignees of

John Wheeldon Benton. The insurance
office thereupon paid the policy money,
viz., the 1,103*l.* 4*s.* 6*d.*, into Court, under
the Trustees Relief Acts; and the peti-
tioners presented this petition for the pay-
ment of it out to them, with costs, to be
paid by the respondents, John Wheeldon
Benton and Mr. Digby, on the ground
that their claims were wholly without
foundation.

Mr. Karslake and Mr. Jolliffe, for the
petitioners, said there were many reported
cases in which trustees who had impro-
perly paid money into Court under these
Acts, had been ordered to pay the costs of
the petition to get the money out; but
there was no case in which a respondent
who set up a wholly unfounded claim to
the fund, and so occasioned the trustees
to pay it into Court, had been made to
pay the costs of the petition.

Mr. Kekewich was for the insurance
office.

HALL, V.C., made an order for the
payment out to the petitioners of the
fund in Court; and directed that both
the respondents, John Wheeldon Benton
and Mr. Digby, should pay the petitioners
their costs; the petitioners paying the
insurance office theirs, and adding these
costs to their own.

Solicitors—Messrs. Williams & James, agents for
Mr. Peppercorn, Oxford, for petitioners; Messrs.
Digby, Son & Evans, and Messrs. Simpson &
Callington, for respondents; Messrs. Bockett &
Son, for the Insurance Office.

BACON, V.C. }
1874. }
July 4, 6. }

ASTON v. WOOD.

*Will—Construction—Particular Residue
—Ademption—Misdescription—Gift cum
onere.*

*A testator gave a fund to particular
trustees, upon trust to invest on freehold
mortgage enough to provide for certain an-
nuities and gave the residue of that fund
to his nephew, J. A. The will contained a
general residuary bequest. Some of the*

gifts of annuities, being charitable, were void :—Held, that J. A. took the whole of the particular residus.

A gift of a balance due to the testator from his partnership at a particular date :—Held, to be adeemed, pro tanto, by drawings made before his death and partly before the date of the will.

Shares in a company were given, together with other property, and were onerous :—Held, that the legatees could repudiate the shares, and take the rest of the gift.

The late Mr. Thomas Wood made his will, dated the 15th of November, 1870. After various devises and bequests, it proceeded—"I give and devise unto my brother, Henry Wood, and my nephew, Albert Wood (whom I appoint trustees, but only for the purposes of this bequest, and not further or otherwise), the sum of 10,000*l.*, due to me from my partners, and also all the money I have invested in the funds, upon trust, that they, the said Henry Wood and Albert Wood, shall invest such portion thereof upon mortgage of freehold security in their names, as they shall deem sufficient to pay and produce the following annuities and payments, namely." The will then specified a life annuity of 150*l.* to the testator's niece, Lucy Aston, and one of 50*l.* to his nephew, George Swinford Wood, and various perpetual annuities for charitable purposes, to the extent of 45*l.* a year during the life of Lucy Aston, and 185*l.* after her death. The will then proceeded, "I give and bequeath unto the said James Wood Aston, for his own absolute use and benefit, all the rest, and residue, and remainder of the said sum of 10,000*l.*, and the money invested in the Government funds, as aforesaid, after investing such portion thereof as shall be necessary for payment of the above-mentioned sums and annuities as aforesaid." The will contained the following bequest—"I give and bequeath unto the said Lucy Aston all balances of profits due from the said new firm in which I am a partner, up to the month of June, 1869, together with all my shares in the Cradley Heath Gas Company, for her own absolute use and benefit." After certain other bequests,

the will continued, "I give and bequeath all my shares in the Cambrian Testing Company, and all that debt or sum of money owing to me by Messrs. Savin & Co.; also all moneys due to me from the Hereford and Brecon Railway Company, together with the securities I hold for the same; also, the shares in the Flintshire Oil Company; also, all my shares in the Staffordshire Testing Company, unto my nephew, the said George Swinford Wood, and my niece, Mary Ann, the wife of Sir Thomas Gibbons Frost, in equal shares and proportions." After certain devises, the will proceeded, "I give, devise and bequeath all my share estate and interest in the stock-in-trade, book debts, credits, effects and profits, from June, 1869, to the time of my decease, and interest in the new firm of Wood Brothers; and also all the rest, residue and remainder of my real and personal estate, of what nature or kind soever, unto my said wife, Sarah, the said James Wood Aston, George Swinford Wood and Mary Ann Frost, in equal shares and proportions, as tenants in common, and not as joint tenants." He appointed his wife and James Wood Aston, his executors.

The testator died on the 15th of December, 1870, and this suit was instituted for the administration of his estate. It now came on to be heard on further consideration. It had been certified that the testator, between June, 1869, and his death, had drawn from his partnership on account of profits, an amount less than what was owing to him in June, 1869, by 15*l.* 9*s.* 9*d.* One question to be determined was whether the legacy of the balance due in 1869, given to Lucy Aston, had been adeemed.

A second question was whether the gift of the residue of the 10,000*l.* and funds given to James Wood Aston, the plaintiff, was specific or residuary, that is to say, whether the void charitable legacies sank into the general residue, or went to James Wood Aston.

On enquiry, it was found that there was no company called the Flintshire Oil Company, but the testator held shares in a company called the North Wales Coal Oil Company (Limited), whose registered

office was at Chester, but whose works were in Flintshire. These shares were of no value, but liable to calls. A third question was whether the testator had designated them by the description of shares in the Flintshire Oil Company, and if so, whether the legatees could repudiate them without giving up the benefit of the other property given to them.

Mr. Kay and Mr. Speed, for the plaintiff, James Wood Aston, contended that the gift of the remainder of the 10,000*l.* was, in its nature, residuary, and the lapse of sums payable out of it accrued for the benefit of those entitled to such residue—

Carter v. Laggart, 16 Sim. 423;

Petre v. Petre, 14 Beav. 197;

De Trafford v. Tempest, 21 Beav. 564;

Baker v. Farmer, 36 Law J. Rep.

(N.S.) Chanc. 819; s. c. (on app.)

37 Law J. Rep. (N.S.) Chanc. 820;

s. c. Law Rep. 3 Chanc. 537.

Mr. Eddis and Mr. G. O. Edwards, *Mr. Jackson*, *Mr. Hemming* and *Mr. Little*, contra, relied on—

Walpole v. Aphorpe, Law Rep. 4 Eq. 37;

Re Brown's Trusts, 1 Kay & J. 522;

Page v. Leapingwell, 18 Ves. 463;

Eusum v. Appleford, 10 Sim. 274;

s. c. (on app.) 5 Myl. & Cr. 56;

s. c. 10 Law J. Rep. (N.S.) Chanc. 81

Mr. Macnaughten, for a trustee.

BACON, V.C., said, Upon this point I cannot say that I entertain any doubt upon the construction of the will, which is the first thing to be considered. The testator takes out of his general estate certain property, which he devotes to certain plain purposes. He gives it to trustees whom he appoints trustees only for the purpose of this bequest. As to the annuities, if it is four per cent. on mortgage, as I suppose it was at least, if not more, there would be a surplus beyond satisfying the annuities, which would unquestionably belong to the residuary legatee of this particular fund. The testator knew what sum most likely he had in the Funds, and knowing that there was a debt of 10,000*l.* on these two particulars, he creates a trust fund, and

proceeds by his will to deal with that, first providing that out of it shall be invested a sufficient sum to produce the income to pay the several annuities, and then in words which, in my opinion, admit of no reasonable doubt, he says—"I give to James Wood Aston, for his own absolute use and benefit, all the residue and remainder of the 10,000*l.*, and of the money invested in the Government funds, as aforesaid, after investing such portion thereof as shall be necessary for payment of the above-mentioned sums and annuities, as aforesaid." I cannot conceive words expressing more distinctly the testator's intention that the two particular species of property which, he mentions, shall stand charged with the payment of the sums which he gives by way of annuity, and that all beyond that shall be the property of the residuary legatee. If rules are wanted, if any help can be derived from decided cases, there is no case but *Page v. Leapingwell* (*ubi supra*) which can be referred to which would lead to a contrary construction, and *Page v. Leapingwell* (*ubi supra*) proceeds plainly on the principle that there was a fund sufficiently specified and particularised which was to be divided. There is no such thing in this case, there is no division whatever, and I am not aware of any case (certainly, *Page v. Leapingwell* (*ubi supra*) is not one, nor either of the others which have been referred to in the course of this discussion), in which the judgment of the Court did not proceed upon the fact that the trust fund or otherwise, whatever it was, was the subject of division. According to the true construction of the will, there is no division of this fund, it is one entire fund, consisting of two particulars. Out of it certain things are to be paid. All that is not required for those payments goes to the residuary legatee of that particular fund. The trust fund is subject to diminution, but never to division. Here I can see nothing like it. I cannot find a word that means it, or that it can be imputed to the testator that he meant any other than this—"I set apart a fund, which shall be charged with, and the income of which shall be diminished by certain payments which I name, and that

purpose being accomplished, all that remains shall belong to James Wood Aston." In my opinion, not only is there no authority against it, but there is no reason or principle against it, and certainly nobody reading the will in a popular sense would entertain any doubt about the intention of the testator. In my opinion, consistently with all the cases referred to, and all that I know of, and with every principle of reasonable construction, this will presents no serious doubt that the payments directed by the testator in the shape of annuities being satisfied, there must remain something.

Mr. Little and Mr. Whitehorne, for Lucy Aston, contended that the gift to her was of a sum of money equal to the balance due to the testator from his firm in June, 1869. That this was meant was clear, from the fact that when the will was made the supposed ademption must have taken place. If this construction was not to be put on the gift, as between Lucy Aston and those entitled to the balance due at the testator's death, the drawings subsequently to June, 1869, were to be set against profits made after that date—

Selwood v. Mildmay, 3 Ves. 306 ;

Badrick v. Stevens, 3 Bro. 431 ;

Backwell v. Child, Amb. 260.

BACON, V.C., said—Unless I were to make a new will for this testator, I could not accede to the agreements which I have heard from Mr. Little and Mr. Whitehorne. The words are plain—"I give and bequeath to Lucy Aston all the balances of profits due from the firm in which I am a partner, up to the month of June, 1869." I am told that there was a balance due to him, which he had drawn out of the firm, and dealt with in any way he thought fit. The cases which have been referred to no doubt are cases of authority, and one might not be surprised, perhaps, that the Courts of Common Law looked with a great deal of alarm at these cases, and did not understand the ground on which the Court of Equity had so dealt with it.

However, it is only necessary to say, as to these cases, that they were cases of mistake. The Court was satisfied, as a matter of fact, on the terms of the will,

and the extrinsic evidence adduced on these cases that it was a mere mistake, and that only by a mistake the legatee could be deprived of the benefit which the testator intended to confer upon him. But what do we see here? Here the testator has an account current with his late partner or partners, and draws from time to time as he thinks fit. In his will, in the plainest possible terms, he says—"I give to Lucy Aston all that is due to me from the new firm in respect of profits, up to June, 1869." In another part of his will, where he deals with the profits after 1869, he uses very different words. There he gives all his share estate and interest in the stock-in-trade, book debts, credits, effects and profits, from June, 1869, "to the time of my decease, and interest in the new firm of Wood Brothers, and also all the rest, residue," and so on, words entirely distinct from those which he uses when he is giving the legacy to Lucy Aston. Unless there was some sum of money, ascertainable from the Chief Clerk, I cannot go beyond it or behind it. The sum which was due to him from the firm is the sum which, by his will, he has given to Lucy Aston. The thing does not subsist. The payments had extinguished the debts. How can that be called a chose in action which is a debt paid and satisfied? Unless I were, as I said, to make a new will for the testator, to make him say—"My intention is to dispose, by this my will, of all the profits which, upon the taking of the partnership accounts, appear to be due to me, whether I have received it or not, up to June, 1869," I could not give any effect to this legacy beyond the extent to which the Chief Clerk has found that there was a balance of 15*l.* 9*s.* 9*d.*

Mr. Kay and Mr. Speed argued that the testator's North Wales Coal Oil Company shares passed under the description of Flintshire Oil Company, and the legatees could not take the other things given to them in the same gift, and leave the burden of these shares to be borne by the residuary estate—

Talbot v. Lord Radnor, 3 Myl. & K. 252.

Mr. Jackson and Mr. Hemming (contra), contended that the legatee could take one gift and repudiate another, unless it was clearly shewn that the beneficial gift was given for the purpose of enabling the legatee to discharge some obligation—

Warren v. Rudall, 1 Jo. & H. 1; s. c.

29 Law J. Rep. (N.S.) Chanc. 543;

Andrews v. Trinity Hall, 9 Ves. 525, 533;

Moffett v. Bates, 3 Sm. & G. 468; s. c.

26 Law J. Rep. (N.S.) Chanc. 465.

Mr. Speed replied.

BACON, V.C., said—I think that the finding of the Chief Clerk sufficiently establishes that the shares, which the testator calls “the shares in the Flintshire Oil Company” were those in the oil company which was in the county of Flint. The identity, in my opinion, is established. I think that, without going against the authority of *Warren v. Rudall* (*ubi supra*), and without going against the reasoning of *Warren v. Rudall* (*ubi supra*), I cannot hold that the legatee is bound to accept the shares in the Flintshire Oil Company. The Vice-Chancellor seems to have paid, as he always did, great attention to the case before him, and to the authorities which were cited in the course of it, and he came to a very clear conclusion, that the decision of Sir John Leach, in *Moffett v. Bates* (*ubi supra*), was one which ought to be adopted by him in the case before him, and there the gift was, as it is in this case, of things following each other closely or to be read altogether. *Mr. Speed* has endeavoured to distinguish this case from *Warren v. Rudall* (*ubi supra*), because he says the gifts are separate. I cannot conceive that that can make any possible difference. There was no such difference in *Moffett v. Bates* (*ubi supra*), which I find adopted by the Vice-Chancellor, Lord Hatherley, not only without hesitation, but as establishing the true rule of the case. In his decision, the Vice-Chancellor said there was not much authority on the subject, which is quite true; but, with reference to an argument which had been pressed upon him, and which had been supported by a case which had been referred to, the case of *Wilson v.*

Lord John Townshend, where the decision was expressed thus—“You must adopt or reject the whole instrument,”—his Honour said, “It would be mere pedantry to apply the general rule that a person cannot at the same time affirm and disaffirm an instrument in such a case.” Then referring to *Moffett v. Bates*, he says he entirely approves of it. “There a devise and a gift of shares were made to the same person, an infant. The executors assented to the bequest, but the infant, on coming of age, rejected the shares, which had become burdensome by the failure of the company, and it was argued that he must take the real estate *cum onere*. But the Vice-Chancellor held otherwise, and it appears to me that common sense and equity compel me to put a similar construction upon the will.” Of course not only am I guided by it, but to some extent I am bound by the decision in *Warren v. Rudall* (*ubi supra*), but if I had to choose I could not find words which express more distinctly than these that I have read do, what I think is the clear law on the subject. I think the legatees are entitled to disclaim those onerous shares.

Solicitors—Messrs. Tucker & Lake, for plaintiff; Messrs. Mackeson, Taylor & Arnould, agents for Mr. Thos. Horner, Brierley Hill, Messrs. Chester, Urquhart & Co., agents for Messrs. Walker & Smith, Chester, for the various defendants; Messrs. Illiffe, Russell & Illiffe, for Lucy Aston.

JESSEL, M.R. }
1874. } ARMSTRONG v. ARMSTRONG.
July 31.

Costs—Term for Raising Portions—Raising Costs as well as Portions.

*Power to raise a sum of money by mortgage includes power to raise also by mortgage the costs of effecting the security. Trustees of a marriage settlement made in 1802 were empowered to raise and levy the sum of 6,000*l.* for portions on the security of a term of 300 years in certain freeholds. Part of the 6,000*l.* was raised. In 1872 it became necessary to raise the residue,*

which then amounted to the sum of 3,290*l.* 8*s.* 4*d.* By an order then made in this suit which was instituted for the execution of the trusts of certain indentures of settlement, certain trustees were authorised to advance this amount out of their trust funds upon the security of the term. Considerable costs had to be incurred in effecting the security, and it was now asked that the lastly named trustees might be at liberty to advance a further sum out of their trust funds upon the same security to cover the costs so incurred:—Held, that the term of 300 years might properly be taken as a security, not only for the whole amount of 6,000*l.* but also for the costs.

By a settlement made in 1802 on the marriage of Elliott Armstrong with Mary Cartelon, certain freehold estates in the county of Cavan were limited to trustees for a term of 300 years, upon trust to levy and raise by sale or mortgage the sum of 6,000*l.* to provide portions for younger children. In the year 1866 this suit was instituted for the purpose of carrying out the trusts of two other indentures—indentures of settlement—and in pursuance of orders therein two several sums of 2,621*l.* 7*s.* 6*d.* Bank Three per cent. Annuities, and 2,575*l.* Bank Three per cent. Reduced Annuities were paid into Court. In the year 1872, part of the 6,000*l.* having been raised it became necessary to raise the residue, amounting to the sum of 3,290*l.* 8*s.* 4*d.* by mortgage of the term, and the instrument being offered to the trustees of the funds, the subject of this suit, the Court by an order made in the suit ordered that the said sum of 2,621*l.* 7*s.* 6*d.* Bank Annuities, and so much of the sum of 2,575*l.* Bank Reduced Annuities as should with it make up 3,290*l.* 8*s.* 4*d.*, should be sold, and should be invested by the trustees upon the security of the term of 300 years.

At the time of the order it was not anticipated that any considerable costs would be incurred, and no provision was made for their payment. In fact, however, owing to the death of the surviving trustee of the term, considerable costs had to be incurred in effecting the security, and it was desired that the mortgage

should extend to them. Accordingly application was now made to the Court by petition that such further sum of the residue of the said Bank Reduced Annuities as would suffice to raise the costs of effecting the security (which were estimated not to exceed 300*l.*) might be sold and added to the security; and the question arose whether the said term of 300 years could properly be taken as a security, not only for the whole sum of 6,000*l.*, but also for the costs that had been incurred in raising a part.

Mr. Southgate and Mr. Cecil Russell, for the petitioners, referred to—

Parker v. Watkins, Johns., 133, and

Mitchell v. Mitchell, 4 Beav. 549.

Mr. Cozens Hardy, for other parties to the suit.

THE MASTER OF THE ROLLS, in making the order, said, that if there were no precedent he should be willing to make one. That it was impossible to levy and raise the money without incurring costs, and that an authority to raise and levy a sum by mortgage amounted to an authority to raise and levy the costs of the security.

Solicitors—Messrs. Wadeson & Malleon, for all parties.

BACON, V.C. } Re BONELLI'S ELECTRIC
1874. } TELEGRAPH COMPANY.
July 9. } COOK'S CLAIM.

Practice—Petition—Trustees Relief Act—Respondent out of the Jurisdiction—Service.

Upon a petition under the Trustees Relief Act the Court has jurisdiction to order service on a respondent out of the jurisdiction, and also substituted service.

This was a motion for leave to serve copy of petition upon a respondent residing in France.

The petition was for the payment out of Court of a fund which had been paid in under the provisions of the Trustee Relief Act. One of the persons named in the trustees' affidavit as claiming to be entitled to a share in the fund was residing in Paris.

Mr. Macnaghten now moved on behalf of the petitioners for an order for service upon the respondent out of the jurisdiction, or for substituted service, and referred to

Drummond v. Drummond, 35 Law J. Rep. (N.S.) Chanc. 780; s. c. 36 ibid. 153; s. c. Law Rep. 2 Eq. 335; s. c. 2 Chanc. 32;

Cookney v. Anderson, 31 Beav. 468; s. c. 1 De Gex, J. & S. 365; s. c. 32 Law J. Rep. (N.S.) Chanc. 427;

Seton on Decrees, 1245;

but mentioned that some difficulty existed in consequence of the case of

Re Maugham, 22 W.R. 748,

where the Master of the Rolls, following

Ex parte Bernard, 6 Irish Chanc. Rep. 133,

which was a case under the Trustees Relief Act, refused to make an order for service out of the jurisdiction, but allowed substituted service.

BACON, V.C.—What is required is that this respondent shall have notice that the petitioners intend to apply for the distribution of the fund in Court. I will therefore make an order for service on the respondent out of the jurisdiction, and also for substituted service, and when the petition comes on to be heard, I shall know whether sufficient notice has been given.

Solicitors—Messrs. Parkin & Pagden, for petitioners; Mr. H. W. Trinder, Messrs. Deane & Chubb, and Messrs. Hargrove, Fowler & Blunt, for respondent.

HALL, V.C. }
1874. } *Re THOMPSON'S ESTATE.*
July 30. } *NALTY v. AYLETT.*

The Debtors Act, 1869 (32 & 33 Vict. c. 62. s. 4, sub-sec. 4)—*Prisoner—Discharge—Order.*

An order of this Court is necessary, under the above statute, for the discharge of a prisoner who has been in prison a year for contempt of Court.

By the Debtors Act, 1869, section 4, it is provided that, with the exceptions thereafter mentioned, no person shall after the commencement of the Act be arrested or imprisoned for making default in payment of a sum of money. Then follow the exceptions, among which is default by an attorney or solicitor . . . in payment of a sum of money, when ordered to pay the same in his character of an officer of the Court making the order. The section also provides that no person shall be imprisoned, in any case excepted from the operation of the section, for a longer period than one year. In this case a solicitor had been ordered, on the 21st of February, 1873, to pay into Court in the above matter and cause a sum of 200*l.* He did not obey that order. On the 17th of July, 1873, he was committed to the Essex County Prison for contempt of Court. The twelve months mentioned in the Act had now elapsed. There was a doubt whether the practice in such a case entitled a prisoner to his discharge as of course, or whether it was necessary to obtain an order of the Court to release him?

Mr. Pemberton moved for an order to discharge the solicitor from prison.

Mr. Methold was for the sheriff of the county.

HALL, V.C., made an order for the discharge of the prisoner, being of opinion that an order for the purpose was necessary.

Solicitors—Mr. H. L. Pemberton, solicitor to the Court of Chancery, for the prisoner; Mr. William Haigh, for the defendant; Messrs. Paterson, Snow & Burney, agents for Messrs. Gepp & Sons, Chelmsford, for the sheriff of Essex.

HALL, V.C. }
 1874. } *Re HOPKINS'S TRUSTS.*
 May 23. }

Tenant for Life — Income — Costs — Shares in the Sun Life Association Society and the Sun Fire Insurance Office — Payment of "Extraordinary" and "Special" Dividends after Death of Testator.

A testator died on the 20th of December, 1870, having by his will bequeathed the residue of his personal estate to trustees to invest as therein mentioned, and then to permit and empower his wife to receive "the dividends, interest and income, of his trust money, stocks, funds, shares and securities," for her life; and on her death, to permit his brother to receive the residue (after the payment thereof of certain legacies) of the same "dividends, interest and income," for his life, with remainder to one of his brother's children and another legatee as therein mentioned. At his death, the testator had twenty-five shares in the Sun Life Assurance Society and fifty-two in the Sun Fire Insurance Office. The trustees of the will paid his widow the dividends on those shares till 1873, when they withheld the January and July dividends on the respective shares, on the ground that it was doubtful whether the dividends were corpus, or income, of the estate. The question depended on the construction of the company's deed of settlement, and on the mode in which the company had declared the dividends, which were called "extraordinary" and "special." The resolutions under which the dividends were declared were not produced to the Court; but it was stated that they were identical in terms with the dividend warrants; and the warrants spoke of the money payable thereunder as "dividend paid out of profits." The trustees paid the money into Court; and the testator's widow presented a petition praying payment of it out to her:—

Held, on the construction of the company's deed of settlement, and the resolutions declaring the dividends, that the dividends were income and not corpus of the estate, and belonged to the petitioner. Costs were allowed out of the fund.

Petition.

Henry George Hopkins died on the 20th of December, 1870, having by his will bequeathed the residue of his personal estate to trustees to invest (as therein mentioned), and then to permit and empower his wife to receive "the dividends, interest and income of the trust moneys, stocks, funds, shares and securities," during her life; and on her death (after payment of some legacies thereof) to permit his brother to receive the residue of the same dividends, interest and income, for his life; and on the brother's death to stand possessed of the trust funds for the benefit of one of his brother's children, Frederic Gardiner Hopkins, and Henry Morden Bennett.

Part of the testator's estate consisted, at the time of his death, of twenty-five shares in the Sun Life Assurance Society, and fifty-two shares in the Sun Fire Insurance Office. The trustees of the will retained the shares, and paid to the testator's widow, Sarah Hopkins, as the present tenant for life of his estate, the dividends which accrued due on the shares previously to January, 1873. In that month the trustees received a dividend in respect of the twenty-five shares amounting to 278*l.* 15*s.*, and which was called an "extraordinary" dividend. In July, 1873, they received a dividend in respect of the fifty-two shares, amounting to 520*l.*, and which was called a "special" dividend. Doubts then arose as to whether the preceding payment of dividends to the widow was valid; whether, in fact, the sums so paid by the trustees were income or corpus of the testator's estate?

The trustees, therefore, paid the 278*l.* 15*s.* and the 520*l.* into Court, under the Trustees Relief Acts.

The question depended upon the constitution of the Sun Life Assurance Society and the Sun Fire Office, and the mode in which that body had dealt with the moneys.

The affidavit of the trustees, when they paid the money into Court, stated that the shares in the Sun Life Assurance Society were of the nominal value of 100*l.* each, but that the sum of 10*l.* only had been called up and paid in respect of each

of such shares, and that the value of such shares according to the present market price was 72*l.* each, or thereabouts; that dividends in respect of such shares were paid regularly, half-yearly, in January and July; and that every five years a further dividend was paid, which was called an extraordinary dividend, the amount of which varied from time to time—And that by the deed of settlement of the Life Assurance Society, dated the 15th day of June, 1810 [after reciting amongst other things that it had been agreed that the capital stock of the society should be the sum of 480,000*l.*, to be divided into 4,800 shares of 100*l.* each, and that each of the parties thereto had paid 10*l.* per cent. on the sum subscribed by him] it was amongst other things provided, that the funds or property of the society should consist of the said capital of 480,000*l.*, of all sums to be from time to time received by the society for assurances effected by the society, the revival of forfeited policies, annuities granted by the society, and of all sums which should from time to time be recovered by any action or suit that might be prosecuted against any person or persons breaking or refusing to conform to, or comply with, any of the covenants, conditions and stipulations, contained in that deed of settlement, and which on his, her, or their part ought to be performed and complied with; and of the interest, dividends and annual produce and accumulations of so much of the capital of 480,000*l.*, and of so much of the sums to be received and recovered from time to time as aforesaid, as should from time to time be actually in the hands of the society and remain unapplied and undisposed of, after answering the claims which persons assured and annuitants should from time to time have on the society, and the various other claims upon and expenses of the society; and also the stocks, securities, house and other property, in or upon which the said sums, interest, dividends, annual produce and accumulations, or any part thereof respectively, should be laid out and invested—That out of the funds or property of the society the committee of directors should

always keep separate and apart from the rest the sum of 48,000*l.*, the amount of the 10*l.* per cent. so paid by the parties thereto on their respective shares as aforesaid, and the accumulations thereof arising as well from interest thereon as from the fund thereafter called “the surplus fund,” and the stocks and securities on which the said sum and its accumulations should for the time being be invested, and the interest, dividends, and annual produce thereof; and that the said sum of 48,000*l.* so to be kept separate and apart as thereinbefore was mentioned, and the accumulations thereof, should be called “the separate fund” of the society—That such of the funds and property so to be laid out and invested as aforesaid, as should from time to time remain after the separation of the said sum of 48,000*l.*, and the accumulations of such remaining funds or property, should be called “the surplus fund” of the society—That after the expiration of four years from the date of that indenture, and not before, a dividend out of the separate fund might be annually made amongst the members of the society—That the annual dividend to be made as aforesaid should at no time be of such an amount as to reduce the separate fund below the sum of 48,000*l.*, it being the true intent and meaning of that indenture that the separate fund should never be reduced below that sum, except when it should be found necessary to resort thereto for the purpose of satisfying the claims of persons assured and the annuitants, and the expenses attending the purchase and support of the house and the various other expenses of the society—That the annual dividends so to be made as aforesaid should at no time exceed 5*l.* per cent. upon what the separate fund amounted to at the commencement of twelve calendar months immediately preceding the time at which the annual dividends should be made, and should be, at the time of such dividend—That at the end of twelve years from the date of that indenture, and after that time at intervals of not less than seven years at the least, a dividend might be declared out of the surplus fund for the time being of the society—

That at the first meeting of the managers after a dividend should have been declared out of the surplus fund, the same should be divided into two equal parts, and one of such parts should be added to and consolidated with the separate fund, and form part thereof—That at the same meeting the remaining part should, at the end of the said twelve years, be divided amongst the proprietors in proportion to their respective shares in the capital of the society, and be paid at such time and by such instalments as the managers should think proper within the period of seven years from that time; unless any unforeseen demand upon the company might make it necessary to resort to the sum so intended and declared to be divisible among the proprietors as aforesaid, in which case it should be lawful for the managers altogether to stop the payment of such dividend to the proprietors, or such part thereof as should then remain unpaid, or to postpone or to make such alteration in the amount or time of paying such dividend, as a general meeting of the managers should, under the then circumstances of the society, think proper and expedient—That at the end of the next and every succeeding seven years such dividend should be divided into three equal parts, and one of such parts should be added to the capital of the separate fund as aforesaid, until the separate fund should amount to 100,000*l.*; the remaining two equal parts should be distributed amongst the proprietors in the manner and subject to the like power in the managers to suspend, alter or vary the amount or time of paying the same as was thereinbefore given with respect to the payment of the moiety of the first dividend of the surplus fund—That if at any time it should appear, upon any division of profits, to the managers at a general meeting, that it was necessary or expedient to add a larger proportion of the profits to the capital than the proportion thereinbefore mentioned, it should and might be lawful for them so to do, until the separate fund should amount to 100,000*l.*, if three-fourths of the managers at such meeting should so decide, and such decision should be confirmed by an

equal number of managers at the next subsequent general meeting of managers; and that from and after the separate fund should amount to 100,000*l.* it should be lawful for the like number of managers in manner aforesaid, upon any subsequent division of profits, to decrease the sum to be carried to the separate fund in such proportion as might be thought expedient and proper, until the separate fund should amount to 480,000*l.*

The trustees also stated that alterations had been from time to time made in the provisions of the deed of settlement under powers in that behalf contained in the deed and by Act of Parliament, and by virtue of such alterations dividends out of the separate fund were now paid half-yearly; and that dividends out of the surplus fund were declared or paid every five years; and that by the revenue account and balance sheet of the Sun Life Assurance Society for the year 1873 it appeared (and they believed it to be the fact) that the separate fund now exceeded 100,000*l.*, and amounted, in fact, to 262,360*l.*; and [after stating the amount and value of the shares in the Sun Fire Insurance Society] that ordinary dividends in respect of the same shares were paid regularly half-yearly, in January and July; and that at irregular intervals special dividends were paid in respect of such shares, the amount of which fluctuated from time to time, but such special dividends, when declared, were added to the amount of the ordinary dividends and paid with them; the amounts of the ordinary dividends and the special dividends being, however, distinguished in the dividend warrants. They also stated that the managers of the Sun Fire Office declined to allow them to inspect the deed of settlement, or (except as therein and hereinafter mentioned) to afford them any information as to the shares in the same society, or the source from which their dividends were declared; and that they were, therefore, unable to depose with certainty to the sources from which the said special dividends were derived. But the trustees, from enquiries which they had made and information which they had received, believed that such

special dividends were not attributable to or paid out of the profits of the year or half-year immediately preceding the declaration of such dividends; but that the payment of the same depended upon the proportion which the profits of the society bore to the losses thereof, for a period which varied according to circumstances; and that they were informed and believed that the practice of the last mentioned office, as to the payment of dividends, was as follows; namely, that the ordinary dividends were paid regularly out of the subscribed capital of the office, and that out of the annual premiums paid on policies in each year the losses and expenses of the office for that year were paid; and that if it had been a good year and the losses had been small the surplus profits were divided in the form of a special dividend; but that if it had been a bad year and the losses had been serious no special dividend was declared, but the surplus profits (if any) were carried forward to the next year, and so on from year to year if the losses continued to be serious; and that it usually happened that there was a series of bad years in which no special dividend was declared, and then a

series of good in which such dividend was declared; that it was sometimes found necessary in very bad years to resort to the subscribed capital to make up losses, and that when that happened no special dividend was declared in subsequent years until the amount of capital so taken had been replaced out of the accruing profits; that the managers of the two societies were the same, and that the scheme of the management of the Sun Fire Insurance Office assimilated to that of the Sun Life Assurance Society; and that they had caused enquiries to be made at the offices of each of the societies, with the view of ascertaining whether the aforesaid extraordinary and special dividends respectively paid by the two societies were considered by them as being in the nature of dividends or bonuses; and that they had been informed at both the offices that they were deemed dividends, and represented the earnings of the capital of the societies respectively. They also stated that since the death of the testator they had received the following dividends on the several shares respectively, that was to say:—

Sun Life Shares.				Sun Fire Shares.			
1871.				Ordinary dividend ...			
January Ordinary dividend...	...	£27 10 0		...	...	£169 0 0	
July ditto ...	...	27 10 0		Ordinary dividend ...	£169 0 0	} 585 0 0	
1872.				Special ditto ...	416 0 0		
January Ordinary dividend...	...	27 10 0		Ordinary dividend ...	...	169 0 0	
July ditto ...	...	27 10 0		Ordinary dividend ...	£182 0 0	} 546 0 0	
1873.				Special ditto ...	364 0 0		
January Ordinary dividend	£27 10 0	} 306 5 0		Ordinary dividend ...	...	182 0 0	
Extraordinary ditto...	278 15 0			Ordinary dividend ...	£182 0 0	} 702 0 0	
July Ordinary dividend	...	31 5 0		Special ditto ...	520 0 0		

The trustees then referred to the payments they had made to the widow, to the doubts which had arisen as to them, and to their desire to pay the dividends in their hands into Court, and stated that to the best of their knowledge and belief the only persons interested in or entitled to the said sums of 278*l.* 15*s.* and 520*l.* were the petitioner, Sarah Hopkins, as the tenant for life of the residuary estate of the testator, Frederic Hopkins, as the

tenant for life thereof in remainder, expectant on the decease of Sarah Hopkins, and Frederic Gardiner Hopkins and Henry Morden Bennett as the ultimate residuary legatees named in the said will.

The extraordinary dividend of 11*l.* per share constituting the sum of 278*l.* 15*s.*, in respect of the shares in the Sun Life Assurance Society, was declared in the month of January, 1873, for the five years ending on the 24th day of June, 1872, and

in reply to a letter from Messrs. Law, Hussey and Hulbert, the solicitors of the petitioner, asking for information as to the nature, purport and effect of such resolution, they received a letter dated the 12th of May, 1874, from J. G. Priestley, the actuary of the Sun Life Assurance Society, which was as follows—"I duly received your letter of the 5th inst. which I have submitted to the managers, and I am directed to inform you that the extra dividend of 11*l.* per share paid to the proprietors in January, 1873, was ordered by the general meeting of the managers for this society to be paid out of the amount of profit made in the quinquennial interval."

The special dividend of 10*l.* per share constituting the sum of 520*l.* in respect of the shares in the Sun Fire Office, was declared in the month of July, 1873, for the year ending on the 24th day of June, 1873. And in reply to a letter from the solicitors of the petitioner, asking for information as to the nature, purport and effect of such resolution, they received a letter dated the 6th of May, 1874, from Mr. R. B. Relton, the secretary of the Sun Fire Insurance Office, which was as follows—"Your favour of the 5th inst. is to hand and in reply to your enquiry regarding the dividends of the Sun Fire Office, I beg to inform you that the sum of 10*l.* per share paid in July last was in the terms of the resolution a special extra dividend paid to the proprietors. The warrant declared the whole sum paid to be a dividend; and I may add that it was paid out of the profits of the business. The last price at which any shares in the Sun Fire Office were sold was 205*l.* per share. The Sun Life Assurance Office will answer your enquiries separately."

There was no copy of the resolutions in evidence before the Court, but they were said to be in the same terms as the warrant.

The petitioner submitted that the sum of 278*l.* 15*s.* was derived from the profits and earnings of the capital of the Sun Life Assurance Society, and that the sum of 520*l.* was derived from the profits and earnings of the capital of the Sun Fire Insurance Office, and that the petitioner was entitled to receive the two sums of

278*l.* 15*s.* and 520*l.* as the tenant for life of the residuary personal estate of the testator Henry George Hopkins, under his will.

The petition prayed that the two sums of 278*l.* 15*s.* and 520*l.*, making together the sum of 798*l.* 15*s.*, standing to the account entitled "Hopkins residuary estate share and dividend account," might be ordered to be paid to the petitioner; and for an order in the alternative, as to the rights of the parties in the funds.

Mr. Osborne Morgan and *Mr. G. S. Law*, for the petitioner.—The testator clearly intended his widow to take "all" dividends of every kind, whether ordinary, extraordinary or special; and having regard to the mode in which the society has by its resolution declared these dividends, they are income and not *corpus*; and the petitioner is therefore entitled to the sums in Court.

They cited—

Browne v. Collins, Law Rep. 12 Eq. 586;

Bates v. Mackinley, 31 Beav. 280; s. c. 31 Law J. Rep. (N.S.) Chanc. 389;

Maclaren v. Stainton, 27 Beav. 460; s. c. 29 Law J. Rep. (N.S.) Chanc. 401;

Price v. Anderson, 15 Sim. 473;

Preston v. Melville, 16 Sim. 163;

Paris v. Paris, 10 Ves. jun. 185;

Jones v. Ogle, 41 Law J. Rep. (N.S.) Chanc. 633; s. c. (on app.) 42 ibid. 334; s. c. Law Rep. 8 Chanc. 192;

Straker v. Wilson, 39 Law J. Rep. (N.S.) Chanc. 463; s. c. (on app.) 40 ibid. 630; s. c. Law Rep. 6 Chanc. 503;

Ilbbotson v. Elam, 35 Beav. 594; s. c. Law Rep. 1 Eq. 188.

Mr. Bristowe and *Mr. Dalton*, for the parties entitled on the death of the tenants for life.—It is clear if we look to the sources whence these dividends came, that they are capital and not income. There is no doubt a distinction between the two kinds of shares; but the true test of the quality of these payments is this—When there is a half yearly division of profits, the proceeds are income, and go to the tenant for life—When there is no such division,

they must be treated as capitalised, and added to the *corpus*—

Plumbe v. Neild, 29 Law J. Rep. (N.S.) Chanc. 618.

HALL, V.C.—The arguments on this petition have proceeded on the assumption that the resolutions for the payment of the money in question, were for the payment of it as a bonus or dividend; and it is on the footing of that assumption being correct that the observations I shall make will be based. I think that in the present state of the authorities on the subject it is clear that the tenant for life is entitled to the money as extraordinary dividends; unless, as it was insisted in the arguments, they were in fact paid out of the capital of the society. If they were so paid, then, whether they were called bonus or dividend, they would equally be payments of so much of the capital; and as such would belong to the remaindermen, and not to the petitioner, the present tenant for life. The constitution of the Sun Life Assurance Society is this—They commenced business with the appropriation of a specific sum of 48,000*l.* out of their capital, viz., 10*l.* a share paid up, as a fund which not only was never to be encroached upon, but which might be increased in future. They paid no dividend for four years. At the end of that time they began to pay one out of the 48,000*l.* which was called, or considered as, a separate fund; whether it amounted to more or less than that precise sum. The dividend so paid, did not exceed 5*l.* per cent. But there was a provision also made for something more, and in this way: after paying the dividend out of the 48,000*l.* there was another fund set aside, called “The Surplus Fund,” which was invested in the ordinary way. Dividends were to be paid out of that fund at the end of twelve years from the date of the settlement of the society; and after that at intervals of seven years, a period which was subsequently altered to five years. That was a fund appropriated not as “capital” of the concern, but as a “dividend” fund. Whatever arose from that fund was in every sense “a dividend.” The argument in behalf of the respondents to this petition therefore fails. The

case is really one of an ordinary kind, viz., of the payment of a dividend out of a fund appropriated to that specific purpose. In *Barton's Trusts* (1), Lord Hatherley, when Vice-Chancellor, in explaining *Paris v. Paris* (*ubi supra*), said this—“If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he must use his influence to get them to vote as he wishes. But where the company by a majority of their votes have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle; and I must hold that these additional shares formed part of the capital fund, under the settlement, and went to the children, and not to the tenant for life, their mother.” That was Lord Hatherley's view of the subject, in that case. But there is nothing of the kind in the present one; for here, on the face of the resolutions, the society have referred to the money as dividends, and not capital. If it had not been so treated and the money had been declared by the society to be capital, a very grave question would have arisen, whether, having regard to the deed of settlement, such a resolution would not have been at variance with it. I think it would not have been competent to the society to make such a declaration. As to the fact that the shares in this case are of two kinds, I think that in no way affects the determination of the question. The case is one of an ordinary character, and the order must be made for payment to the petitioner of the two sums of 278*l.* 15*s.* and 520*l.* as prayed. I think that as the hearing of the petition has settled the question whether these sums are income or *corpus* of the testator's estate, the costs of all parties to the petition should come out of the fund.

Solicitors—Messrs. Law, Hussey & Hulbert, for petitioner; Messrs. E. & H. Tylee, Wickham & Moberley, for respondents.

(1) 37 Law J. Rep. (N.S.) Chanc. 194; s. c. Law Rep. 5 Eq. 238.

LORDS JUSTICES. }
 1874. }
 July 7. } MAYOR, &C., OF HASTINGS,
 v. IVALL.

BACON, V.C. }
 1874. }
 March 7. } FINCH v. PRESCOTT.

Practice—Appeal by Defendant—Security for Costs of Appeal—Fictitious Defendant.

Upon appeal by a defendant, it having been proved that the appellant was a man without property, and had no substantial interest in the suit, but was defending it on behalf of another person, he was ordered to give security for costs.

In this suit Vice-Chancellor Malins had made a decree restraining the defendant Ivall from depositing rubbish on the beach at Hastings, and the defendant had presented a petition of appeal.

The plaintiffs now applied, by way of original motion, that all proceedings in the suit might be stayed until the appellant had given sufficient security for the costs of the appeal. It appeared that the defendant Ivall was a person of no property, and had no substantial interest in the suit, but that he was, in reality, defending it on behalf of a Mr. Moreing.

Mr. Glasse and Mr. Ellis, on behalf of the plaintiffs, supported the application.

Mr. Cotton and Mr. Hemming, for the defendant, opposed it, and said there was no authority for such an order.

LORD JUSTICE JAMES considered that upon principle, if not in reported cases, there was ample authority for granting this application. It appeared that Moreing was really *dominus litis*, and was carrying on the proceedings in the name of a pauper. If there was no precedent for such an order they would make one in this case. The proceedings would be stayed until proper security was given, but the plaintiffs must undertake not to sue out execution for costs already incurred until the appeal was heard.

MELLISH, L.J., concurred.

Solicitors—Mr. J. H. Lydall, for plaintiffs;
 Messrs. Walker & Martineau, for defendant.

Executor—Right to—Interest.

An executor who expended money of his own for the benefit of the estate was allowed simple interest at 4l. per cent.

This was an administration suit. The testator devised and bequeathed his residuary estates, including the goodwill of his business as a railway carrier, to his executors on trust, as soon as conveniently might be after his decease (or at such time or times as he or they should think fit to do so) to convert it into money. One of the executors advanced money from time to time out of his own pocket, to pay debts of the testator. He now claimed to be allowed simple interest at the rate of 4l. per cent. per annum upon an average of the money due to him from the estate. Interest was calculated by taking the balance due to him at the end of every half-year, and taking 2l. per cent. on each balance. The first balance was struck for a period greater than half a year, and 3l. per cent. taken on that balance.

Mr. Woodroffe, for the plaintiff, objected. He said many of the debts paid would bear no interest, or bear a lower rate than that claimed.

Mr. Kay and Mr. T. A. Roberts, for the executor, relied on—

Ex parte Chipendale, 4 De Gex, M. & G. 19; s. c. 22 Law J. Rep. (N.S.) Chanc. 926;

Re Murray's Executors, 5 De Gex, M. & G. 746; s. c. 24 Law J. Rep. (N.S.) Chanc. 25;

Sargood's Claim, Law Rep. 15 Eq. 43.

BACON, V.C., thought the claim reasonable and allowed it.

Solicitors—Messrs. Robinson & Preston, agents for Messrs. Johnson & Raper, Chichester, for plaintiff; Messrs. Smith, Fawdon & Low, agents for Messrs. Ford & Ford, Portsea.

LORDS JUSTICES.

1874.

July 25.

Aug. 1.

FOXON v. GASCOIGNE.

Solicitor—Charge for Costs on Property recovered or preserved—Suit relating to Easement—23 & 24 Vict. c. 127. sec. 28.

The 28th section of the Statute 23 & 24 Vict. c. 127, which empowers the Court to declare a solicitor entitled to a charge for his costs upon property recovered or preserved in a suit through his instrumentality, does not apply to a suit which relates merely to an easement.

This was an appeal from a decision of the Master of the Rolls.

The suit of *Foxon v. Gascoigne* was instituted in November, 1872.

The plaintiffs were the occupiers of some leasehold premises in Sheffield, adjoining some other leasehold premises which were in the occupation of the defendant. The bill alleged that the defendant had then lately begun to make some alterations in his premises, that he had already raised the height of his buildings about twenty feet, and that he intended to carry them still higher, and that the effect of what he had already done was a serious interference with the plaintiffs' ancient lights; and the bill prayed an injunction to restrain the defendant from carrying up his buildings any higher, and also a mandatory injunction to compel him to restore his buildings to their original height.

On the 19th of December, 1872, on the undertaking of the defendant not to carry his buildings any higher and to pull down any part of them if so ordered at the hearing of the cause, a motion for an injunction was ordered to stand till the hearing. On the 4th of February, 1873, the defendant filed a liquidation petition under the Bankruptcy Act, 1869, and John Walker was, on the 26th of February, appointed trustee under the petition. A compromise of the suit was afterwards entered into between the plaintiffs and the trustee, and it was arranged that the buildings should be carried no higher; but, on the other hand, that what had already been built should remain. On

NEW SERIES, 43.—CHANC.

the 11th of December, 1872, the trustee sold and conveyed the premises to William Cooper. He afterwards mortgaged them. The solicitor who had acted for the defendant in the suit prior to the liquidation presented a petition, praying a declaration that he was entitled, under section 28 of the Act 23 & 24 Vict. c. 127, to a charge upon the leasehold premises purchased by Cooper for the amount of his taxed costs, charges and expenses, of and incident to the defence of the suit, and that the amount might, if necessary, be raised by a sale. Cooper had purchased with notice of the petitioner's claim.

The Master of the Rolls dismissed the petition, and the solicitor appealed.

Mr. Ince and *Mr. Whitaker*, for the appellant.—The 28th section of the Act applies. The bill asked for a mandatory injunction, and the defence of the suit has prevented the pulling down of the buildings. The buildings have been preserved in the state in which they were when the bill was filed. It is enough that the property has been kept *in statu quo*. It is not necessary that the solicitor should have done anything actively—

Jones v. Frost, 42 Law J. Rep. (N.S.)

Chanc. 47; s. c. Law Rep. 7

Chanc. 773;

Twynnam v. Porter, 40 Law J. Rep.

(N.S.) Chanc. 30; s. c. Law Rep. 11

Eq. 181;

Bailey v. Birchall, 2 H. & M. 371;

Pinkerton v. Easton, 42 Law J. Rep.

(N.S.) Chanc. 878; s. c. Law Rep.

16 Eq. 490;

on which the Master of the Rolls relied, does not conflict with the other cases.

[MELLISH, L.J.—Has this section ever been held to extend to the case of a suit relating merely to an easement, to an action of trespass, or to a suit relating only to the mode of enjoyment of property, not for the recovery of the property itself? The present suit did not relate either to the title to the property or to its administration. In all the decided cases the suit appears to have related to the whole property.]

Scholesfield v. Lockwood, 38 Law J.

Rep. (N.S.) Chanc. 232; s. c. Law

Rep. 7 Eq. 83,

shows that it is enough if something has

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been removed which would deteriorate the value of the property—

Baile v. Baile, 41 Law J. Rep. (N.S.)

Chanc. 300; s. c. Law Rep. 13 Eq. 497,

was a suit to protect an infant's real estate.

Mr. North, for the purchaser and his mortgagee, was not called upon.

MELLISH, L.J.—This is an appeal from a decision of the Master of the Rolls, whereby he refused the petition of the defendant's solicitor, which asked that the costs and charges of the solicitor against the defendant might be made a charge on the property to which the suit related, and which was alleged to have been preserved by means of the suit.

The question turns upon the construction of the 28th section of the 23 and 24 Vict. c. 127, which says, "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding, in any Court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved."

Now there have been a great many cases on this section, but in all of them, as far as I have been able to discover, the suit or action has always related to property; that is to say, either to the recovery of property or to the administration of property, or to the dealing with property in some way or another. No doubt it applies to property of all kinds, personal property, real property, corporeal property and incorporeal property, property in possession and property in remainder or reversion. Wherever any property has been either recovered or preserved there the section applies.

In a large number of the cases the suits have been for the administration of property, and of course in suits for the administration of property the Court decides and settles to whom each portion of the property belongs. Of course, in such a suit property may be either recovered or preserved, although, according to *Pinkerton v. Easton* (*ubi supra*), it

does not necessarily follow that in an administration suit property is either recovered or preserved, and if it is neither the one nor the other, then the section does not apply.

Now in the case before us the suit was one respecting the right to light. The plaintiff alleged that he was entitled to the access of light to certain windows of his; that the defendant was raising his neighbouring buildings; that he had already obstructed the plaintiff's light, and that he was proceeding to build still higher, and still further to obstruct the plaintiff's light; and the plaintiff asked for an injunction to restrain the defendant from erecting the building higher, and also for a mandatory injunction in order that some portion of the building already erected should be pulled down. Subsequently the defendant became bankrupt, and the suit was ultimately settled between the trustee in the bankruptcy and the plaintiff, on the terms that the building should not be raised any higher, but that the defendant or his trustee should not be obliged to take down what had been actually erected before the filing of the bill. We have, therefore, now to determine whether a suit respecting an easement is one in which property can be said, whichever side is successful, either to be recovered or preserved.

The Master of the Rolls gave several reasons for his judgment, but one of them, and it is the ground upon which our judgment will be based, was this, that it was not a suit to recover property at all. In my opinion that is correct.

First, let us suppose that the plaintiff entirely succeeds in such a suit, and that he sustains his right to the lights which he claims, and gets a positive injunction preventing the defendant from obstructing his lights. Could the plaintiff's solicitor then say that any property had been recovered on which he could have a charge? Would it be possible to say that the plaintiff's house had been recovered or had been preserved? It seems to me that it would be impossible to say that. In such a suit the title of the plaintiff to the property in his house is not in question at all. If the plaintiff succeeds, all that can by any possibility be said to be recovered or

preserved (whichever word you choose to employ) is the right to the lights. How is it possible to make a charge upon the right to the lights? The charge can, however, only be made upon the property itself which is recovered or preserved, and no charge can be made if the suit relates only to some incident to property. You cannot, as it appears to me, because some benefit to the property has been acquired by means of a suit, on that account make a charge upon the whole property; and it seems to me impossible to make a charge upon an easement. Supposing there is a suit respecting a right of way, a suit to determine whether the plaintiff has or has not a right of way in a certain direction over the defendant's close, however that suit may end, whether the plaintiff succeeds in establishing his right of way, or the defendant succeeds in establishing that there is no right of way, how can it possibly be said that any property has been either recovered or preserved by the result of that suit? If the plaintiff succeeds, his property may be benefited by having a right of way attached to it, and if the defendant succeeds, his property may be benefited by its being established that it is not subject to any such right of way. Still, as it appears to me, it cannot be properly said that property has been either recovered or preserved. In my opinion the word "preserved" is used in contradistinction to "recovered," and means preserved from the claim which is made by the other side. I doubt extremely whether, if it cannot be said that if the plaintiff succeeds he has recovered any property, it can properly be said that any property has been preserved if the defendant succeeds. Take the ordinary case of a suit respecting lights, as regards the defendant, the real question is, not whether he is the owner of his property, that is not in dispute at all, but whether he is entitled to use his property in a particular way, or whether his using it in a particular way will prejudice the rights of the plaintiff. Supposing the defendant succeeds in establishing that he has a right to use his property in the way in which he asserts that he has, I cannot see how by that result any property is either

recovered or preserved. And, indeed, the only ground upon which it was at all plausibly contended in this case that any property had been recovered or preserved was, that it so happened that a mandatory injunction was asked for to compel the defendant to take down some portion of the building which had been raised before the bill was filed; and it was said that that portion of the building had been preserved. In my opinion it has not been preserved within the true meaning of the section, because the property is not affected. The property in the whole house, including the new erection, remained in the defendant as much after the suit as it did before, but he was not obliged to diminish the height of it. If he had been compelled to pull it down, when he had done that, the property in the bricks, mortar, beams and iron, which composed it, would have remained in him. No property would have been taken from him. It appears to me that it would be a very narrow distinction indeed, if we came to the conclusion that in a suit respecting lights generally, if the plaintiff filed his bill before any obstruction had been actually erected, and the result of the suit was that the defendant succeeded in maintaining his right to erect the proposed building and proceeded to erect it, then no property would have been preserved; but that if the plaintiff happened to ask for a mandatory injunction (which in practice is very seldom granted), and the defendant was so far successful as that a mandatory injunction was not obtained, then we should say that property had been preserved. In my opinion, according to the true construction of the section, the suit must in some way or another relate to the property itself, which must be held to belong either to the plaintiff or to the defendant; and the section cannot apply at all to suits which do not relate either to the recovery or to the administration of property, but relate only to rights in the nature of easements which the owner or occupier of one property may have against the owner or occupier of another.

It is said that this section ought to be liberally construed, and although for some purposes that may be so, yet I have very

considerable doubt whether great harm would not be done if it were extended to suits of this kind. Suits relating to easements sometimes, no doubt, involve very important questions, and are of considerable consequence to the owner of the property; but they very often relate to extremely trifling matters; and I doubt extremely whether it would be for the general advantage if in every case where there is a dispute relating to the right to an easement, the value of which may be extremely trifling, however long the litigation is carried on, the solicitors should be perfectly safe because their costs can be made a charge on the property which might be benefited either on the one side or on the other by the result of the suit. I think that so to hold would be to stretch the words of the section beyond their natural meaning; and I do not think that such suits fall within the principle upon which the Legislature acted in saying that the costs of a solicitor shall be a charge upon the property recovered or preserved through his instrumentality.

JAMES, L.J.—I am of the same opinion. The appeal will be dismissed with costs.

Solicitors—Mr. E. B. Tattershall, for appellant; Messrs. Doyle & Edwards, agents for Messrs. J. & G. E. Webster, Sheffield, for respondents; Mr. R. H. Wilkins, agent for Messrs. Bass & Jennings, Burton-on-Trent, for Bass & Co.

LORDS JUSTICES. } *In re* THE ADANSONIA
 1874. } FIBRE COMPANY;
 July 30, 31. } MILES'S CLAIM.

Bill of Exchange—Authority to accept—Secret Partnership—Company—Winding up.

Four mercantile firms, each of whom carried on a separate trading business of its own, agreed to carry on jointly a particular trade which had been theretofore carried on by F., one of the four firms, alone. The agreement between the four firms provided that the business should be carried on under the style of F., who were to keep separate books for the purpose, and that each party to the agreement should be liable in respect

of the business in proportion to his share in the undertaking, and in the event of being under cash advance he should receive interest for the same; but it was "understood and agreed, that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged."

The association was known to the members as the A. Company, but its name and existence were kept secret.

In order to raise money for the purposes of the business a number of bills of exchange were drawn by M., one of the firms, upon each of the other three, were accepted by them respectively, and were discounted by bankers, the money thus obtained being applied to the purposes of the joint business. The bankers were ignorant of the existence of the association. An order was afterwards made to wind up the association, as an unregistered partnership consisting of more than seven members:—

Held (reversing a decision of MALINS, V.C.), that only those of the firms whose names appeared upon the bills of exchange were liable in respect of them, and that consequently the holders of the bills could not prove upon them in the winding up.

This was an appeal from a decision of Malins, V.C.

Prior to the 18th of September, 1871, a firm of Fox Brothers had carried on a trading business with the West Coast of Africa. On the 18th of September, 1871, an agreement in writing was entered into between Fox Brothers, and three other firms of merchants, namely, Malcolms & Co.; Merry, Willis & Lloyd; and W. J. & A. W. Adams, for the carrying on of this business, as from the 1st of January, 1871, by the four firms jointly. This agreement contained the following clauses—

"First. The business to be carried on under the style of Fox Brothers, who shall keep separate books for the purpose and separate clerks.

"Third. That each party to this agreement be liable in respect of the business in proportion to his share in the undertaking, and, in the event of being under cash advance, he shall receive five per cent. interest for the same, but it is

understood and agreed that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged."

The profits and losses of the business were to be apportioned between the four firms at the rate of twenty-five per cent. to each firm.

The association was known among the members by the name of the Adansonian Fibre Company, but this name was not known to the persons with whom they dealt, nor indeed was the existence of the association known to anyone but the members.

In order to raise money for the purposes of the business it was the practice for one of the four firms to draw bills upon another of the firms, and those bills when accepted were discounted, and the money thus obtained was applied for the purposes of the business. For instance Malcolms & Co. drew bills upon Adams & Co., or upon Merry, Willis & Lloyd, or upon Fox Brothers; and the bills so drawn were accepted and were afterwards discounted by various bankers and discount houses.

After the date of the agreement each of the four firms continued to carry on a separate business of its own. The association was never registered under the Companies Act. On the 22nd of February, 1873, an order was made to wind up the association as an unregistered partnership, consisting of more than seven members.

At this time there were in the hands of Messrs. Miles & Co., bankers at Bristol, ten bills for sums amounting altogether to 10,291*l.* 5*s.* 4*d.*, which had been drawn and accepted for the purposes of the association, and had been discounted by Miles & Co., and which were dishonoured at maturity. These ten bills were all drawn by Malcolms & Co., four of them on Adams & Co., four of them on Fox Brothers, and the other two on Merry, Willis & Lloyd. Miles & Co. claimed to prove upon these bills in the winding up of the association. They admitted that when they discounted the bills they knew nothing of the association, but that they knew only the names of those firms whose names appeared upon the bills.

The Vice-Chancellor admitted the claim, upon the ground that the agreement of the 18th of September, 1871, authorised any one of the four firms to draw or accept bills in its own name so as to bind the association.

The official liquidator appealed.

Mr. Cotton and *Mr. E. Rodwell*, for the appellant.—No one is liable upon a bill of exchange but those persons whose names appear upon it, either actually or by means of a person or firm who has authority to bind them—

Byles on Bills (11th edit.), pp. 37, 44;

Kirk v. Blurton, 9 *Mee. & W.* 284; s. c. 12 *Law J. Rep.* (N.S.) *Exch.* 117;

Beckham v. Drake, 9 *Mee. & W.* 79; s. c. 11 *Law J. Rep.* (N.S.) *Exch.* 201;

Ex parte Bolitho, 1 *Buck.* 100;

Ex parte Hunter, 1 *Atk.* 223.

Here the agreement gave no authority to bind the association by the drawing or accepting of bills by the individual firms, and, the association being a secret one, there was no holding out to the world.

The South Carolina Bank v. Case, 8 *B. & C.* 427; s. c. 2 *Moo. & R.* 459; s. c. 6 *Law J. Rep.* (O.S.) *K.B.* 364,

is distinguishable from the present case.

Edmunds v. Bushell, 35 *Law J. Rep.* (N.S.) *Q.B.* 20; s. c. *Law Rep.* 1 *Q.B.* 97,

does not support the Vice-Chancellor's decision.

Nicholson v. Ricketts, 2 *E. & E.* 497; s. c. 29 *Law J. Rep.* (N.S.) *Q.B.* 55,

is a direct authority in favour of our contention.

Mr. Napier Higgins and *Mr. W. F. Robinson*, for Miles & Co.—The Vice-Chancellor has put the right construction on the agreement. But at any rate the course of dealing, as shewn by the books of the association, proves that it was intended that each firm should bind the association by the acceptance of bills.

Edmunds v. Bushell (*ubi supra*) is in our favour, and

Nicholson v. Ricketts (*ubi supra*) is really not against us.

LORD JUSTICE JAMES.—The question before us relates entirely to bills of exchange; whatever other liability may attach to the members of this association that is a matter not now before us. Now it is, and always has been, the law of this country that nobody is liable upon a bill of exchange unless his name, or the name of some partnership or body of persons of which he is one, appears either on the face or on the back of the bill. That is the clear law of this country. It was decided by the Court of Queen's Bench in *Nicholson v. Ricketts* (*ubi supra*), if it required any authority for it, that an association which is absolutely without a name has no name by which it can draw, accept, or indorse bills of exchange.

It was suggested, and the suggestion appears in this case to have prevailed with the Vice-Chancellor, that where the members of such an association, or the firms constituting such an association, for the purposes of the association draw or accept bills in their individual names, or in the names of their partnerships, that, for that purpose and for the purpose of doing equity or of reaching the real principal, it might be assumed that the name of the partner upon the bill, or the name of the partnership upon the bill, might be considered as being *pro hac vice* the name of the association. That, in my opinion, is a mere *fiction juris*, and although it used to be said *in fictione juris consistit æquitas* I think that in these prosaic days, and in the old days of the Court, we do not indulge in those flights of imagination in which our predecessors indulged when they invented those fictions.

I am of opinion that there is no evidence whatever that any name upon any one of these bills was intended to represent, or in fact did represent, any association or body of persons whatever except the particular firm whose particular trade name it was.

LORD JUSTICE MELLISH.—The question in this case is whether the holders of ten bills of exchange are entitled to prove against the Adansonia Fibre Company, which is being wound up in this Court.

Now that company consisted of the members of four firms, and the bills in question all purport upon the face of

them to be drawn by one of the firms on another of the firms. If the case stopped there, it would be of course perfectly clear that there could be no proof except against those firms whose names appear on the bills. It would be the simple case stated by Mr. Justice Crompton in *Nicholson v. Ricketts* (*ubi supra*), as a case which was perfectly clear and free from doubt. "Where A., B. & C. are in partnership, and arrange that C. shall draw bills in his own name on A. & B., I think it impossible to say that C.'s signature to such bills binds the others."

Then, in order to prove that the bill does bind the other firms, in my opinion it must be made out that the others had given authority, either to the drawers or to the acceptors, to use those names which were so put upon the bills as representing the whole Adansonia Fibre Company.

The question is whether that is proved. The Vice-Chancellor thought it was made out by the agreement of partnership itself. Now that agreement says—"The business to be carried on under the style of Fox Brothers, who shall keep separate books for the purpose and separate clerks." It is not necessary to say to what extent that goes, but at any rate, if it makes the name of any one of the firms the name of the association, it is the name of "Fox Brothers." [His Lordship then read the third clause.]

The question is, what is really the meaning of those words, "the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged." The Vice-Chancellor thought that they meant that the name of each of the four firms might be used for the purpose of accepting bills for and on account of the association so as to bind the association, and that it amounted to an express agreement by the four that they would carry on business and draw and accept bills for the purposes of the four, in the name of whichever of the four might be most convenient. In my opinion it is quite clear that that is not the true construction of the agreement. When a deed of partnership provides for the raising of capital in order to carry on the business of the

partnership, it is competent to the partners to raise that capital in any way they please. If they please they may say that the capital required to carry on the partnership shall be borrowed on the credit of all the partners. If that is said, or possibly if the money is borrowed upon the credit of all the partners without that being said, then the whole partnership may be liable. It is equally competent for the partners to say, we will each of us bring in a sum of 10,000*l.*, or any other sum that may be agreed on, in order to raise capital for the purpose of carrying on the business of the partnership. That is an agreement by each with all the others that he will bring in that sum. It is also quite competent to them to say, instead of bringing in money which it is not convenient to us to do, each of us will give our individual acceptances, in order that upon the credit of our individual acceptances money may be raised for the purpose of the partnership. In my opinion it is perfectly clear that that is the true construction of this agreement. The word "several" seems to me to make it quite plain—"the finance of the business shall be carried on by acceptances of the several parties interested." So far from meaning that the acceptances of the several parties shall bind the association, it means exactly the contrary; it means that each of the four firms is to raise its share of the capital which may be wanted for the benefit of the whole association, by giving its individual acceptances.

That being the true meaning of the agreement, I do not think that there is any evidence to shew that the business as it was actually carried on differed at all from what was contemplated by the agreement of partnership. No doubt, this clause in the agreement does not expressly provide how the bills are to be drawn; it only says that funds are to be raised by each individual firm giving its acceptances. They might have drawn the bills in any way they pleased. If a bill had been drawn in the name of Fox Brothers there might have been a question (I do not say how it would have been decided) whether the name of Fox Brothers was not used to designate the

association. But none of these bills are drawn in the name of Fox Brothers, and when we find that the bills are drawn in the name of some one of the others it seems to have been done on purpose that, in raising money for the benefit of the association, the bills should not bind all the four firms, but that the money should be raised on the individual credit of the drawers and acceptors. That seems to me to be the true construction of it. I cannot see that there is any evidence that the course of business was different from the agreement, because all the bills in question, according to the evidence before us, were used for the purpose of raising money, whether they were meant for the renewal of previous bills or not, in this sense that previous bills having become due which ought to have been taken up by the company, no doubt all the bills were to be taken up by the company; each firm was not to pay the bills upon which it was liable, but was to enable the company to raise money by lending its individual credit and by giving acceptances, and it is quite consistent with this that the bills were to be taken up by the company. There is no evidence to shew that the course of business was not precisely in accordance with this agreement. If it were wanted to raise money to pay off previous bills, the money was raised by one of the firms pledging its individual credit by drawing on another of the firms who then pledged its individual credit by accepting, and the money raised by the discount of the bills so drawn and accepted was applied to take up other bills or to pay any debts of the company, or it was used in any other way for the purposes of the company.

Therefore I am of opinion upon the facts that the intention was, by signing the name of each individual firm, to bind that firm only.

I do not think there is any difference with respect to the two bills accepted by Fox Brothers, even assuming that, because of the first clause of the agreement, the name of Fox Brothers upon a bill might possibly, if it was intended to do so, bind the association. For I am of opinion, as a matter of fact, that it was not

intended, by using the name of "Fox Brothers," as acceptors of a bill, to bind the association. This being an entirely secret association, there was no holding out to the world, and Fox Brothers was a firm carrying on a business in its own name for its own purposes, and therefore, unless the acceptance was given with the authority of the association, and on account of the association, the name of "Fox Brothers," as acceptors, would not bind the association. I am of opinion that these bills accepted by Fox Brothers, being acceptances for the purpose of raising money for the association, the inevitable inference is that they were acceptances in accordance with the third clause of the agreement which bound Fox Brothers just as much as the other three firms, that money should be raised for the purposes of the association by pledging the individual credit of each of the firms. My opinion is that in respect of these bills Fox Brothers were giving the individual acceptances of their firm for the purpose of raising money for the benefit of the association in accordance with the provisions of the agreement.

Perhaps it is right to say something about the authorities which have been referred to. The Vice-Chancellor relied very strongly on *Edmunds v. Bushell* (*ubi supra*). Now that case was not very greatly considered, because it was a case where a rule was moved for on the ground of misdirection, and was summarily refused. When the facts are looked at there is, as far as I can see, no great doubt about it. The case was tried before Mr. Justice Crompton, and the following facts were proved—"The defendant Jones was a wholesale straw hat manufacturer, who carried on business at Luton, in Bedfordshire, and also, until May, 1865, had a branch establishment in Milk Street, London." Therefore that branch was entirely his branch. "The business in London was carried on under the name of 'Bushell & Company.' By an agreement between the two defendants" (that is Bushell & Jones) "it was agreed that Bushell should enter Jones's service as manager of the establishment in London, and that he should be paid for his services quarterly an amount equal

to one half of the net profit to be derived from the business carried on in London. Jones opened an account in the name of 'Bushell & Company,' at the London and County Bank, into which account Bushell was to pay all sums which he received to the amount of 5*l*. He had authority from Jones to draw cheques in the name of Bushell and Company for the purposes of the business, but he had no authority to draw or accept bills." It is quite plain upon these facts that Jones authorised Bushell to carry on business in London in the name of "Bushell & Company," and that the business so carried on in the name of "Bushell & Co." was Jones's business. It is quite plain that, if the account at the London and County Bank in the name of "Bushell & Company" had been overdrawn by means of cheques drawn by Bushell in the name of "Bushell & Company," there could not be the least doubt in the world that Jones would have been liable. It was argued that, because Jones had not given authority to Bushell to accept or draw bills in the name of "Bushell & Company," therefore he was not liable upon the bills, but the Court said, it being part of the general business of such a partnership to draw and accept bills, you cannot, by giving instructions that bills shall not be drawn, prevent yourself from being liable on bills drawn by the person who carries on your business in that name in which you choose to carry it on. In my opinion, that is no authority at all on the case now before us.

But the two authorities which really apply are—*The South Carolina Bank v. Case* (*ubi supra*) and *Nicholson v. Ricketts* (*ubi supra*). The case of *The South Carolina Bank v. Case* (*ubi supra*) has, no doubt, been very considerably questioned by some Judges since. The judgment is very short, because it was a case sent from the Court of Chancery, and the Common Law Courts frequently gave either no reasons or very short reasons in cases that were sent to them in that way. But if the arguments of the counsel, Mr. Parke and Mr. Patteson, are read, it is quite plain what the real question in dispute was. By the articles of partnership, and by the instructions given to the

partner who went to America, he had no authority to use his own name as the name of the partnership; but as a matter of fact for several years the business had been entirely carried on in the name of the individual partner who was in America, and the Court of Queen's Bench gave an opinion to the Court of Chancery, that under all the circumstances of that particular case the firm in England was bound by the bills drawn in the individual name of the partner in America, on the ground that that was to be treated, notwithstanding the terms of the partnership articles, as the name of the firm for the purposes of the business in America.

In *Nicholson v. Ricketts* (*ubi supra*), Mr. Justice Crompton said—"My only difficulty arose from the decision in *The South Carolina Bank v. Case* (*ubi supra*). But I think if that case is to be regarded as law it must be on the grounds pointed out by Baron Bayley in *Smith v. Craven* (1). Rightly or wrongly the Court there assumed that the facts shewed an authority from the partners in England to the partner in America to bind the whole firm by contracts made by him there in his own name; that he was in fact a mere branch house abroad of the house in this country." From the mode in which Mr. Justice Crompton states that it is tolerably clear that he did not himself agree with the inference which the Court drew from the facts in *The South Carolina Bank v. Case* (*ubi supra*); he seems to have thought that it ought to have been determined upon what was the real agreement made by the partners *inter se*. However that may be, I am of opinion that *Nicholson v. Ricketts* (*ubi supra*) is a direct authority upon the question that is now before us. In that case there was a complete agreement for a partnership between a firm in South America and a firm in England. The partnership was to be a partnership in exchange business, the profit and loss of which was to be divided, and the business was to be carried on by the firm in South America drawing bills in its own name upon the firm in England, and selling

those bills in South America, and then employing the proceeds by lending money to persons in South America for the joint benefit of the two firms, and subsequently by buying short bills to take up the bills in England. The bills therefore were drawn by a firm which was in partnership with another firm, and there was far stronger evidence than there is in the present case that they were drawn for the direct purpose of carrying on the business of the partnership; but nevertheless, because the agreement was that the bills were not to be drawn on behalf of the whole association composed of the two firms, but by the one firm on the other, although they were to be drawn and sold for the joint benefit of the two firms, the Court said, there is no authority for the firm in America by drawing bills in its own name to bind the firm in England, that is to say, to treat the name of the firm in America as including the name of the firm in England. In fact, their very intention was to avoid that result, by having the bills expressly drawn in the names which were understood to be only the names of the individual firms.

In my opinion that is the case here. The bills were drawn for the purpose of raising funds for the benefit of the association, but the intention of the four firms was that they were to be drawn so that each of the firms whose names appeared on them should pledge only its individual credit, and under such circumstances, in my opinion, the names upon the bills do not represent the Adanson Fibre Company, but represent only the individual firms themselves.

The order of the Vice-Chancellor was discharged, and the costs of all parties, both before the Vice-Chancellor and on the appeal, were ordered to be paid out of the estate.

Solicitors—Messrs. Paine & Layton, for the liquidator; Messrs. Druce, Sons & Jackson, for Messrs. Miles & Co.

(1) 1 Cr. & J. 500; s. c. 1 Tyrw. 389; s. c. 9 Law J. Rep. O.S. Exch. 174.

LORDS JUSTICES.

1874.

Aug. 5.

} WILLIAMSON v. WILLIAMSON.

Lessor and Lessee—Underlease—Covenant not to assign or underlet without license.

A lease of mines was granted by S. to W., his executors, administrators and assigns (described as the "lessee or lessees"), W. covenanting that the lessee or lessees would not assign or underlet without the consent of S., his heirs or assigns. There was a proviso of re-entry in case they did so. W. died, and his executor agreed, with the consent of S., to underlet a part of the property comprised in the lease to B., the underlease to contain "the like provisions and conditions" as were contained in the original lease. W.'s interest in the original lease was then assigned to C., subject to the agreement with B.

*A question was raised by C., as under-
lessor, whether the lease to B. ought to be
so framed as to require the consent of the
original lessor or of the underlessor to any
assignment or underlease by B.:—*

*Held (reversing a decision of BACON,
V.C., ante p. 382), that the lease must be
so framed as to require only the consent of
the under-lessor.*

*Held also, that upon the true construction
of the original lease, the consent of S. was
not required to any assignment or under-
lease made by an underlessee of whom S.
had approved.*

*Held also, that the original lessor could
not, by the terms of a license to underlet,
enlarge the proviso for re-entry reserved by
the original lease.*

*This was an appeal from a decision of
Vice-Chancellor Bacon, which is reported
ante, p. 382, where the facts are stated.*

*Mr. Eddis, Mr. Chitty and Mr. White-
head, for the appellants, the Chatterley
Company, referred to*

Jarman's Bythewood, vol. iv. p. 573;

Davidson's Precedents, vol. v. p. 176.

*Mr. Joshua Williams, Mr. Kay and Mr.
Whitehorne, for Baddeley, cited*

Vere v. Loveden, 12 Ves. 179.

*Mr. E. R. Cook and Mr. Everitt, for the
Wedgwood Company.*

Mr. Batten, for the plaintiffs.

JAMES, L.J.—I am unable to concur at all in the judgment which the Vice-Chancellor has pronounced in this matter. The Vice-Chancellor appears to me to have fallen into an error in considering that Lord Sidmouth has anything whatever to do with this underlease after he has once granted the license to make it. It is very true that this underlease could not have been made without Lord Sidmouth's consent. He did give his consent in writing to the granting of the underlease, but he said that the license was not to authorise any further dealing with the property, that is to say, that nobody could rely on that license as authorising anything else to be done with the property. That of course left the parties entirely to their rights independently of the license. It is said that that meant that the underlessee was not to deal with the property which he thus got without Lord Sidmouth's consent. There are no such words in the license, and there is, to my mind, nothing from which any such meaning could be extracted. It is not a conditional license; it is not a license with any further stipulation for the benefit of Lord Sidmouth. He simply says this, "I have granted you license to do something; it shall not authorise you to do anything else."

Now, independently of the license, how does the case stand with regard to the underlease? I am clearly of opinion that the underlessee is in no way bound by the original stipulation in the lease. The words are that the lessee, his executors, administrators or assigns (and the word "lessee" implies executors, administrators and assigns), shall not do a certain thing. Beyond all question that is a bargain between the lessor and lessee, and does not extend to anything done by the underlessee, between whom and the original lessor there is no privity whatever. There is no privity of contract and no right. Lord Sidmouth has nothing whatever to do, as it seems to me, with the underlease, and nothing therefore, it appears to me, can be imported into the consideration of this question arising from any supposed necessity of protecting Lord Sidmouth's interest, or making the agreement as it were a tripartite agreement

between the lessor and lessee and Lord Sidmouth. I can see no ground for introducing Lord Sidmouth into the transaction, after he has once granted the license which has authorised what is proposed to be done.

That being so, you have simply an agreement between a man who has property to let, and a man who is minded to take that property on lease. It appears to me utterly immaterial that the man who has the property to let is himself only a lessee for a term. As a matter of construction, it seems to me that the agreement for the underlease is to be construed exactly in the same way as if, instead of its being an agreement between a lessee and an underlessee, it had been an agreement between Lord Sidmouth and some new person in respect of some adjoining property, and Lord Sidmouth had said, "I will let you the property for such and such a term, and the lease shall contain exactly the same provisions, conditions and stipulations as are contained in the lease I have granted to Mr. Williamson." To my mind there could be no doubt, in a case of that kind, that every covenant contained in the first lease would have to be introduced into the second—transcribing them from one to the other, changing the names so as to make a proper lessor and a proper lessee. In this case, there being a lease from the superior landlord, the lessee says to another person, "I will grant you an underlease. You have seen my original lease; we will have no quarrel about what are usual or proper clauses; there is an existing lease, and my bargain with you is that that which is contained in it shall be contained in the lease which I propose to grant you." It is just the same as if they had taken any other lease between any other two persons in the world and said, "That is to be the form of the lease which is to bind us;" it is not a question of doubt or ambiguity, it is not a question of there being something which you are not to strain, or on which you are to put a liberal interpretation in favour of the one party against the other; but the bargain is plain, precise and unambiguous, that that one written document is to be the model from which the other written document is to be

copied, with the proper alterations of names, dates and sums.

In this case I see no ground upon which a Court of construction could strike out the proviso for re-entry on alienation without consent, any more than it could strike out the proviso for re-entry for breach of any of the other covenants usually found in a mining lease. The meaning of the parties is, When we have got something in writing before us we will have no Chancery suit about it. Here is a simple thing, here is a document, take and copy it with the proper names. It appears to me that this is what the parties meant, and we cannot legitimately or properly be influenced in our view of the construction of a written document by the fact that some of the parties may have got themselves into some complication or difficulty because they have been acting on a different view of the proper construction of the document. I am of opinion that the order of the Vice-Chancellor ought to be reversed, and that the proviso for re-entry and the covenant ought to stand with the name of the Chatterley Iron Company, and not the name of Lord Sidmouth, as the persons who are to give consent to an alienation.

MELLISH, L.J.—I am of the same opinion. I think that, according to the true construction of the original lease by Lord Sidmouth to Mr. Williamson, no right of re-entry is given to Lord Sidmouth in the event of an underlessee of Mr. Williamson (where a proper license has been given for the underlease) subsequently selling or transferring his underlease. The original lease demises the premises to Mr. Williamson, his executors, administrators and assigns, "hereinafter called the lessee or lessees," so that the words "lessee or lessees" throughout the lease are to include Mr. Williamson, his executors, administrators and assigns. Then the proviso for re-entry is, "if the lessee or lessees," that is, if Mr. Williamson, his executors, administrators or assigns, "or any of them shall at any time or times hereafter, during the said term hereby granted, set, let or part with possession of the said premises hereby demised, or any part or parts thereof, or transfer this present indenture, for all or any part of the term hereby granted to any person or

persons whomsoever, without the consent in writing of the said Viscount Sidmouth, his heirs or assigns, for that purpose first had and obtained, save and except to a wife, child or children, or to a partner or partners," then and in any such case it shall be lawful for the lessor to re-enter.

Now a proviso for re-entry on alienation without consent has beyond all question always been construed strictly by Courts of law, and it cannot be carried by construction beyond its plain terms. Here the part of the proviso for re-entry applicable to this subject is, if the lessee or lessees, that is, if Mr. Williamson, his executors, administrators or assigns, shall part with the premises or any part thereof to any other person or persons. But it does not say, if the underlessee, who may claim under a lease made with the lessor's license, shall part with the premises, and in my opinion it cannot be made to extend to an underlessee. That view seems to me to be confirmed by this—that all these subsequent words clearly apply only to "the lessee or lessees," and not to an underlessee. For instance, the exception in the cases of a wife, child or children, or a partner or partners, plainly means a wife, child or children, or a partner or partners, of the original lessee or lessees, that is to say, of Mr. Williamson, his executors, administrators and assigns, and could never be construed to apply to an underlessee. Therefore I am of opinion that there is no forfeiture in the case of an underlessee parting with the property without the consent of Lord Sidmouth.

Then, that being so, the license must be construed with reference to the lease; even if the license had professed to reserve it, there could not be a right of re-entry not given by the original lease. I do not think that the license professes to do that, for it is not to be extended beyond what it expressly says, and it is possible there may be a further parting with the same premises by the original lessee. It is not a license to let for the particular term which has been granted, but for any term; for aught that appears it might have been a short term or a long term, or it might have been forfeited or surrendered,

and a question might have arisen whether the lessee could make another underlease.

That being the construction of the lease and of the license, it appears to me there is no difficulty at all in construing the particular clause contained in the agreement by Williamson to grant an underlease to Baddely, which states what stipulations are to be contained in the underlease. In the first place it seems to me utterly impossible to construe that clause so as not to include a covenant not to assign without license, because the underlease is to contain "the like provisions, conditions and stipulations, in all respects," except one particular one that is mentioned. It is impossible to say that the power of re-entry in the case of an assignment without consent is not one of the provisions, conditions and stipulations of the original lease. Therefore plainly, a right of re-entry in case of an assignment or underlease without consent must be inserted.

Then, whose name is to be put in as the person to consent? One cannot doubt it is the name of the person who is the lessor in that lease which is to be made. Indeed I have great doubts whether even if the original lease from Lord Sidmouth and his license bore a different construction from that which they do bear, the words of the agreement are not so clear that it would be impossible to construe them otherwise. If the question turned on the construction of the clause alone, without any reference to the construction of the original lease and the license, I should be of opinion that the words are too clear to admit of any other construction. I doubt whether the license to make an assignment or underlease, where there is a power of re-entry in case of alienation without consent, is to be given by anybody except that person who beyond all question alone can exercise the power of re-entry, namely, the immediate landlord, his heirs or assigns. It would be a most arbitrary and extraordinary provision (I do not say it would not be good if you could shew it in express terms) to require to an assignment of the lease the consent of a different person from the person who, as owner of the reversion, can alone act upon the pro-

viso for re-entry if the covenant not to assign without consent is broken. I have no doubt at all that, according to the proper construction of the agreement, it is the consent of the underlessor that is to be required to any alienation of the property included in the underlease.

Solicitors—Messrs. Worthington, Evans & Cook, agents for Messrs. Hand, Blakiston & Everett, Stafford, for appellants; Messrs. Lewis, Munns & Longden, for respondents; Messrs. Wedlake & Letts, agents for Messrs. Keary & Marshall, Stoke-upon-Trent, for other parties interested.

LORDS JUSTICES. }
 1874. } THE GREAT WESTERN INSUR-
 April 20, } ANCE COMPANY (OF NEW
 21. } YORK) v. CUNLIFFE.

Principal and Agent—Account—Insurance—Negligence of Agent—Secret Profit of Agent.

Where a bill against an agent for an account alleges certain specific questions that have arisen as the ground for taking the account, and these questions are decided against the plaintiff, the bill will be dismissed.

The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its actual extent.

A claim against an agent in the nature of damages for neglect of duty cannot be passed as an item in taking an account between principal and agent, but must be enforced in an action at law.

A marine insurance company in New York employed merchants in this country as their agents to settle claims and grant insurances, and also to effect reinsurances. A percentage was paid by the company on the first two classes of business, but the agents were remunerated as to the reinsurances by the brokerage allowed to them by the underwriters. They charged the company the full amount of the premiums, but were allowed by the underwriters, first,

5 per cent. on the premiums, and secondly, 12 per cent. on the balance (if any) payable by them to the underwriters on the account for the year, crediting the underwriters with the premiums (less the 5 per cent.), and debiting losses. This was according to the usual custom on the credit system as between brokers and underwriters, but the 12 per cent. allowance was for some time unknown to the company:—Held, that the agents were entitled to both the percentages.

A bill was filed by the company, alleging that in taking the accounts questions had arisen, and, after stating three questions—the first as to a loss through the alleged neglect of the agents to reinsure a vessel, the second a question as to interest, and the third the above question as to the 12 per cent. discount—praying a general account against the agents. It being decided (reversing the decision of BACON, V.C.), that the first question must be tried at law, and that on the other two the plaintiffs were wrong,—Held, that the bill must be dismissed.

This was an appeal from a decree of BACON, V.C.

Messrs. Pickersgill & Son were in 1858 a firm carrying on business in London as merchants, and they also acted in certain cases as agents for effecting marine insurances for other firms.

The father, J. Pickersgill, died in 1865, but the business was continued under the same name, and the two defendants to the suit, one being the son and both being the executors of J. Pickersgill, properly represented the firm for the purposes of the suit.

On the 15th of June, 1858, Mr. Lather, the president of the Great Western Insurance Company of New York, addressed a letter to Messrs. Pickersgill, stating that the company proposed to make some of its policies payable in London or Liverpool, and asking if Messrs. Pickersgill would consent to be appointed agents to adjust and settle such claims, and (if so) on what terms.

In answer Messrs. Pickersgill wrote that they should have much pleasure in undertaking the agency on the usual terms, say 2½ per cent. on the amount paid.

The president wrote a letter, assenting to these terms, and in his letter mentioned that the company would often require reinsurances to be effected, and asking if the company could rely on Messrs. Pickersgill to effect them.

In answer Messrs. Pickersgill wrote that they anticipated no difficulty in effecting any reinsurances at current rates, if there was nothing unusual in the risks, and if instructions to reinsure were given as early as practicable.

The agency constituted by these letters continued until the year 1863, when Messrs. Pickersgill became the exclusive agents in London of the company for the purpose of taking risks. The new arrangement was embodied in an agreement dated the 26th of June, 1863, between the company and Messrs. Pickersgill, whereby, after reciting that the company were desirous of appointing agents in this country to take risks on their behalf, and to issue policies, and that Messrs. Pickersgill had agreed to accept such agency, and that the parties had agreed to enter into the stipulations thereafter contained, it was mutually agreed "That the said firm of Messrs. John Pickersgill & Son shall become and be the exclusive agents of the Great Western Insurance Company in London, for the purpose of taking risks upon ships or freights, or upon goods, wares or merchandises, or bottomry or respondentia interests, either for time or for any voyage or voyages; and the said firm shall also act as such agents for the purpose of investigating and settling and adjusting and paying all claims that may arise upon such policies or any of them, and of resisting any claim or claims upon such policies which the said John Pickersgill & Son may consider ought not to be paid; nevertheless the said John Pickersgill & Son shall conduct the business under the direction of the Great Western Insurance Company, and subject to such written instructions as they may receive from time to time from the said company in regard to the conduct of the said agency."

The agreement contained various provisions as to offices, books, &c., and the mode in which Messrs. Pickersgill were

to conduct the business, and a provision that the remuneration to Messrs. Pickersgill "for conducting the business as such agents" should be a commission of five per cent. on the net amount of the premiums in each year. The agreement made no mention of reinsurances.

This agreement was determined in May, 1866, and the agency continued on the original terms until the 1st of April, 1868, when it was finally put an end to.

The bill in the present suit was filed by the company in June, 1869. After stating the agency, it stated that in taking the accounts of the said agency between the company and the firm, "questions have arisen," and that it was expedient and proper that the accounts should be taken by and under the direction of the Court, and the bill went on to state three questions:

The bill contained a further statement that the accounts involved numerous transactions and items on both sides of the account, and could not be conveniently taken except by and under the direction of the Court, and the first paragraph of the prayer asked for a general account, the second paragraph being directed to the charging and disallowance of items with respect to the three matters particularly complained of.

The first question stated by the bill was as to the loss caused by the alleged neglect of Messrs. Pickersgill to reinsure a vessel called the *Roger A. Hiern*. On the 24th of November, 1865, the secretary of the company wrote to Messrs. Pickersgill, "I find you report as having taken 3,245*l.* per barque *Robert*, from New Orleans to Liverpool. As our line by this vessel was already full, please reinsure the amount you have taken, and in order to prevent a like occurrence in future, we will furnish you weekly lists of vessels sailing from Gulf ports to Europe, on which we have full lines." And a list of thirty-seven vessels was enclosed accordingly, one being the *Roger A. Hiern*.

On the 5th of December, 1865, when the agents received this letter, they made an attempt to reinsure these vessels, but wrote the same day to the company, stating that in consequence of recent losses in the Gulf there was almost a panic

amongst many of the underwriters, and they could not reinsure except at extraordinary rates, if at all, and suggesting that the reinsurance might be effected better in New York.

The letter was received about the 21st of December. The *Roger A. Hiern* was lost on the 19th, and the company had to pay 3,500*l.* for the insurance on the vessel taken by Messrs. Pickersgill. The company alleged that the reinsurance could have been effected if Messrs. Pickersgill had taken reasonable trouble to effect it, and that they were bound to reinsure when directed; and the company sought to charge Messrs. Pickersgill, in taking the accounts between them, with the amount lost by their alleged neglect. The defendants denied the neglect, but contended that in any case the claim must be decided at law.

The second question was as to interest, which it was alleged that Messrs. Pickersgill had improperly charged against the company on premiums before their actual payment. The facts on this point sufficiently appear in the judgments.

The third question was as to a certain profit made by Messrs. Pickersgill on re-insurances, to which profit the company claimed to be entitled.

From the evidence it appeared that there are two systems of payment adopted between brokers and underwriters. On the credit system, which was that adopted in the present case, the broker is debited in his account with the underwriter with the premium, and credited with five per cent. on the premium for brokerage, upon the insurance being effected. The account is continued up to the 31st of December in each year, and in this account the underwriter is debited with the losses which have arisen upon the risks protected by insurances; and if upon the balance of the account the amount of the premiums, less brokerage, exceeds the amount of the losses, so that the underwriter has money to receive, the underwriter allows to the broker a reduction of twelve per cent. upon the balance which the broker pays to the underwriter, the account extending to all the transactions between the broker and underwriter, without distinction between

the accounts due to different principals. On the other hand, if the losses on the whole exceed the premiums, less brokerage, the broker does not receive any allowance upon the amount of the premiums which he pays in account. This deduction or allowance of twelve per cent. is called discount.

Both the five per cent. brokerage and the twelve per cent. discount had been retained by Messrs. Pickersgill. The plaintiffs alleged that the five per cent. brokerage appeared in the accounts between them and Messrs. Pickersgill, but that the twelve per cent. did not, but as a matter of fact nothing appeared except the amount of the premiums. The vice-president of the company was in England in 1866, and then heard for the first time (as the plaintiffs alleged) of the twelve per cent. allowance in conversation with a member of the firm, and communicated the fact to the president. The defendants maintained that the fact was communicated to the company even earlier, namely, in 1860; and it appeared that in the course of previous correspondence Messrs. Pickersgill had referred to the reinsurance as the most profitable part of their business with the company; and as a matter of fact no direct remuneration had been received by them from the company in respect of such business. They claimed to retain the profit as their ordinary remuneration as brokers, maintaining that they were not agents of the company in any other sense in respect of this business.

Messrs. Pickersgill acted also as brokers for other parties than the company, but from 1865 the accounts of their business with underwriters on account of the company were kept separate.

The Vice-Chancellor decided in the plaintiffs' favour on all three points, and the defendants appealed.

Mr. John Pearson and *Mr. Millar*, for the appellants.—From the time a broker effects an insurance the merchant or other person for whom he effects the insurance gets the benefit of the policy, whether the broker actually pays the premium or not, and is therefore liable to pay the amount of the premium to the broker—

Power v. Butcher, 10 B. & C. 329;
s. c. 8 Law J. Rep. K.B. 217;

Xenos v. Wickham, 13 Com. B. Rep.
N.S. 381; s. c. 31 Law J. Rep.
(N.S.) C.P. 364; s. c. on app. 14
Com. B. Rep. N.S. 435, 464; s. c.
33 Law J. Rep. (N.S.) C.P. 13;

Dalzell v. Mair, 1 Campb. 532;
Nunett v. Forrester, 4 Taunt. 541
(note).

We say, therefore, that we were entitled to charge interest, and might have charged interest, as from the time of each insurance, although we only paid at the end of the year. But we say further, that as a matter of fact we have only charged interest from the end of the year, from which time we ourselves were charged with interest.

Then as to the twelve per cent. discount, they admit that they knew of it in 1866, and we say earlier still, and they continued the agency afterwards. An agent is not necessarily an agent for every purpose—

Moxon v. Bright, Law Rep. 4 Chanc. 292;

and as regards the reinsurance, we were brokers, and entitled to our remuneration as such.

As to the *Roger A. Hiern*, an action for damages cannot be tried as an item of an agent's account; and on the merits, if they must be gone into, we say we exercised a fair discretion.

Mr. Kay and *Mr. Marten*, for the plaintiffs.—The firm were as much our agents in this country as our secretary would have been if placed here. The reinsurance was part of the agency business, and they cannot retain a secret profit made as our agents—

The Queen of Spain v. Parr, 39 Law J. Rep. (N.S.) Chanc. 760.

The loss of the *Roger A. Hiern* was the result of their negligence as our agents, and can be investigated in taking the agency account—

The Southampton Dock Company v. the Southampton Harbour and Pier Board, 40 Law J. Rep. (N.S.) Chanc. 82; s. c. 41 Law J. Rep. (N.S.) Chanc. 832; s. c. Law Rep. 11 Eq. 254; s. c. Law Rep. 14 Eq. 595;

Piggott v. Williams, 6 Madd. 95;

Sweeting v. Pearce, 9 Com. B. Rep. N.S. 534; s. c. 30 Law J. Rep. (N.S.) C.P. 109.

Mr. Millar, in reply, as to the *Roger A. Hiern* only.

LOED JUSTICE JAMES.—I am of opinion that the decree of the Vice-Chancellor must be discharged.

Though filed as a bill for a general account between principal and agent, the bill was really filed for the purpose of getting the opinion of the Court upon three questions, and three questions only. That is the mode in which the bill itself states it. The plaintiffs say there are three questions. One is as to the loss of a ship—neglect with respect to re-insurance followed by the loss of the ship. The next is the question of interest, and the third is the question of discount. Those are the only questions which have arisen. They say that certain questions have arisen, and they state the questions. That being so, there is no doubt upon the face of the bill an admission against the plaintiffs that but for those questions there would be nothing to litigate about in this Court or in any Court.

Now, how do those three questions stand? First of all, with respect to the interest, I am of opinion that the case intended to be made by this bill has wholly failed. The case made by the bill is, not that the defendants were not entitled to claim interest with respect to the moneys that they paid, but that instead of charging interest from the end of the year, which was the proper time to do it, they charged the interest from the time at which the actual sums were paid during the year; and the plaintiffs allege that the interest during that portion of the year ought to be disallowed. The answer, as counsel has put it, is this—"If we had been minded we were entitled to charge interest from the time the premium was paid or supposed to have been paid, but we did not do it, we only charged interest from the end of the year, which is upon the pleadings admitted to be right. The accounts are produced, and there is no trace of any such interest being charged except at the end of the year."

Then the next thing is as to the premiums—the discount, or whatever it may be called, the allowance, or gratuity, which the broker receives from the underwriters. The plaintiffs say—"You are our agents, and you have received a gratuity in the course of that agency, which you ought not to keep for yourselves. You are mere agents, and, according to the principle of the Court, a mere agent has no right to receive any benefit himself in the course of his agency, he has no right to make any profit in the shape of discount, or anything of that kind." I believe the principle is laid down in one or two cases which were brought before me as V.C.—in the *Queen of Spain v. Parr* (*ubi supra*), where I acted upon the principle. The question is, whether the agent has been otherwise reimbursed, and whether he has received a gratuity of which his principal is supposed to be ignorant. But here, whether they are called insurance brokers, or insurance agents, or merchants doing brokerage business or insurance business, the mere name was not a matter of the slightest consequence. What was done was this—These were gentlemen, merchants in London; minded to do insurance business as agents of the plaintiffs, and minded to do other business connected with it, and apparently doing insurance business not only for the plaintiffs, but for other clients who came to them. As stated on the part of the plaintiffs, they were agents to underwrite, and to settle losses in respect of policies, and, whether you call them agents or not, they were agents or brokers to effect re-insurances in those cases in which re-insurances were thought right by the principals in New York. That part of the business it is quite clear was the business which was thought to be most profitable, because it appears from the letters that the defendants represented that they would not carry on the other part of the business without that, and it was not likely that the plaintiffs could get any other persons to act as agents without allowing them to obtain the profit of that particular business. Now, with regard to the other part of the business, which is the underwriting, with respect to settling the losses an actual agreement is made,

NEW SERIES, 43.—CHANC.

and the terms of remuneration are reduced into writing, but with regard to this part, not only is the remuneration not reduced into writing, but no remuneration ever was paid by the plaintiffs, or supposed to be paid by the plaintiffs, to the defendants at all. It was done by them to obtain profit, and was known to be a profitable part of the business. It was not profitable by reason of anything which was to be paid by the plaintiffs to them as their paid servants or agents, which seems to me to be the view the Vice-Chancellor has taken, but they were left to make the profit which was incidental to the business itself. That was the character of their employment; otherwise it would not have been a profitable employment. The profit was not to come from the plaintiffs in the shape of any direct payment, it was to be profit which should enure to the defendants in the ordinary course of that kind of business. That was the business of going to underwriters and getting them to accept the risks, paying them the premiums for it. That is a well known business, and the person connected with that kind of business, whether you call such a person a broker or not, the person who is the agent for the merchant, or anybody else who goes and obtains the insurances, receives, in the particular form which was adopted here, a discount of five per cent., which he puts into his own pocket. He is paid by the underwriter instead of by his principal, and then by a practice quite as well known, recognised by the Courts of law of this country, referred to over and over again, there is another thing which occurs, there is a gratuity which the broker gets upon the settlement of the accounts by receiving twelve per cent. upon the balance if the balance should happen to be a favourable one; that is, if the underwriter finds it to be a profitable account he gives twelve per cent. upon it to the broker who brought the business to him. It is not upon the particular transaction, as I gather, but it is upon the whole result of the transactions which the broker has introduced to the particular underwriter, calculated upon all the business during the whole year. That is the established remuneration which a broker receives for

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effecting that business. In my opinion that is as right a thing as the five per cent. The plaintiffs have never disputed that the defendants were entitled to retain in their own pockets the five per cent. They say, we knew that, but we did not know of the other. They never enquired. They say, we meant it to be according to the usual practice, and they never made any enquiry about it until the year 1866, when it appears upon their own case that in conversation the defendants told them what the nature of their profit was. That was stated to the vice-president of the plaintiffs' company, and was communicated to the president. Both these people knew it in the year 1866. It is not pretended that there was a shadow of a complaint by those gentlemen at that time. They allowed the matter to go on during the remainder of the year 1866, and during 1867 and part of 1868, without the slightest suggestion that there was anything wrong in what the defendants were doing, and they were allowed to go on doing their work upon that understanding. I think that, under these circumstances, the dispute on the part of this company is deficient in honesty as well as in law. I think that they ought not to have disputed the thing when they allowed the defendants to go on after 1866, even if they had any reason to find fault before.

That disposes of the question of interest and of the question of the so-called discount.

Then, with regard to the other point, I am of opinion that it never could be the subject of a suit in equity. I asked in vain for any authority in which it is laid down that, as between principal and agent, with an outstanding account between them, you can introduce an item for damages occasioned by the negligence of the agent in disobeying some instructions of his principal. The most analogous case to it is that which I suggested, of taxing a solicitor's bill and taking cash accounts between him and his client. I have never heard that in such a case you can introduce into the account the loss sustained by the negligence of the solicitor in carrying on an action improperly, or never investigating a case at all.

That must be left to the common remedy of an action at law for negligence. The case of a solicitor was referred to, in which a demurrer to a cross bill was overruled. There, the solicitor having security for his costs, filed a bill to enforce that security, and there was a cross bill saying that there was nothing due, because there had been so much negligence that the solicitor was not entitled to recover. That was totally different, and was a clear case, for in ascertaining the amount due upon the security, the question would necessarily arise. But with that exception, that single exception, no case is suggested in which an action for negligence has been brought into this Court merely because there has been some money account between the employer and the employed with respect to the matter in which the supposed negligence has arisen. I am of opinion, therefore, the bill was not rightly filed. The answer contains the same objection as if the bill had been demurred to, and I am of opinion that if there had been a demurrer it ought to have been allowed. There being only three points alleged by the bill as having arisen in the matter, and all three points being decided against the plaintiffs, the only consequence is that the bill must be dismissed with costs.

LORD JUSTICE MELLISH.—I am of the same opinion. The first question to be considered is, what remuneration were the defendants entitled to charge the plaintiffs for acting as their agents in effecting re-insurances and making themselves liable to pay the premiums on those re-insurances to the underwriters? Now, the plaintiffs being a large insurance company in New York, by the letter of the 15th of June, 1858, proposed to the defendants to act as their agents for the purpose of paying the amount due on policies, when losses occurred, which they were going to make payable in England. That was the principal matter which they wished to employ them for, and they asked what would be the charge the defendants would make if they were appointed agents for that purpose, and the defendants answered that their charge would be two and a half per cent.; those being the usual terms for settling and paying claims. Then

the plaintiffs accept that offer, and mention in the letter accepting the offer that "we shall frequently have re-insurance and other business negotiations to make through you," but they ask no question as to what will be the charge which the defendants will make for effecting such re-insurances. The defendants accept that offer, and the business goes on and is transacted between the two parties, and large quantities of re-insurances are effected. In the accounts, as far as we have them before us, the defendants simply charge the plaintiffs with the full amount of premiums, with interest, payable from the 1st of January succeeding the time when the particular insurances are made, and the plaintiffs go on settling the accounts and paying them from time to time during the eight years, making no objection to that mode of charging. It is obvious from that that they are not charged any brokerage for re-insurance, nor do they pay it. Then it is quite obvious that they must have known, and they do not deny that they did know, that the defendants were to receive their remuneration by means of a certain allowance or discount from the underwriters with whom they made the bargains. It is easy to ascertain, by enquiring, what is the usual and ordinary charge which agents who effect re-insurances are entitled to make. If a person employs another whom he knows carries on a large business to do certain work for him, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him but by the other person with whom the agent is to transact the business—which is a very common thing in mercantile business—if he does not choose to take the trouble to enquire what the amount is, he must pay the ordinary amount which such agents receive.

Now what are the reasons which they allege, why the Great Western Insurance Company should not pay to the defendants the ordinary charge—it seems to me immaterial whether you call the agent a broker or not—but why should they not pay the ordinary charge allowed to, and received by, agents who effect insurances? The sole question to be decided

is, whether, the business having been carried on, I think from 1858 to 1868, the circumstance that the company did not discover till 1866 this practice as to the underwriters allowing the twelve per cent. affords any reason why they should be allowed to re-open this matter, and have an account so as to obtain a share, or the whole, of that twelve per cent. for themselves. Even if they had never discovered it until after the whole account was closed, I am of opinion, that if a principal employs an agent, and does not ask what his remuneration is, and the agent goes on and transacts business on that footing, the principal, knowing that the agent is to receive his remuneration from the other persons with whom he deals, and not choosing to make enquiries, is bound, by the ordinary custom and usage, though he does not know it. Secondly, I entirely agree with what the Lord Justice has said, that, having discovered it in the year 1866, they ought to have stopped at once, and not to have gone on dealing for two years without making any objection. There is no reason to suppose that Messrs. Pickersgill & Son would have consented to act for them on any other than the ordinary footing.

It seems to me also quite clear on the question of interest, because the thing has been settled ever since the time of Lord Mansfield, with reference to this very peculiar business of insurance agents and brokers, that though the premium may not have been paid by the assured to the broker, and may not have been paid by the broker to the underwriter, yet, as between the assured and the broker, it is considered to have been paid from the moment of the insurance being effected, and the broker makes his own bargain with the underwriter when the premium is to be paid to him. The bargain was, as it is proved by the account—and there is nothing unreasonable in it—that Messrs. Pickersgill would give the company credit up to the end of the year, which is exactly the same time, as, according to the credit system, the underwriter gives, and if it was not paid at the end of the year then interest, as on a mercantile account, was to be charged from that time. That appears

to me to be perfectly correct, and there is no reason at all why this account should be taken, and the matter re-opened for the purpose of making fishing enquiries, for which there is no occasion or ground whatever, whether payments were made to the underwriters on the 1st of January or at some time afterwards. It appears to me there is no right to make any such enquiries.

I also entirely agree that as to the last matter—the *Roger A. Hiern*—this is not a case for a Court of equity, but is only a case for a Court of law. I should say that, though generally I am very sorry to send persons from this Court to bring their suits to another Court, yet I cannot help thinking that this is really a case for a mercantile jury sitting at Guildhall to say whether there has been negligence in not re-insuring this ship, for which the defendants ought to be liable. I am very glad not to be obliged to express an opinion one way or other on the subject. No case having been cited to us in which a Court of equity has ever taken upon itself to decide such a question, I am of opinion that it is not called upon to decide it when the objection is taken as it is here.

Appeal allowed, and bill dismissed with costs.

Solicitors—Messrs. Thomas & Hollams, for the plaintiffs; Messrs. Waltons, Bubb & Walton, for the defendants.

MALINS, V.C. } THE CORPORATION OF HUD-
1874. } DERSFIELD AND JACOMB.
Jan. 12, 13. }

Arbitration—Award—Motion to set aside—9 & 10 Will. 3. c. 15, s. 2—"Last Day" of Term—Making Complaint—Notice of Motion.

The last day of term is too late for the commencement of a proceeding to set aside an award under 9 & 10 Will. 3. c. 15, s. 2.

Service of a notice of motion to set aside an award which has been made a rule of the Court of Chancery is "making a complaint" within the meaning of the statute.

This was a motion to set aside an award made between the Corporation of Huddersfield and Mr. Jacomb, determining the amount of purchase-money and compensation to be paid to him for his interest in certain lands taken by the corporation under the powers conferred upon them by the Huddersfield Waterworks Act, 1869 (32 & 33 Vict. c. 110). After the passing of the Act the corporation entered into negotiations with Mr. Jacomb for the purchase of his interest in the lands in question; but the parties being unable to agree as to the amount of purchase-money, the matter was referred to two arbitrators or their umpire in the usual way. Eventually the umpire, the arbitrators having differed, made his award on the 16th of June, 1873, and on the 20th of June, 1873, the award was taken up by the corporation. On the 20th of October, 1873, Mr. Jacomb gave notice to the corporation of his intention to have the submission made a rule of the Court of Queen's Bench, and asked them for the appointment of his arbitrator, which was then in their hands. He obtained the document on the 12th of November, and on the following day served the corporation with notice of a summons to produce the appointment of their arbitrator, for the purpose of having the submission made a rule of Court; but at the hearing of the summons on the 15th of November the corporation opposed it, on the ground that they had the previous day made the submission a rule of the Court of Chancery, under the Act 9 & 10 Will. 3. c. 15, and the hearing was adjourned till the 18th of November, when the Master by whom it was heard ordered the corporation to produce a verified copy of the appointment of their arbitrator within two days. The corporation then appealed from this order, but the appeal was dismissed.

On the 19th of November Mr. Jacomb gave notice to the corporation of the present motion for the 25th of November, which was a motion day and the last day of Michaelmas Term. The 20th of November was the only other motion day between the 19th and the 25th. The motion having accordingly been mentioned on the 25th, stood over by arrangement, on

the understanding that it should be treated at the hearing as if it had been made on the last day of Michaelmas Term.

The notice of motion stated the grounds on which Mr. Jacomb sought to have the award set aside.

Upon the motion now coming on for hearing,

Mr. Higgins and *Mr. Bagshawe*, for the corporation, took the preliminary objection that the motion was too late. By section 2 of the Act 9 & 10 Will. 3. c. 15 (1) the motion to set aside an award must be made not *on*, but "*before the last day*" of the next term after the making of the award. The cases on that Act have laid down the rule that the words of that section are to be construed strictly as against any person moving under it to set aside an award. The *last day* of term, therefore, will not do. The "*complaint*" must be actually made before—

Reynolds v. Askew, 5 Dowl. P.C. 682;

In re Evans and Howell, 4 Man. & G. 767; 5 Sc. N.S. 240.

[*MALINS, V.C.*—But here the notice of motion was given on the 19th of November. Has it ever been decided that "*complaint*" is not "*made*" when the notice of motion is served?]

The Act must be construed strictly. The motion itself must be made in open Court before the last day. It has never been decided that service of a notice of motion is a "*complaint in Court*." The motion must be made within the time prescribed by the Act, whatever may be the grounds of objection to the award—

Zachary v. Shepherd, 2 Term Rep. 781;

Loundes v. Loundes, 1 East 276.

The Court has no jurisdiction unless the submission be made a rule of Court—

(1) Section 2 of the Act 9 & 10 Will. 3. c. 15, enacts, "That any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties; anything in this Act contained to the contrary notwithstanding."

Davis v. Getty, 1 S. & St. 411; s. c.

1 Law J. Rep. (o.s.) Chanc. 209;

Dawson v. Sadler, ib. 537; s. c. 2

Law J. Rep. (o.s.) Chanc. 80.

And the jurisdiction is confined to that Court of which the submission is made a rule—

Auriol v. Smith, Turn. & R. 121.

Harvey v. Shelton, 7 Beav. 455; s. c.

13 Law J. Rep. (N.S.) Chanc. 466,

where the Master of the Rolls apparently extended the time limited by the Act for making the complaint, cannot be considered as an authority, as the point was not fully argued.

They also referred to

Russell on Arbitration, 4th ed. pp. 639, 640,

citing

Ross v. Ross, 16 Law J. Rep. (N.S.) Q.B. 138;

and

In re The Midland Railway Company and Heming, 4 Dowl. & L. P.C. 788.

Mr. Cotton, as *amicus curiæ*, mentioned

In re Elliot and The South Devon Railway Company, 2 De Gex & S. 17.

Mr. Glasse and *Mr. W. Barber*, for *Mr. Jacomb*.—This motion is not too late. Moreover, the corporation delayed making the submission a rule of Court, in order to prevent *Mr. Jacomb* from moving to set aside the award, inasmuch as the Court cannot entertain such a motion until the submission is made a rule of Court—

Davis v. Getty (*ubi supra*).

This Court should take into consideration all the equitable circumstances of the case, which shew that we could not have moved earlier than the 25th of November, and not follow the strict construction of the Act adopted in

In re Evans and Howell (*ubi supra*).

The true meaning of the Act is, that complaint must be made "*on or before the last day*," that is, before the term ends. There is no object in reserving the "*last day*." We rely on

Harvey v. Shelton (*ubi supra*);

and in

Re Perring and Keymer, 3 Dowl. P.C. 98,

the Court enlarged the time for moving to set aside an award.

We also submit that the notice of motion, setting forth the grounds of Mr. Jacomb's objection to the award, was a sufficient "complaint" to bring him within the statute, and corresponded to the three weeks allowed for giving notice of appeal by section 124 of the Companies Act, 1862.

In re Elliot and The South Devon Railway Company (*ubi supra*), was not a case under the Statute of Will. 3, but under the Lands Clauses Act.

They also referred to

Brown v. Brown, 1 Vern. 157.

Mr. Higgins, in reply.—The decision in

Re Perring and Keymer (*ubi supra*) has been questioned on several occasions; see

Russell on Arbitration, 4th ed. p. 638.

In re Evans and Howell (*ubi supra*) is a later decision, and was not cited in

Harvey v. Shelton (*ubi supra*).

The Court of Chancery will only exercise its jurisdiction when the matter is brought before it within the statutory time—

Smith v. Whitmore, 1 Hem. & M. 576; s. c. 2 De Gex, J. & S. 297; s. c. 33 Law J. Rep. (N.S.) Chanc. 713.

MALINS, V.C.—This is a technical question, but it may be one of great importance. It appears that Mr. Jacomb was made aware of the award in June, 1873, but he allowed the whole period from that time till the month of October to slip away without taking any action. Then in October he took the first steps for making the submission a rule of the Court of Queen's Bench. Pending this process the corporation made the submission a rule of this Court. There was thus complete jurisdiction in this Court, and Mr. Jacomb might have moved this Court to set aside the award before the last day of term, the 25th of November. Therefore there cannot be said to have been great diligence on his part. But the question I have now to decide is, whether he has not come to the Court too late. The question whether the 25th of November was too late must depend upon the words of the statute as interpreted by the Courts of Law and Equity. [His Honour then read the 2nd

section of the Act, and proceeded.] According to the strict grammatical construction of the English language, the words "before the last day of the next term" cannot include the last day of the term; and, therefore, if the matter were *res nova*, I should come to the conclusion that "before" must mean before, and that the latest day on which the complaint can be made must be the last day but one of the term, though why the Act excludes the last day I do not know. But nothing can be more expressly to the point than the decision in *In re Evans and Howell* (*ubi supra*). Mr. Justice Maule there says, "By the statute, therefore, a party in whose favour an award has been made is entitled to the benefit thereof, unless a motion be made to set it aside *before* the last day of the following term. To allow this application would be, in effect, to repeal the Act." That is an express decision in the year 1842. But it is said that a different decision would have been arrived at in the Court of Chancery. I should be sorry to say that the Court of Chancery could come to a different conclusion to a Court of law upon the language of a statute. My opinion is, that all the Courts of justice in this country should come to the same conclusion upon the language of a statute. It is said that *Harvey v. Shelton* (*ubi supra*) is an authority that the last day of term is not too late; but I cannot so regard it. The motion in that case seems to have been brought on upon the last day of term, and it seems to have been assumed, and erroneously assumed, by both parties that the last day of term was soon enough, when there was a standing decision the other way in *In re Evans and Howell* (*ubi supra*). That case was not cited to Lord Langdale, and I am clearly of opinion that if it had been he would have come to the conclusion that the last day of term was too late for bringing on the motion. Therefore, on these grounds, I am of opinion that the last day of term is too late for the commencement of a complaint. But another question raised is, as to what constitutes the commencement of a complaint. This is the Court in which the complaint is to be made, and the question must be determined by

the nature and course of proceedings in this Court. Notice of motion was served on the 19th of November. Was that a complaint? If so, it was in time. It seems to have been assumed in *Auriol v. Smith* (*ubi supra*) that it would be sufficient to take the first step. No doubt that point was not adjudicated upon, but it seems to have been assumed that if a bill were filed it would have been sufficient. But it is not necessary to file a bill, since a more summary mode of procedure is allowed by motion, which is the proper mode of proceeding to set aside an award. At common law the case is quite different, and no proceeding could be commenced by notice of motion. But surely the complaint began when a notice of the objection to the award was given by one party to the other, which brought both parties before the Court. It appears to me, therefore, that serving the notice of motion was "making a complaint" within the meaning of the statute. If I take the analogous case of the Statute of Limitations, service of a writ saves the remedy. So a right of appeal is secured by serving the petition of appeal. So also under the Companies Act. Therefore, though I am with the corporation on the first point, I am against them on the second, and the case must be heard on its merits.

His Honour then having heard Mr. Jacomb's objections to the award fully argued by his counsel, pronounced them vexatious and frivolous, and refused the motion with costs, without calling upon the other side.

Solicitors—Messrs. Williamson, Hill & Co., for Mr. Jacomb; Messrs. Van Sandau & Cumming, agents for Mr. J. Batley, Huddersfield, for the corporation.

BACON, V.C. } IN RE THE VICTORIA PALACE
1874. } THEATRE SYNDICATE.
July 18. }

Partnership—Promoter—Misrepresentation.

*Persons subscribed to a scheme for the purchase and resale of a theatre. The association was wound up. The subscriptions amounted to over 5,000*l.* and were at-*

*tached to a form appended to a prospectus which falsely stated that out of 12,000*l.* 5,000*l.* only remained for subscription:—Held, that the promoters who issued the prospectus were contributories to an extent proportionate to the amount not subscribed for.*

Messrs. Moore & Delatorre promoted a scheme for the purchase and resale of the Victoria Theatre. They issued a prospectus, which contained the following statement—"The lease for twenty-seven years renewable at the expiration of that term from the freeholder, and the entire re-modelling, re-decorating and furnishing, on a magnificent scale, will cost 12,000*l.*, and of this sum only 5,000*l.* remains for subscription." Nineteen persons subscribed for an aggregate amount of a little more than 5,000*l.* The statement that 5,000*l.* out of 12,000*l.* only remained was false.

The association thus formed was ordered to be wound up, under the 200th section of the Companies Act, 1862, as a partnership of more than seven persons. The official liquidator took out a summons to place Messrs. Moore & Delatorre on the list of contributories, in respect of as much of the 12,000*l.* as had not been subscribed for.

Mr. Kay and *Mr. Methold*, for the liquidator, took no part in the arguments.

Mr. H. M. Jackson and *Mr. Solomon*, for Messrs. Moore & Delatorre, submitted to be subscribers to the extent of 100*l.* They contended that as far as the representation was concerned, at the most they would be put in the place of a person who had agreed to place shares and a contract to place shares did not make the contractor a contributory—

Monarch Insurance Company, Gorissen's Case, 42 Law J. Rep. (N.S.) Chanc. 864; s. c. Law Rep. 8 Chanc. 507.

Mr. Eddis and *Mr. T. A. Roberts*, for the subscribers, contended that Messrs. Moore & Delatorre ought to be placed on the list in respect of the unsubscribed shares. There was such a misrepresentation as would, as between them and the subscribers, affect the contract—

Henderson v. Lacon, Law Rep. 5 Eq. 249;

Rawlins v. Wickham, 3 De Gex & J. 304; s. c. 1 Giff. 355; s. c. 28 Law J. Rep. (N.S.) Chanc. 188;

Carew's Case, 7 De Gex, M. & G. 43; in which subscribers to a scheme for incorporating a railway company were held liable to their co-subscribers for a misrepresentation in a prospectus. In

Leeke's Case, 40 Law J. Rep. (N.S.) Chanc. 172, 254; s. c. Law Rep. 6 Chanc. 469,

a director was held liable for having allowed it to be represented that he held shares.

They cited also

Davies's Case, 41 Law J. Rep. (N.S.) Chanc. 659.

Mr. Jackson replied.

BACON, V.C., said—This case has been discussed at great length; but, in my opinion, it is one which does not present any very serious difficulty.

The winding-up order has been made for the winding-up of a partnership, because an unregistered company is only to be considered as an ordinary partnership, and it comes within the scope of the winding-up Act, because the number of persons composing it is larger than that mentioned in the Act.

Now the 200th section, to which reference has been made, is as plain in its terms as possibly can be. The words are:—"In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs;" that is to say, it is the most ordinary partnership.

The question before me is, how that partnership is constituted; and, for present purposes, it is originated by what is called this circular letter, which, as I read it, is a very plain invitation on the part of Moore & Delatorre, who had stipulated that they should be managers of the partnership, and who were the managers of the partnership—an invitation to

other persons to whomsoever it might be addressed to come and join in the partnership for the new purpose there mentioned. The capital is expressed to be 12,000*l*. That is the invitation—"Come in as many of you as will and join the partnership, the capital of which is to be 12,000*l*.; 7,000*l*. of that has been already collected, and there remains only 5,000*l*.; you who contribute the 5,000*l*. will be partners in the same proportions as the existing partners." The words of the circular are really not open to any question, in my opinion. "The great success which has attended the Alhambra Palace as a place of entertainment has induced a few friends to enter into arrangements to provide the Surrey side of London with a similar establishment." The lease and so on "will cost 12,000*l*., and of this sum 5,000*l*. only remains for subscription when the above is completed" Then it says what is to be done; and a form of receipt is annexed to that proposal, which is in these terms:—"Received the sum of [blank], being one half of my subscriptions towards the sum of 12,000*l*. for the purchase" and so on "of the above theatre, in accordance with the statements contained in our circular" which precedes that form of receipt. Can there be any doubt, then, that the moment any person answers that invitation, and subscribes any sum of money, that he becomes a partner in the concern, of which already the capital consisted of 7,000*l*. and to which 5,000*l*. was to be added? I cannot conceive that any doubt exists upon the subject, or that there is any reason to question what was done. If any other intention had been in the mind of Messrs. Moore & Delatorre, who are the inventors and originators of this plan, it ought to have been expressed in the circular. There is not a word in the circular which throws the slightest doubt upon it. They are the inventors—they are the instigators—the managers, they have the power all in their own hands, and they deal with the thing throughout. In the letter of May, which has been referred to, they say, we have only two shares left, and you must be quick if you want to take them. According to Mr. Jackson's argument, that means only two

shares out of 5,000*l.* Suppose it was, 7,000*l.* has already been subscribed. It is not only two shares out of 7,000*l.*, but we have only two shares out of 12,000*l.*, which are required to carry on this undertaking.

Now the law upon the subject is very plain and distinct. *Rawlins v. Wickham* (*ubi supra*), is a case which has nearer affinity to this case than any other, perhaps. There a partnership contract had been entered into upon certain representations that the assets consisted of so and so, and the liabilities were so much, and so on, and the man engaged to come in upon the invitation there held out, and upon the representation there made. It turned out that the representations were erroneous. Then what was the consequence? The man who made them was held to be bound to make good the representations upon which he had induced another person to enter into obligations. If the concern had been going on, no doubt there were two modes in which the persons who had agreed to subscribe by the misrepresentation might have been relieved. They might have said that the representation was untrue, and we will have the contract rescinded; or they might have said the representation must be taken to be true, and you must fulfil your part of it. That is out of their reach now, because the winding up order has reduced the members of the partnership to one and to only one kind of remedy *inter se*. In the words of the statute, their equitable rights must be ascertained and arranged in chambers. Messrs. Moore & Delatorre say that they were mere agents in this matter, and that only a subscription of 100*l.* had been made. They never said that until after the event has happened in which their liability is to be ascertained. Before that they were the managers of this partnership, and they had a right to say to whoever subscribed, and to all the world, in the proportion of seven to five, "this is our concern." If it had been successful, would there have been any ground why the subscribers for 5,000*l.* could say that they were entitled to more than the profits, however large they might have been, than the proportion which five bears to

seven? How could they dispute the right of Messrs. Moore & Delatorre to the other seven shares of the co-partnership? What the amount of liabilities may be, it is not for me at present to say, and I have not heard at present. Whatever they may be, these persons, partners in a trading concern, for trading concern it is, buy or lease, fit up a theatre, and so on, and whatever liabilities there may be they must bear them *inter se*. As I have said, I cannot draw any distinction between this and any ordinary partnership, I mean in the essence of a partnership contract, that every member of it is to bear his share of the burden, and to have his share of the profits. 7,000*l.* had been already collected, as the managers of the partnership say. In my opinion, they must be held to make that statement good. If they can give in the names of the persons who had agreed to take shares to the amount of 7,000*l.*, the names of those persons will be inserted in the list of contributories. If not, as to 7,000*l.* they must be inserted in the list, in order to make up the contributions.

They are in my opinion wholly prevented from saying that there were not other shareholders; and if they say that there were others but cannot shew who, the consequence is, that they must say we alone were the shareholders. In short, it seems to me as plain as possible that in carrying the 200th section of the Act into effect, the official liquidator must treat this as a partnership, the capital of which was 12,000*l.* He has the means of ascertaining who were the subscribers after issuing that circular, and then he must naturally put them upon the list, unless Messrs. Moore & Delatorre furnish him with the names of other persons who were shareholders, and the liability will accrue in the proportion which seven bears to five.

The cases referred to do not, in my opinion, except so far as they contain principles, apply in the slightest degree to this case. In one of the cases which has been referred to there was no undertaking to place shares, there was only a limited undertaking beyond which the Lords Justices would not extend the liability of the person who made the promise.

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Here the consideration is, "Come and join us, here is a very good thing; by subscribing 12,000*l.* we shall make 300*l.* for every 100*l.* subscribed; 7,000*l.* are already collected, and when there is 5,000*l.* more we shall go on merrily." The list of contributories must be settled in that way.

Solicitors—Mr. J. I. Solomon, for Messrs. Moore & Co.; Mr. C. F. Knox, for other members; Mr. T. D. Bolton, for the official liquidator.

MALINS, V.C. }
1874. } JAMES v. THE QUEEN.
Feb. 11. }

Forest of Dean Act (1 & 2 Vict. c. 43), s. 38—*Rights of Free Miners—Application for Gale—Death of Applicant before Grant—Right of Representatives—Transmissible Interest.*

A free miner of the Forest of Dean applied for an unoccupied gale. The gaveller acceded to the application, duly entered it in his book, and gave notice of his intention to make the grant upon a certain day. Conflicting claims being set up, the actual grant of the gale was delayed, and, in the meantime, the free miner died. The devisees under his will then presented their petition of right, praying that the gale might be granted to them in right of their testator. Upon demurrer by the Crown,—Held, that the 38th section of the Act 1 & 2 Vict. c. 43, applied only to the state of things at the passing of the Act, and that the free miner had acquired a title transmissible by will; and the demurrer over-ruled accordingly.

James Davis, a duly qualified free miner of the Forest of Dean, on the 5th of July, 1872, applied for a gale within the forest, and on the same day William Ellway applied for the same gale. The deputy gaveller duly entered these applications in his book, and on the 12th and 19th of the same month gave notice, by advertisement in the *Forester* newspaper, of these applications, and of his intention to grant the gale to the applicants on the 2nd of August. Davis, however, protested against any grant of the gale being made to Ellway, and the proceed-

ings were adjourned. Other conflicting claims were then made by two free miners named Adams and Jordan, and a suit was instituted by Davis, and Ellway having disclaimed, and Davis having applied that the grant should be proceeded with, the deputy gaveller, on the 28th of February, gave notice in the *Forester* of his intention to grant the gale in question to Davis. Further protests were, however, made by Adams and Jordan. The son of Ellway instituted a suit against Davis to restrain him from applying for any gale, on the ground that he was already the grantee of three gales, which suit was decided in Davis's favour (see

Ellway v. Davis, ante, p. 75; s. c. *Law Rep.* 16 Eq. 294),

and during the delay caused by these proceedings, Davis died, on the 19th of November, 1873.

By his will Davis gave all his real and personal estate to A. James and T. Moore, upon certain trusts therein declared, and they now presented this petition of right, praying for a declaration that Davis was entitled to a grant of the gale in question in priority to all other free miners, and that such gale ought to have been granted to him, and ought now to be granted to the suppliants in his right upon the trusts of his will, and for a grant accordingly.

To this petition the Crown put in a demurrer.

The material sections of the "Act for Regulating the Opening and Working of Mines and Quarries in the Forest of Dean and Hundred of St. Briavels, in the City of Gloucester" (1 & 2 Vict. c. 43), upon the construction of which the question depended, are the 60th, 62nd, 23rd and 38th.

The 60th section of the Act enacts, "That the gaveller, or deputy gaveller for the time being, shall grant gales to free miners in the order of their applications in writing, to be made from and after the passing of this Act, and the entry of such applications in the books of the gaveller, or deputy gaveller, shall be evidence of the priority of such applications respectively, and the said gaveller, or deputy gaveller, is hereby directed to make entries of all such applications as aforesaid, and in the order in which the same are

made, and the application for such gales shall be made by the filling up a printed form of application, to be provided by the said gaveler, or deputy gaveler, and when there shall be more than one application on the same day for the same gale, then the person who is to be entitled thereto shall be determined on by lot, to be drawn by the parties before the gaveler, or deputy gaveler, and as he shall direct, and for the purposes of this Act the day shall be taken to begin at ten of the clock in the forenoon, and end at five of the clock in the afternoon."

The 62nd section enacts, "That the said gaveler, or deputy gaveler, for the time being, shall not be compellable to grant any gale which he may conceive will interfere with any existing gale, pit, level or work, or which, either from its proposed situation or extent, shall not in the opinion of the said gaveler, or deputy gaveler, be considered as adapted for obtaining the coal or other mineral in the best and most economical manner."

The 23rd section enacts, "That such free miners, duly registered as aforesaid, shall have the exclusive right of having gales or works granted to them by her Majesty's officer, herein called gaveler or the deputy gaveler, to open mines within the said hundred, and to have gales, or leases of quarries within the said forest, as hereinafter mentioned, and it shall be lawful for such free miners to sell, transfer, assign or dispose of such gales and works, and all other the gales and works to which they are now entitled, and all quarries, to be defined as after-mentioned, either by deed or will to each other, or to any other person or persons."

The 38th section will be found in the judgment of the Vice-Chancellor.

Mr. Glasse and *Mr. W. W. Karslake*, for the Crown, in support of the demurrer.—The Crown has no interest in the matter, except to see that justice is done, and the question is whether under the Act of 1 & 2 Vict. c. 43, the suppliants have any just claim. The gale never was actually granted to Davis. The equity is only a personal equity. Under the 38th section of this Act no person is entitled to a gale unless it has been duly granted and entered on the gaveler's books; and

an application which has not been granted and entered confers no title to a gale. Davis therefore had at his death no transmissible interest; and as gales can only be granted to free-miners, the suppliants, who are not free-miners, are not themselves entitled to any grant.

Mr. Higgins and *Mr. J. G. Wood*, for the suppliants, in support of the petition of right.—The gaveler is bound to grant gales to free-miners according to their priority of application. If the gale is unoccupied, and the applicant is a duly qualified free-miner, the gaveler cannot withhold the grant. That he is "compellable" to make it is shewn by the 62nd section which provides that in certain specified cases he shall not be "compellable." In this case the gaveler admitted Davis's title to the gale in question, and gave notice of his intention to grant it to him, and the perfecting of the grant was only delayed by accidental circumstances. The 38th section manifestly applies only to the state of things existing at the passing of the Act, and not to applications made subsequently to the Act. The expression, "an application which has not been duly granted," means, "which has not already been duly granted." Moreover by the 23rd section a free-miner entitled to a gale may sell or dispose of it by deed or will, and accordingly the right to the gale to which Davis was entitled passed to the suppliants, and they are now entitled to the grant.

Mr. Glasse in reply.

MALINS, V.C.—This petition of right raises a very important question with regard to the rights of the free-miners in the Forest of Dean, who for generations have had the privilege of obtaining a grant of a gale, which means a right to work a particular district and sink for iron and coal, or both, these minerals being found in that district in great abundance.

In the year 1838, in consequence of the great number of free-miners and the manner in which their rights had been dealt with, matters for some time had fallen into great confusion, and, in order to put an end to that confusion, the Act of Parliament which gives rise to this ques-

tion was passed in July, 1838. Amongst other things, that Act of Parliament defines who are the free-miners. It is admitted in this case that James Davis was a free-miner, and had the rights which free-miners possessed before the passing of this Act, and which by the Act were confirmed to them, and amongst those rights is that of applying for a gale; and as I read this Act of Parliament the gavelleur or deputy gavelleur has no discretion whatever, but upon an application being made by a free-miner for a gale which is free from any other application, the first applicant is to have the gale. What the gavelleur has to do is to consider, Is the applicant a free-miner? Does he apply for a gale which is unoccupied? And if he finds that he is a free-miner, and that he applies for that which is unoccupied, then his duty is prescribed by the 60th section of this Act. [His Honour here read the 60th and 62nd sections of the Act as stated above, and remarked that there was considerable force in the argument in support of the petition, that as this 62nd section provided that in certain events which did not apply to this case, the gavelleur should not be compellable, it implied that in other cases he was compellable. His Honour then continued.]

Now Davis having every qualification to apply for a gale, makes his formal application for this gale on the 5th of July, 1872. His application is acceded to by the gavelleur, who entered it in his book and gave formal notice of it in the paper published in the district for the information of the free-miners. [His Honour here read the notice published by the gavelleur.] Now therefore the deputy gavelleur having no discretion, but being bound to grant the gale if free from any other application, has here in the most formal manner admitted Davis's title, acceded to his application, and given notice that he would proceed to perfect it by an actual grant on the 2nd of August, 1872. [The Vice-Chancellor then stated the circumstances which caused the delay of the grant, and the death of Davis, and resumed.]

Now it is contended that, upon the death of Davis, all rights upon his part

ceased. It is said that the grant must be to a free-miner, and cannot be made to a representative; that the free-miner can have no right to transmit the grant unless it is made in his lifetime. That question depends solely upon the 38th section of the Act, but before referring to that section I must look at the principle which is not new in this Court. The right of the miner is to have a gale. All that is incumbent upon the gavelleur or the deputy gavelleur, is to fix upon the boundaries. If the ground is unoccupied it is the free-miner's, as I conceive, the moment he gives notice to take it. It is very much, I think, like the right of a railway company who have compulsory powers of taking land and serving notice to treat; upon that notice to treat being served, as between them and the landowner, the land becomes the property of the company. It is also like the case of a right of preemption. A says to B, "You may have my estate at a given price if you will give me notice within a limited time." The purchaser gives notice, and the land the moment the notice is served becomes his. So, in this case, upon principle, my opinion is that the moment a free-miner gives notice to the deputy gavelleur, the gale becomes his, and the 23rd section says that when it becomes his, he is at liberty to sell or transfer it. [His Honour here read the 23rd section, and continued.]

Now, therefore, when application was made by Davis, a free-miner, and that application was acceded to by the gavelleur, as it was by the notice of the 5th of July, that the gale would be granted on the 2nd of August, and that notice was again renewed by the notice to Adams and Jordan, it seems to me that everything had been done to perfect the title of any free-miner except clothing him with the actual legal estate by delivery out to him of the grant; and it does seem to me, upon every principle, that when that was once done, the free-miner was then in a situation to deal with it, because we know by experience that these men do not work these gales themselves. They are probably things of great value, and from what I have heard of this particular gale, I have no doubt that it was worth many

thousand pounds to this poor man, and that he had been long in the expectation that he would become a rich man by this gale, and died so; whereas, on the other hand, if this argument on the part of the Crown were to succeed, by the mere accidental delay and interposition of other persons, who set up a claim which they have not been able to sustain—by that accidental circumstance, the family of this man, instead of being probably left in affluence, may, for aught I know, have been left in indigence. However, I quite agree with Mr. Glasse's argument that all those considerations must be set aside, and that I am not in the slightest degree to indulge in them, if the proper interpretation of the Act of Parliament is that which has been contended for on the part of the Crown.

Such, then, being upon the general principles of this Court, the right of the parties, and such being, as I collect, independently of the 38th section, the proper construction of this Act of Parliament, I think I ought not, at all events in the present state of this cause, to accede to the argument of the Crown upon that section, unless I am perfectly clear that without doubt it does apply, not only to the state of things which existed at the time that the Act passed, but to all the states of things which should thereafter occur.

With regard to the 38th section, considering the state of confusion which existed when the Act passed, I think that that may be not an unfair interpretation which has been contended for in support of the petition, namely, that this 38th section is not intended to apply to all time, but only to the state of things which existed when the Act of Parliament passed, when the rights were uncertain and had got into great confusion. I will now read the 38th section to see what its language is. The first part of the section evidently applies to the state of things which existed when the Act passed—"Be it enacted that no person shall be considered as entitled to any gale at the time of the passing of this Act, unless such gale shall have been duly granted by the gaveller, and entered on the gaveller's books on or before the 9th

day of April, 1832." That was the date after which, by section 39, all granting of gales was suspended until the passing of the Act. The first part of the section then refers to the state of things before the passing of the Act, and one would infer naturally that some part of the session would apply to the period of the passing of the Act. I think that the language favours the view that it applies, not to the state of things which afterwards existed, but to what then existed. I think that to be probable. I do not, however, finally decide it, because the only question now is, whether I allow the demurrer. The section goes on, "And an application made by any person for a gale, but which has not been duly granted by and entered in the books of the gaveller or deputy gaveller (except as regards such gales, pits, levels or works as shall be awarded and confirmed by the said commissioners hereby appointed under the authority in that behalf hereinafter contained) shall not confer a title to any gale."

Therefore I read that first part as enacting that no person shall be considered as entitled to any gale at the time of the passing of this Act, unless such gale shall have been duly granted by the gaveller, and entered on the gaveller's books on or before the 9th of April, and no application already made by any person for a gale which has not been duly granted by, and entered in the books of the gaveller or deputy gaveller, shall confer a title to any such gale. That is my interpretation of the natural meaning of the language; and I am very much inclined to agree with Mr. Higgins's argument that that is borne out by the 39th section, because it goes on—"And whereas since the 9th day of April, 1832, the granting of gales in the said forest and hundred has been suspended." Why? No doubt suspended on account of the state of confusion as to the rights of the parties. "But since the 9th day of April, 1832, various applications in writing have been made by free miners for gales at various places in the said forest and hundred; and whereas although such applications have not been granted, nevertheless the same have in some instances been acted upon as if they

had been granted, and works have been erected and proceeded in under such applications at considerable expense, now therefore be it enacted that the commissioners appointed under this Act shall determine by their said award, whether any and what gales for which such applications have been made subsequent to the said 9th day of April, 1832, and have been so acted upon, can be granted without injury or detriment to any legally existing gales, pits, levels or works." Therefore, looking at all the sections together for the present purpose, the inclination of my opinion (and it is quite sufficient to say that) is, that this 38th section applies only to the state of things which existed when the Act passed, and that it is not prohibitory, and I am very clearly of opinion that it ought not to be prohibitory for the future; and I cannot suppose that it was ever the intention of the legislature to inflict so great a hardship upon this poor class of men, who, by reason of their applications being acceded to, are put in a position of just expectation of being possessed of considerable property, as that a mere accidental delay, such as the illness of the gaveller, or some other accidental circumstance over which they had no control, such as the man dying before the thing was completed, is to deprive them of that which is likely to be a valuable property. I say deliberately that I cannot come to that conclusion unless I find that the language is so positive and clear as to admit of no doubt. I have very great doubt upon the subject, and I think it is a case in which these people ought to have an opportunity of bringing any evidence to shew that that was not the practice, and therefore never could have been the intention of the Act, or, in other words, that they should be allowed to amend their case as much as they possibly can; and therefore I think it would be a harsh proceeding in the present state of the case to say that this demurrer shall be allowed finally to decide everything against the petitioners.

With regard to the conduct of the Crown, the officer of the Crown, the solicitor of the Woods and Forests, instructing the counsel who appear for the Crown, has only performed a public duty. It is

not a matter of any feeling. The feeling would all be in favour of Davis, and it is only just to the counsel for the Crown to mention that Mr. Glasse did say that they would concur in the observation, that if the Act of Parliament does not prohibit the grant, it is one that ought to be made. As a matter of feeling I am sure the inclination of all parties would be in favour of Davis and his family. Therefore I think the proper course would be to overrule this demurrer in order that the question may undergo further investigation, and the costs will go with the event.

Solicitors—Messrs. Peacock & Goddard, agents for Messrs. Smith & Son, Newnham, for the suppliants; Mr. H. Watson, for the Woods and Forests.

MALINS, V.C. } *In re* HOGHTON'S ESTATE;
1874. } HOGHTON v. FIDDEY.
July 10.

Practice—Administration Decree—Leave to File Supplemental Bill—Facts discovered since Date of Decree—Infant—Petition—Affidavit in Support.

A common administration decree having been made, an infant interested in the estate some years afterwards presented a petition by her next friend for leave to file a supplemental bill, with the object of charging a trustee of the estate with a breach of trust, which she alleged had been discovered since the date of the decree. The Court granted leave accordingly, without requiring an affidavit by the next friend that the alleged breach of trust could not with reasonable diligence have been discovered at the date of the decree.

Semle, in such a case, the object being to obtain an addition to a decree already made, the proper mode of applying for leave is by petition.

This was a petition by Frances de Hoghton, an infant, by Richard de Hoghton, her next friend, for leave to file a bill or supplemental bill in the nature of a bill of review under the following circumstances—

Harriet Sarah Dowager Lady de

Hoghton, the mother of the petitioner, by her will, dated the 16th of August, 1862, bequeathed all her personal estate to her executors, Lord Winmarleigh, Colonel John Ireland Blackburne and Charles Fiddey, upon trust for all her children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares.

The testatrix died on the 25th of October, 1866, and her will was proved by Colonel Blackburne and Charles Fiddey alone. Lord Winmarleigh never in any way acted in the trusts of the will.

The testatrix left several children, and personal estate to the amount of upwards of 40,000*l.*

After the death of the testatrix, Colonel Blackburne left the sole management of the trust estate to his co-trustee, Fiddey, who was a solicitor, and in whom he reposed entire confidence.

In October, 1867, a suit was instituted on behalf of the infant children of the testatrix for the general administration of her estate; but in December following an order was made staying all proceedings in that suit as not being for the benefit of the infants, a summons for the administration of the personal estate of the testatrix having previously been taken out in the name of Charles De Hoghton as next friend of the infants.

On the 18th of December, 1867, a decree was made upon the summons, directing the usual accounts and inquiries, which, however, the next friend neglected to prosecute.

Charles Fiddey died on the 4th of September, 1872, and the petition alleged that it was then for the first time discovered that he had misappropriated and applied to his own use the several securities upon which the testatrix's estate had been invested, with the exception of a mortgage security for 21,000*l.*, then in Colonel Blackburne's possession.

Fiddey having died insolvent, this petition was presented with the object of establishing the liability of Colonel Blackburne, his co-trustee, to make good the loss to the estate.

The allegations in the petition were not supported by any affidavit.

Mr. Glaesse and Mr. Ingle Joyce, for the

petitioner.—A *prima facie* case is made out against Colonel Blackburne by the petition sufficient to justify the Court in granting leave to file a bill, though it is doubtful whether a petition is in fact necessary. The Court merely requires a *prima facie* case to be made out; it is not necessary to go into detail—

Partington v. Reynolds, 6 W. R. 615.

Mr. Cotton and Mr. Field, for Colonel Blackburne.—This application is irregular. The petition ought to have been supported by an affidavit by the next friend that the facts relied on could not with reasonable diligence have been known at the time the administration decree was made—

Thomas v. Rawlings, 34 Beav. 50;

Dan. Ch. Pr., 5th ed., p. 1423;

Mitford on Pleading, p. 84.

Moreover, it is not necessary for an infant to present a petition in order to obtain leave to file a bill.

Mr. Torriano, for Fiddey's representatives.

MALINS, V.C.—The question which I have to decide is whether this infant, on whose behalf a decree was taken by consent in 1867, she being now fourteen years of age, and therefore then only seven, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience.

Now it is said that there is no occasion for this application because she is at liberty to file a bill without leave.

I am by no means satisfied that the bill might not have been filed without the leave of the Court, because, one next friend having taken out a common administration decree at a time when there was no reason (as far as I can make out) to suspect that anything more could be required, the infant is in this position—that her next friend at that time has grossly and inexcusably neglected his duty, for I have been informed (and it is not contradicted) that that decree, though it was made in December, 1867, has never been carried into my chambers. If that next friend had prosecuted the decree, as he ought to have done, this

misfortune might not have fallen on any of the parties. It might possibly have been (as Mr. Field suggested) that Mr. Fiddey would have found the money at the expense of some other person, or that at that time he might not have incurred the loss which led to the subsequent disastrous state of affairs. However, I cannot enter into that. But when I hear it gravely argued that this infant of tender years may have her whole fortune wrecked by the neglect of her next friend, that is a proposition so monstrous that I cannot pay attention to it for a moment. If she has had the misfortune to have a negligent next friend, she should not suffer for it, because she is entitled to have a diligent next friend, and one who will protect her interests. Then it is said that until after the death of Mr. Fiddey, in September, 1872, these facts were unknown. Colonel Blackburne's own case is that he never suspected the real state of things. If he did not, why were the friends of the family bound to suspect it? If he let Mr. Fiddey have 20,000*l.*, which he now claims as creditor, is it open to him to say that other people were negligent for not suspecting that which he never suspected? Surely, if his conduct is excusable, theirs is. I am satisfied, upon the whole, that by no reasonable diligence could these facts which are now complained of have been discovered; and if they could, they ought to have been discovered by Colonel Blackburne himself.

The first question is, whether this infant is entitled to file a bill. It is perfectly clear to my mind she must have that right. She happens to be one of a large family, and she, as well as the other infants interested with her, is clearly entitled to file a bill to raise the question against the trustee.

Then if she can file a bill, as every principle requires she should be at liberty to do, the only remaining question is, whether it is necessary in this suit to apply for leave. Possibly not. Mr. Glasse said that the question had been carefully considered, and that the conclusion had been arrived at that it was not safe to file a bill without the leave of the Court. Possibly that is right, for there

being a suit for the administration of the estate of the testatrix, the proposition is that there should be an additional enquiry—an additional decree in that suit. It possibly may be that it might be more proper that there should be the leave of the Court to add to that decree. Therefore I cannot say I am by any means satisfied that it was not necessary to apply to this Court; but whether it was necessary or not, I think it is quite proper that the petitioner should have applied, and leave must be now given to her.

Then with regard to the affidavit, Mr. Field cited *Thomas v. Rawlings* (*ubi supra*), in which an application by a person *sui juris* for leave to file a bill of this kind, not supported by the usual affidavit that the mistake could not have been discovered by reasonable diligence before, was dismissed, but that case has no application to an infant of tender years who can be guilty of no negligence, and who cannot be answerable for the negligence of her next friend. Therefore I think the true reason why Mr. Field has not been able to find a case applicable to an infant is because the Court has not applied that principle to the case of an infant. The Court cannot say that an infant is guilty of negligence in not making an affidavit that the infant could not discover the mistake, for the infant is not bound to discover anything, and that is a sufficient reason why no such case could be found. This is the mere case of an infant, and the negligence which is complained of cannot be attributed to her. She has a right to investigate the case, and I am of opinion, upon the whole, that it is a prudent and proper course to come to this Court before filing a supplemental bill in the nature of a bill of review. The leave must therefore be given.

The only question that remains is, what is to be done with the costs? If this application had been acceded to by Colonel Blackburne, I think the proper course would have been to have made the expenses of this petition costs in the cause, that is, in the administration suit that has already been instituted, and I think, to a certain extent, that will still be the right course. Therefore I think the pro-

per course will be that the petitioner's costs should be costs in that cause, and that the costs of Colonel Blackburne should also be costs in that cause, but only as if having been served with this petition he had, instead of opposing it, acceded to its prayer. All the costs of bringing this petition before me, and of uselessly wasting money and the time of the Court, he must pay himself.

Solicitors—Messrs. Gregory, Rowcliffes & Co., for petitioner; Messrs. Field, Roscoe & Co., for Col. Blackburne; Messrs. Pitman & Lane, for the executors of Fidley.

HALL, V.C.
1874.
July 8, 9, 10, 11. { DOWLING v. THE PONTY-
POOL, CAERLEON AND
NEWPORT RAILWAY
COMPANY.

Railway Company — Landowner — "Lands Delineated and Described in Plans, and Book of Reference"—Meaning of Word "Delineated"—Land not included in Notice to Treat—Costs.

A Railway Company's Act empowered them to make their railway "in the line and upon the lands delineated on the said plans, and described in the said book of reference." The deposited plans had numbers placed on some of the pieces of land required by the company; but those pieces of land were shewn on the plans to be enclosed on three sides only (one of such three sides being the centre line of the railway) and not on all the four sides. Those pieces were mentioned in the notices to treat; but it was contended that they were not properly "delineated" and could not be taken by the company:—

Held, that for the construction of the railway itself, lands within the limits of deviation, although not shewn to be bounded on all the four sides, might be taken by the company up to the line of deviation:

Held also, that as the plaintiffs (landowners) had notice that some portion of the same lands were outside the line of deviation, the company could take those portions:

Held also, as to the words "delineated and described," that the word "delineated"

NEW SERIES, 43.—CHANC.

does not mean "surrounded on every part by lines," but "sketched or represented or so shewn, that landowners would have notice that the land might be taken:"

Held also, that where Parliament has not clearly defined the position of the centre line of a railway, the company are acting within their powers if they have taken the measurement for the purposes of their Act, from a point which competent engineers consider a proper one from which to find the centre of the line of railway.

Circumstances under which a piece of land, numbered in the deposited plans, but not included in the notices to treat, was considered to be well taken by the company.

Special circumstances under which the plaintiffs' bill was dismissed with costs.

Motion for decree.

The plaintiffs were Mrs. Dowling and her son, Mr. R. B. Dowling. Mrs. Dowling was the equitable tenant for life in possession, and Mr. Dowling, the equitable tenant in tail in remainder, of the Llantarnam Abbey Estate, in the parish of Llanvihangel Llantarnam, in the county of Monmouth.

The defendants were the above named company and their secretary.

The company was incorporated by the Pontypool, Caerleon and Newport Railway Act, 1865. That Act embodied the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, the Railways Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, part I. of the Companies Clauses Act, 1863, and (so far as applicable) parts I. and III. of the Railway Clauses Act, 1863.

When the Act of 1865 was being passed the plaintiffs appeared before Parliament, and opposed it.

By the 20th section of the Act of 1865, it was provided that the powers thereby conferred for the compulsory purchase of lands should not be exercised after the expiration of three years from the passing of that Act, but the exercise of those powers was subsequently extended to August, 1872. By the 23rd section of the Act of 1865 it was provided as follows—

5 E

"It shall be lawful for the company, subject to the provisions in this and the incorporated Acts and parts of Acts contained, to make and maintain the railways hereinafter described with all proper works, approaches and stations *on the line and upon the lands delineated on the said plans, and described in the said book of reference*, and according to the levels described on the said sections, and the company may enter upon, take and use such of the said lands as shall be necessary for such purposes."

In consequence of the plaintiffs' opposition to the passing of the Act of 1865, a special section was inserted in it for their benefit. That section was (so far as is material to this report) as follows—

Section 32. "And whereas the lines of railway No. 1 and No. 3 will pass through the Llantarnam Abbey Estate, in the parish of Llanvihangel Llantarnam, in the county of Monmouth, and it is expedient to make provision for the protection of that estate, therefore (except as otherwise mutually agreed between the company and owner for the time being of that estate) the following provisions shall be in force and observed and fulfilled by the company—that is to say—

"First. The company shall in the field No. 34 in the said parish make on land to be provided by the owner of the estate for that purpose, for the use of such owner and her tenants, a good and sufficient siding, with proper junction points, such points to be under the reasonable control of the company.

"Second. In constructing the railway No. 1, across the road No. 64, and the plantation No. 65 in the said parish, the company shall not bring any of the railway westward of the centre line of railway shewn on the deposited plans."

"Fourth. The company shall not take more land from the owner of the estate than is required for the railways and works, and shall not erect or allow to be erected on any land taken from the estate, any dwelling-houses except for the servants of the company."

On the 4th of July, 1870, the company served on Mrs. Dowling a notice—"that they required to purchase or take the

lands of which the particulars were contained in the schedule thereto, with the appurtenances, and which said lands so required were, for the better description thereof, delineated on the plan attached thereto or delivered therewith, and were thereon distinguished by a red colour, and which lands the company were authorised to purchase or take."

A schedule and four notice plans were appended to that notice. The schedule contained the name of the parish or place and county in which the lands required were situate; the number on the plan or map, and in the book of reference deposited with the clerk of the peace for the county, and a description of the lands required. The schedule contained forty numbers, including Nos. 34, 35 and 36, but not any piece numbered 38.

One of the plans described the property as containing 9a. 3r. 16p., and it was coloured red. The plaintiffs insisted that although the land so coloured red was part of their estate, that coloured part included portions of the estate lying outside the limits of deviation shewn on the deposited plans, together with portions of the estate which the company were not by any of their Acts empowered in any case to take; portions of the estate which were not required for any of the purposes for which the company was empowered to take land; and portions of the estate which the company were not entitled to take by reason of the provisions of section 32 of the Act of 1865, and in particular of subsection 2 of that section. They specified No. 35 as land extending beyond the lines of deviation, and as unnecessary to and not required by the company, and said that both No. 35 and No. 36 formed no part of the land "delineated" on the deposited plans, or described in the books of reference thereto. The plaintiffs also said that the plans and sections of the books of reference deposited in the parish of Llantarnam (i.e. the parish plans) did not exactly agree with the deposited plans mentioned in the Act of 1865, and that no plan or section of the alterations approved by the Act of 1865, section 32, had been deposited pursuant to the 8th section of the Railways Clauses Consolidation Act, 1845. The

bill then stated the difficulties under which the plaintiffs laboured in consequence of the imperfect information afforded to them by the company, and alleged that in October, 1871, the company sent a surveyor to call on Mrs. Dowling. A correspondence ensued, and Mrs. Dowling asked for information to enable her to select the land for the siding under section 32 of the Act of 1865, subsection 1. On the 16th of November, 1871, the company gave her notice of their intention to obtain the appointment of a surveyor under the Acts to value the property comprised in the notice of the 4th of July, 1870. A surveyor was accordingly appointed who valued the lands at 2,493 $\frac{1}{2}$ l., which the company paid into Court.

With respect to No. 38, the bill stated that no notice was given to the plaintiffs by the company to take it; but that they had nevertheless entered into the possession of it, relying on the fact that it was "numbered 38" in the deposited plan.

In 1872 the cause came on upon a motion for an injunction; but when the motion was only partly heard, the company gave the plaintiffs two more notices, with plans annexed, for the purchase of other portions of their estate. The first of those notices was dated the 17th of July, 1872. It related to a piece of land, numbered 77, and as to that it will be seen that no question arose.

The second of those notices was dated the 30th of July, 1872. It was accompanied by a schedule, and was similar in its terms to that of the 4th of July, 1870.

As to the notice of the 30th of July, 1872, the plaintiffs charged that it was open to many of the same objections as the notice of the 4th of July, 1870. In particular the land numbered 35 in that of the 30th of July, 1872, and coloured red on the plan thereto annexed, was land beyond the limits of deviation; the lands numbered 35, 27, 37 and 1 were not lands delineated on the deposited plans or described in the book of reference; the land numbered 35 was land not necessary or required for the purposes for which the company was empowered to take land; the land numbered 28 in the notice of the 30th July, 1872, was not shewn as land

coloured red in the plans thereto annexed; the land therein numbered 41 was not delineated and numbered on the deposited plans; and that the lands numbered 1 and 2 were wholly or in part the same lands which were included in the notice of the 4th of July, 1870.

The plaintiffs, therefore, charged that the notice of the 30th of July, 1872, was null and void, and that even if it were not so it would not entitle the company to retain possession illegally taken, under their former notice to treat.

The bill was then amended; and it prayed a declaration that the company were not, by any of their Acts, or the Acts incorporated therewith, authorised to take lands coloured "red" on a notice plan of the 4th of July, 1870, and respectively numbered 35, 36, 27, 37, 20, 65, 68 and 34, or the lands comprised in three subsequent notice plans, and respectively numbered 46, 5, 7, 8, 9, 15 and 1:—That the notice to treat of the 4th of July, 1870, was null and void, and that all proceedings founded or to be founded thereon under the 85th section of the Lands Clauses Consolidation Act, 1845, or otherwise, were and would be inoperative:—That the company was not authorised to take lands numbered 28, 41, 35, 27 and 1, in a notice to treat of the 30th of July, 1872; that that notice was in like manner null and void, and that all proceedings thereon would also be inoperative:—That the company were not entitled by any of the Acts aforesaid to take land numbered 38 in the deposited plans and book of reference, or entitled to take or retain possession of the lands comprised in the notices to treat in the bill mentioned respectively, or any part of them, or any part of the plaintiffs' estate; and for an injunction accordingly. The bill also prayed that the company might be restrained from carrying a road, number 64, across their intended railway, or executing any works connected with, or for the purpose, of such crossing, in a manner inconsistent with the 32nd section of their Act of 1865, or with any other provisions of their Acts, or of any Acts incorporated therewith, for damages and costs.

The further hearing of the part heard

motion for the injunction was resumed before the late Wickens, V.C., when he directed it to stand over for fresh evidence as to the precise boundaries of some of the parcels of land in question. It was then arranged that the motion should stand till the hearing of the cause, and come on as a motion for a decree.

A great deal of evidence had in the meantime been adduced on both sides. The further details of the case, so far as they are necessary to this report, and the nature and effect of the evidence, will fully appear from the judgment, *infra*.

Mr. G. W. Hemming and Mr. Robinson, for the plaintiffs.—This is the case of a railway company, upon which Parliament has conferred very large powers of acquiring private property for public purposes, exercising those powers in a way which the plaintiffs say is not authorised by the company's Acts, and in a manner that is most prejudicial to the plaintiffs' interests. The case is, therefore, one in which the Court will interfere to protect individuals against a corporation.

The principal objection to the proceedings of the company is the want of certainty as to the subject-matter of the transactions between the parties.

Nos. 35 and 36 : one of those pieces extends from the centre line of the railway to the line of deviation ; having side lines marked, as from the centre line to that of the deviation. But no other line than that statutory one, opposite the centre line of the railway, is shewn in any plan, as a fourth or boundary line. That piece therefore is not properly "delineated" according to the Act of 1865. It cannot, therefore, even although mentioned in the book of reference and in the notice to treat, be taken by the company.

Then as to the other of these two pieces : it lies partly within and partly without the line of deviation. If we are right in our view as to the first piece, *a fortiori*, we are so as to this second one.

We therefore contend that no company can take any land from a landowner under the powers of their Acts, unless such land is clearly marked out in the plans ; and that for such a purpose the land must be "mapped" out by a distinct continuous line or boundary on all its sides.

As to No. 38, as that is not mentioned in any of the notices to treat, the company can have no right to take it ; and their entry on it is simply illegal. As to the other lands which the company really do not require for the *bona fide* purposes of their railway, those cannot be retained by them. With respect to the land taken for the alteration of the approach to the plaintiffs' lodge, the company are not authorised by their Acts to use it (as they have done) to the injury of the plaintiffs' property. They cited—

Doe d. Armistead v. The North Staffordshire Railway Company, 20 Law J. Rep. (N.S.) Q.B. 249 ; s. c. 16 Q.B. Rep. 526 ;

Wrigley v. The Lancashire and Yorkshire Railway Company, 4 Giff. 352 ; s. c. 9 Jur. N.S. 710 ;

Rangeley v. The Midland Railway Company, 37 Law J. Rep. (N.S.) Chanc. 313 ; s. c. Law Rep. 3 Chanc. 306 ;

Dodd v. The Salisbury and Yeovil Railway Company, 1 Giff. 158 ;

Raphael v. The Thames Valley Railway Company, 36 Law J. Rep. (N.S.) Chanc. 209 ; s. c. Law Rep. 2 Chanc. 147 ; reversing s. c. 35 Law J. Rep. (N.S.) Chanc. 659 ; and s. c. Law Rep. 2 Eq. 37 ;

Gray v. The Liverpool Railway Company, 9 Beav. 391 ;

The Queen v. The Wycombe Railway Company, 8 B. & S. 259 ; s. c. 36 Law J. Rep. (N.S.) Q.B. 121 ; s. c. Law Rep. 2 Q.B. 310 ;

Earl Beauchamp v. The Great Western Railway Company, 37 Law J. Rep. (N.S.) Chanc. 74 ; s. c. on app. 38 Law J. Rep. (N.S.) Chanc. 162 ; s. c. Law Rep. 3 Chanc. 745.

Mr. Dickinson and Mr. Cracknall, for the defendants.—The case is one of contract ; statutory no doubt, but still one of contract, between the parties, and to be determined accordingly. As to the words "delineated or described" (we say "or" and not "and"), do they mean that each piece of land must be surrounded on the plans by a complete line or completed lines ? Certainly not. If so, why say "described in the book of reference ?" All that the statutes require is that the landowners,

with whom the company are treating, should have reasonable information given them as to what lands the company *may* want. Here the evidence shows that ample information was given to the plaintiffs. Delineation *per se* does not mean "description." If you can see, approximately, from the plans or books where the boundary line "must" be—that is sufficient for all practical purposes. A railway company's Act should be liberally construed.

As to the other objections: first, the omission of No. 38 from the notices to treat is immaterial. It is referred to in the deposited plans; and that, putting the plaintiffs on enquiry, is enough to cure the defect (if any). Then as to the land taken being unnecessary: the company are the proper judges of what is or is not necessary land, for the purposes of their railway; and if the company have taken too much, the question should be tried in an action of ejectment. They cited

Coats v. The Olarence Railway Company, 1 Russ. & M. 181; s. c. 8 Law J. Rep. (o.s.) Chanc. 72;

Carnochan v. The Norwich and Spalding Railway Company, 26 Beav. 169;

Duke of Beaufort v. Patrick, 17 Beav. 60; s. c. 22 Law J. Rep. (n.s.) Chanc. 489.

Mr. G. W. Hemming, in reply.—A company cannot give a distinct notice to take Whiteacre, and then take that, plus Blackacre, simply because in a map Whiteacre runs a short distance into Blackacre? The notice to treat must be precise and definite. That is not so here. The entry on 38 was most unjustifiable. "Lands delineated and described" must mean lands marked out by a boundary line. Ninetenths of a circumference will not "delineate" a circle. Therefore these lands are not properly "delineated."

The case is one on the whole of which I ask a decree, that on the true construction of their Acts, the company are entitled only to take such lands as are specified in their notices; delineated by a complete and unbroken boundary line in the plans; and properly described in the book of reference; and that they shall not be al-

lowed to retain—to the injury of the plaintiffs—lands into the possession of which they have illegally entered; and for an enquiry as to damages.

HALL, V.C. (on August 1).—The plaintiff, Mrs. Dowling, is equitable tenant for life in possession, with remainder in tail to the plaintiff, Mr. Dowling, of the Llantarnam Abbey Estate, in the county of Monmouth. The mansion house is situated on the turnpike road leading from Newport to Pontypool, and has an approach by a lodge-entrance from the turnpike road along a carriage-drive through the park, and up to the mansion, thence to another lodge on the same road nearer to Pontypool. By an Act of Parliament passed in the year 1865, the defendant company was empowered to construct a railway which would intersect the turnpike road at a distance of about 100 yards from one of those lodges (which lodge I shall afterwards refer to as "the lodge"). The Act of Parliament of the company incorporated the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act. The 23rd section of the Act of 1865 empowered the company to make the railway, and was in these words—"It shall be lawful for the company, subject to the provisions in this and in the incorporated Acts and parts of Acts contained, to make and maintain the railways hereinafter described with all proper works, approaches and stations on the line and upon the lands *delineated in the said plans and described in the said book of reference*, and according to the levels described in the said sections; and the company may enter upon, take and use such of the said lands as shall be necessary for such purposes." The plaintiffs opposed the bill of the promoters when it was before Parliament; and for their protection, there was introduced into the Act of Parliament clause 32 of the company's Act, 1865.

The plaintiffs by their bill complain that the company have taken parts of their estate which they had not power to take, and that they have taken other parts of their estate without giving notice as required by the Lands Clauses Consolidation Act. The several parcels of land

which the company have taken, and the taking of which is complained of by the plaintiffs, are mentioned in the plaintiffs' bill (with one exception) by reference to their numbers in the notice to treat, and one parcel, No. 38, is mentioned by reference to the deposited plans. The parcels which the plaintiffs complain of the company having improperly taken, are twenty-two. The company gave three notices to treat. The second and third notices were given after the original bill was filed. The complaint as regards them was introduced into the bill by amendment. As regards the second notice, which was a notice to take one parcel only, No. 77, the bill does not make any case against the company. The 6th paragraph of the prayer of the amended bill extends to the lands comprised in all the notices; but there being no case made as to that parcel, there is no case for relief in respect of it. The plaintiffs by their bill seek to restrain the company from acting on their notices to treat; and their case is that if any parcel has been mentioned in any notice which the company could not take, the notice is altogether bad, and they therefore ask by their bill to restrain the company from taking or retaining possession of any part of their estate. The company's notice included many other parcels than those I have above mentioned. The plaintiffs' contention, except as to a few small parcels, with which I will separately deal, is this—They say that the company have taken parcels of land which are not delineated on the said plans or described (or, as the plaintiffs interpret the 23rd section, delineated “and” described) in the said book of reference; that is, that the lands taken are not such lands as section 23 of the company's Act empowers the company to take. They say that the deposited plans in certain cases have upon them numbers of parcels of land, which parcels are in part only inclosed within lines; and that inasmuch as there is only a partial inclosure of such parcels within lines, they are not “delineated and described” within the meaning of section 23. To understand that construction, it is, I think, convenient to take in hand one of the deposited plans. I there-

fore take an exhibit X.W. to an affidavit of Mr. Edward Wilson and Mr. John Stevenson Macintyre, and I look at those parts of the plan on which there are the Nos. 6, 9 and 10. The lands on which those numbers are placed are shewn on the plan as inclosed on three sides, but not on the fourth, the north side. By reason of the absence of any line on such fourth side, the plaintiffs say that no part of the lands on which those numbers are placed can be taken by the company. If such be a correct view, Parliament passed a wholly unworkable and useless Act of Parliament; and instead of authorising and permitting the construction of an undertaking which would be a public advantage, did practically nothing of any use whatever. It was contended that, it having been held (*Doe dem. Payne v. The Bristol and Exeter Railway Company* (1) and other cases) that the limits of deviation do not prevent a company taking, for other purposes than the line of railway, lands delineated on the deposited plans outside such limits, it follows that such limits ought to be wholly disregarded on ascertaining whether the land is delineated or not. But although the line shewing the limits of deviation may not be a delineation of the lands, it appears to me that the laying down on the deposited plan of a centre line and limits of deviation shews that Parliament considered land within such limits to be comprehended within the words “delineated and described,”—and that the words “delineated and described” should not, at least as regards the line itself, be construed as meaning only lands which are on the whole of each side bounded by a line. I therefore hold that for the construction of the railway itself, lands within the limits of deviation, although not so bounded, may be taken.

That disposes of all the plaintiffs' case as to all the parcels, except the few small parcels above-mentioned. I now proceed to consider the plaintiffs' case as to those small parcels. As regards one of those parcels, which was specified in the first notice to treat, and is therein numbered 35, the plaintiffs say it extends beyond the

(1) 6 Mee. & W. 320; s. c. 9 Law J. Rep. (n.s.) Exch. 232.

limits of deviation. Part of No. 35 on the deposited plan is within the limit of deviation, at least that part is included within what I have above decided against the plaintiffs. The other part is outside such limits. The plaintiffs, failing in their contention that no part of No. 35 is authorised to be taken, now say that, although so much thereof as is within the limits of deviation may be held to be authorised to be taken, such decision leaves open to them the contention—and they accordingly do contend—that there is no other land shewn by the company to be included in that No. 35; or, if there be, that a small parcel of land which the company have taken as being part of No. 35, is not shewn by the company to be within section 23 of the Act. The land No. 35 is, according to the deposited plan, land which is inclosed on all sides, except in parts of the south and east sides, there being no lines drawn on portions of the south and east sides. The plan X.W., above referred to, shews to what extent there is on the deposited plan a want of complete inclosure by lines of No. 35. The absence of such complete inclosure is similar in character to that already referred to as regards Nos. 6, 9 and 10; and the piece of land, No. 35, as to which the question now being considered arises, has been referred to, and may be conveniently described as being “the angular piece of land part of No. 35.” The contents of the whole of No. 35 and of the angular piece, and the length not inclosed by lines on the south and east, are as follows—The whole area of No. 35, treating it as comprising the angular piece of land, is 7a. 1r. 1p. The angular piece contains 1r. 11p., being about $\frac{1}{3}$ th of the whole quantity of 7a. 1r. 1p. The length of so much of the angular piece as is on the eastern side, and is not shewn on the deposited plain to be bounded by the road, is about two chains or forty-four yards. The length of so much of the angular piece as is on the southern side, and is not shewn in the deposited plan to have a boundary fence, is four chains and about sixty links, or about 100 yards. In considering this contention on the part of the plaintiffs, regard must be had to the way in which the

deposited plan is drawn as regards the lines bounding wholly or partially different parcels of land; not merely as regards the parcel 35, but other parcels, including some which I have specifically, above referred to, and numbered 6, 9 and 10. It must be assumed that I have rightly decided as to the parcels *within the limits of deviation*, but not wholly surrounded by lines; and it must be borne in mind what the object of deposited plans and books of reference is; such object being to give notice to the public, and landowners in particular, where the promoters of the company propose to acquire power to construct the railway and works. If the plaintiffs, who had notice of the bill in Parliament, and personally, or by their agents, examined the bill and the plans, and opposed the bill, and obtained the insertion in the Act of clauses for their protection, had not noticed by the plans and books of reference that the small piece of land in question might be taken, they had not the opportunity of objecting to the creation of compulsory powers in reference thereto. But if they had such notice, the company were entitled to take it. I cannot bring myself to believe that the plaintiffs had not such notice. I do not think it necessary to determine which, if any, of the several views that the witnesses have put forward as to the mode of completing the inclosure of land numbered, but not wholly surrounded by lines, is the correct one. I think no hard and fast rule can be laid down, but that each case must depend upon its own circumstances. Trying the question as if I were on the land, with the map and book of reference in my hand, and observing the extent in area and length which is uninclosed, as compared with that which is inclosed, and having regard to the actual position of the piece of land in question, and asking myself whether the piece of land in question is “*delineated and described*,” I say, “*It is*,” as those words are to be understood in construing this Act of Parliament. I consider that “*delineated*” cannot in this Act be interpreted to mean “*surrounded on every part by lines*.” I think it is manifest that a broader interpretation of it must be adopted in order to give effect to the Act. If it be neces-

sary to say what it does mean, I say I think it means, "*sketched or represented or so shewn that landowners would have notice that the land might be taken.*" Such, I think, is substantially the view taken by several competent witnesses who have given evidence in this case; but it is not upon their interpretation that I rest my decision. It was contended before me that the case of *Wrigley v. The Lancashire and Yorkshire Railway Company* (*ubi supra*) governs this case; but it does not seem to me that that is so. It appears, from the report of that case in the *Jurist* (*ubi supra*), that all the boundaries of the inclosure No. 71, within the limits of deviation, were duly marked, but that the land outside was undefined. There was, therefore, a complete close to which No. 71 might be referred, and no number applicable to the remainder, which was undefined. The actual facts of the case are not very clearly stated, and the two reports do not agree in the terms of the judgment. As to the piece of land No. 35, having regard to the purpose for which it was taken, namely, to form part of an altered road by means of which access to the plaintiffs' lodge has been afforded (to which I will more particularly refer in the observations I am about to make upon another objection by the plaintiffs to the company taking this piece of land):—And having regard to the very small marketable value of this piece of land, which value I am satisfied does not exceed 5*l.*:—It not having, as I think, any special value to the plaintiffs,—I should not, had I taken a different view to that I have already expressed, have given the plaintiffs relief in this suit.

The other objection raised by the plaintiffs to the company taking this part of No. 35, is this—They say it, or the greater part of it, is unnecessary and not required for the purposes for which the company are empowered to take land. The company have taken this land to form an embankment, being a diversion of the turnpike road from which one of the plaintiffs' lodges was entered. If this road had not been diverted, one of two things must have happened. The turnpike road must have been lowered or raised; so that it would, at the plaintiffs'

lodge, have been several feet below or above that lodge. To prevent this entrance being destroyed, the company diverted the road, considering themselves entitled so to do, under the 16th section of the Railway Clauses Consolidation Act. The plaintiffs preferred to be shut out from the road, and they say that the diversion of the road has not left them a convenient entrance by their lodge. The plaintiffs rely, in support of their contention, on the case of *The Queen v. The Wycombe Railway Company* (*ubi supra*), in which it was held that section 16 of the Railway Clauses Consolidation Act only authorised the diversion of a road when necessary for the construction of the railway. But in that case Lord Chief Justice Cockburn said (p. 320)—"But we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights of property which are interfered with, of those who have immediate access to the road, or persons using it, of necessity, in the ordinary course of their business." The observations of the learned Judges in that case must be read with reference to the case before them, in which the railway company was about to interfere, most materially, with the user theretofore enjoyed by certain persons of the old road. In the case of *Rangeley v. The Midland Railway Company* (*ubi supra*), affirming the decision of the Master of the Rolls, the railway, as laid down, would cross a highway. The company diverted it to a place where there was an authorised level crossing, that being more convenient than a bridge; and the Lords Justices Cairns and Selwyn held that that could be lawfully done. That case was recognised in *Earl Beauchamp v. The Great Western Railway Company* (*ubi supra*), in which the case of *The Queen v. The Wycombe Railway Company* (*ubi supra*) was cited, and in which it was laid down that diversion was lawful as well in the case of a diversion in respect of a private as of a public right. In that case Lord Justice Selwyn said, "*Rangeley v. The Midland Railway Company* (*ubi supra*) established that land might be taken for substituting a highway for the accommodation of the public in the place of another which

had been interfered with. Whether this is to be extended to private accommodation works is now the question. It has been argued not only that land cannot for such purposes be compulsorily taken, but that when it has been acquired it cannot be retained. Is there any distinction in the Acts between public and private works?" And he proceeds, "I think not; for under the 16th section of the Railway Clauses Act all accommodation works are classed together. The only remaining question, one of fact, is, whether this particular work which has been made "is an accommodation work connected with the railway. There cannot be any doubt that it is of a proper and reasonable character, and immediately connected with the railway." In that case the company was compelled to find an accommodation for a private individual. But that does not, I think, prevent that case being an authority in favour of the company in the present one. I also refer to the observations (not to the decision) of Lord Hatherley in the case of *The Attorney-General v. The Ely, &c., Railway Company* (2). Having regard to those authorities, I am of opinion that the objection I am now considering cannot be sustained. The plaintiffs say that the access left or provided for them by the diversion is insufficient and inconvenient. I am not much impressed with that statement; and at all events I think the plaintiffs may well be left to derive from it such advantage as they may be able, in the amount of compensation which they may obtain from the company. If I had not then overruled this objection, I should have considered that the plaintiffs were not entitled to avail themselves of it, having regard to the knowledge they had of the intended construction of the embankment (as appears from the affidavit of Mr. Wood, filed on the 18th of June, 1872), and to what I shall hereafter mention. In one of the letters set out in that affidavit, being the letter dated the 10th of November, 1871, from Mr. Wood to Mrs. Dowling, the writer, who had previously

left with Mrs. Dowling a plan shewing the diversion, stated, "The deviation in the turnpike road is made or to be made to suit your road, and not the public." That was in reply to a letter of Mrs. Dowling's, in which she said the road was no accommodation to her, but the reverse. But although the plaintiffs subsequently objected to the company taking any of these lands, they do not seem to have specifically objected to the diversion of the road. In the cross-examination of Mr. Dowling, referring to the proceedings in Parliament, he says, "The question of the injury to the lodge was considered, and the injury was to be prevented." It was with that view that the company took the piece of land in question, constructed the embankment, and diverted the road. It is further to be observed that part of this piece would under any circumstances have been required for the raising or sinking of the road, unless indeed perpendicular retaining walls had been built; a plan which I do not think it was incumbent on the company to adopt; not forgetting the case of *Coats v. The Clarence Railway Company* (*ubi supra*), and others of the same kind. The plaintiffs, in reference to the preservation of the entrance of their lodge, which can only be preserved by taking the piece of land in question, make a general statement in their bill, which is to this effect:—The mansion house which was externally restored and improved about thirty-five years ago, had large grounds attached to it, was situate in the turnpike road, leading from the town of Newport, in Monmouthshire, to the neighbouring town of Pontypool, and had an approach by a lodge entrance from that road, along a carriage drive, through the park, and up to the mansion house, and thence to another lodge on the road nearer to Pontypool.

The proposed railway of the company was intended to intersect the turnpike road at a distance of 100 yards, more or less, from the last-mentioned lodge, and unless the company were kept strictly within their powers, the entrance to the mansion house and park at that lodge might, and if the then plans of the company were adhered to, certainly would be

(2) 37 Law J. Rep. (N.S.) Chanc. 822; s. c. on app. *ibid.* 258; s. c. Law Rep. 4 Chanc. 194.

NEW SERIES, 43.—CHANC.

most seriously obstructed ; and the value, comfort, and enjoyment of the plaintiffs' estate and mansion house as a residential property, very prejudicially affected and impaired. It was the intention of the company, unless restrained, to raise the highway in order to carry it over their railway to an extent and in a manner which would be impracticable without infringing the provisions of the company's Acts, and without taking lands of the plaintiffs, part of their estate which the company were not authorised to take.

Notwithstanding that, the plaintiffs now virtually insist that the company should have so constructed their works as to block up the entrance to the lodge. In considering the other objections to the company taking this piece of land, No. 35, I have already mentioned the value of it.

I now proceed to consider the plaintiffs' case as to the pieces of land mentioned in the first notice to treat, and numbered 65 and 68. The plaintiffs say that these are not necessary or required for any of the purposes for which the defendants, the company, are empowered to take lands, having regard to the second sub-section of section 32 of the Act. The plaintiffs' contention is that these parcels of land are westward of the line of railway shewn on the deposited plan. A great deal of evidence has been entered into with reference to these parcels of land being or not being westward of the centre line referred to. It would at first sight appear that this was a very simple question of fact, capable of being disposed of by a measurement which might be made in a few minutes, and as to which there could be no mistake. But the difficulty which has arisen has been occasioned by a difference of opinion as to where the centre line referred to is, there being no fixed point specified in the Act from which the measurement is to be made to fix that centre. It appears to me that Parliament not having clearly defined the position of the centre line, the company should be held to be acting within their powers if they have taken their measurement from a point which competent engineers consider a proper point from which to admeasure to find the centre.

I think that the company have acted *bona fide* in this respect, and that the evidence shews they acted within their powers. Had I thought otherwise I should have had to consider and determine whether the *onus probandi* that the company was exceeding its powers, was not on the plaintiffs; considering that the 32nd section is a clause restrictive of the general powers given to the company, and is a contract for the benefit of the plaintiffs, of which they, by their contention, are in effect seeking the specific performance. If the *onus probandi* would lie on the plaintiffs, then, as I view the evidence in support of their case, it is not made out to my satisfaction. I certainly should not, had I not taken the view I have, have given the plaintiffs a decree founded on these objections without first obtaining the assistance of a competent person to fix the centre line of railway, and to make an admeasurement therefrom. I may add that, as regards these lands, their value does not exceed 2l., and they are of no special value to the plaintiffs. I may here observe that the railway is a considerable distance, and cannot be seen from the mansion house.

Another piece of land which the plaintiffs objected to the company taking is a piece of land, No. 34. The plaintiffs say that this is indispensable for the formation of the siding which the company are, by sub-section 2 of section 32 of the Act, bound to construct. As to that I am of opinion that the plaintiffs have not made out their case. On the contrary, I think it is shewn that a proper siding can and will be constructed without making use of this piece of land.

There remains one other piece of land which the plaintiffs object to the company having taken. The objection is this: that although the company are authorised to take it, the notice to treat did not include it. This piece of land is a piece of about eight perches; it is in the deposited plan numbered 38; it is situated in a corner of No. 37, and looking at the plan, had it not had a separate number, would well be included in No. 37. That appears from paragraph 34 of the affidavit of Mr. Wilson and Mr. MacIntyre, of the 3rd of March, 1874. The notice

to treat is set out in paragraph 7 of the bill. It describes the lands required to be taken thus: "The lands of which the particulars are contained in the schedule hereto, with the appurtenances, and which said lands so required are for the better description thereof delineated on the plan attached hereto and delivered herewith, and are therein distinguished by a red colour." In the schedule the number 38 is omitted; but that number is coloured red in the plan. This the plaintiff, Mr. Dowling, after much fencing with the questions put to him, was obliged to and did admit. It seems to me that, taking the notice and schedule and plan together, particularly having regard to the position in which No. 38 stood relatively and in connection with No. 37, a sufficient notice to take No. 38 was given. I think it clear upon the evidence that it was in fact valued by the valuers, and that there was paid into Court the price thereof, as well as of the other lands. It is to be observed that the value of this piece of land was not more than fifty shillings. That appears from paragraph 34 of the affidavit of Mr. Wilson and Mr. Macintyre above mentioned. I think I should also observe that Mr. Dowling and his solicitor were well aware that there was what they considered a defect in the notice, in not inserting in the schedule the number 38, but never called attention to it. It is also to be observed that in a plan annexed to the notice the several pieces of land are mentioned as containing 9 acres, 3 roods, and 16 perches, and that No. 38 is required to make up that quantity.

Mr. Hemming, in the course of his very able argument for the plaintiffs, dwelt much upon the rule that private rights are to be protected as against railway companies exceeding their powers, although the public may be thereby inconvenienced. He referred to *Raphael v. The Thames Valley Railway Company* (*ubi supra*), to which case I may add *Stretton v. The Great Western Railway Company* (3), and *The Attorney-General v. The Mid-Kent Railway Company* (4), and others; and he also mentioned a case

before Lord Westbury, which is not in the regular reports, at least I could not find it when I was looking for it, but which, I suppose, is in some of the other reports. However, the view which I have taken of the plaintiffs' case is in no way opposed to the rule referred to by Mr. Hemming. He also urged before me that unless I gave the plaintiffs a decree, I should be departing from the rule laid down in *Webb v. The Manchester and Leeds Railway Company* (5), and in which Lord Cottenham said, "If there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers, but they will get none from me by way of construction of their Act of Parliament." I may also refer to the case of *Lamb v. The North London Railway Company* (6), in which Lord Justice Selwyn said, referring to *Webb v. The Manchester and Leeds Railway Company* (*ubi supra*), that the burden lies on the company to shew that they are acting within their powers. There have been other cases in which the same rule has been laid down. I have not intended to depart, and I consider that I have not departed, from that rule. At the same time I may refer to what Lord Cottenham said in other cases. For instance, to the case of *The River Dun Navigation Company v. The North Midland Railway Company* (7), which preceded *Webb v. The Manchester and Leeds Railway Company* (*ubi supra*) where he said, "The case must be one in which the Court is very clearly of opinion that the company are exceeding the powers which the Act has given them." In *Swaine v. The Great Northern Railway Company* (8) and which was decided after *Webb v. The Manchester and Leeds Railway Company* (*ubi supra*), it would appear that it is very necessary for the Court to deal strictly with companies, and to prevent them, with the large powers that are given to them by Act of Parliament, from defeating the rights and interests of individuals. But it is also the duty of the Court to take care that, if in-

(3) 40 Law J. Rep. (N.S.) Chanc. 50.

(4) 16 W.R. 268.

(5) 4 Myl. & Cr. 116; s.c. 1 Railway Cases, 576.

(6) Law Rep. 4 Chanc. 522.

(7) 1 Railway Cases, 135.

(8) 33 Law J. Rep. (N.S.) Chanc. 399; on appeal from Wood, V.C., 9 Jurist, N.S. 1196.

dividuals avail themselves of any omission of any power on the part of the company, this Court should not assist those individuals in extorting money from the company. It is the duty of the Court in every case to steer clear of those two opposite extremes, and if there should be some omission which may give a party a legal right against a company, this Court should leave that individual to his legal means of taking advantage of it. I may also observe that the jurisdiction which this Court now has of giving damages in lieu of an injunction, might perhaps have been properly exercised in a case like the present, had I been in favour of the plaintiffs as to some one or more, or even of all the several pieces of land, which they allege that the company have improperly taken.

I may here refer, as bearing on that, to the case of *Wood v. The Charing Cross Railway Company* (9), and to some observations of Lord Hatherley in *Stretton v. The Great Western Railway Company* (*ubi supra*). In conclusion, it must be borne in mind, that the value of all the land of the plaintiffs outside the limits of deviation, taken by the railway company, and of which the lands in question are only part, is but very small, the whole being estimated as worth 25*l*.

The plaintiffs' bill in this suit must be dismissed with costs.

Solicitors—Messrs. Phillips & Son, for plaintiffs;
Messrs. Burchells, for defendants.

LORDS JUSTICES. } *In re* THE IMPERIAL RUBBER
 1874. } COMPANY (LIMITED).
 June 10. } BUSH'S CASE.

Contract—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25—*Fully Paid-up Shares—Registered Contract—Issue of Shares.*

The owners of certain works and patents agreed with T., the promoter of a company, to sell the same for a sum in cash and a number of fully paid-up shares in the company.

(9) 33 Beav. 290.

A contract was subsequently entered into between the vendors and the company by which the company agreed to purchase the property for a much higher consideration, including a larger number of fully paid-up shares, but it was arranged between the parties that the vendors should receive only the consideration mentioned in the original agreement, and that the excess should be received by T.

Accordingly the vendors received only the original consideration, and the directors passed a resolution that the additional shares should be allotted to T.

The contract was afterwards registered at the office of Joint Stock Companies. Subsequently T. transferred twenty of his shares to B. for value. It did not appear when these shares were actually allotted to T. But the certificates of them were dated after the registration of the contract:—

Held, that the contract registered was sufficient to satisfy the 25th section of the Companies Act, 1867.

Held also, that there was no evidence that these shares became the property of T. until the certificates were issued, and that accordingly they must be taken to be fully paid up shares, and the purchaser was not liable as a contributory in respect of them.

This was an appeal by the official liquidator of the above-named company from a decision of Vice-Chancellor Bacon, refusing an application to place the name of Mr. G. J. Bush on the list of contributors, in respect of twenty shares of which he was the registered owner.

The company was formed in October, 1868, with the object of purchasing the Lifford Mills india-rubber factory from Messrs. Mayall & Wilson. The nominal capital was 75,000*l*., divided into shares of 5*l*. each. Messrs. Mayall & Wilson entered into an agreement with Tucker, the promoter of the company, to sell their works and patents for 13,000*l*., of which 1,000*l*. was to be paid in cash, and the remaining 12,000*l*. in paid up shares.

Subsequently, by a contract in writing made between Mayall & Wilson and the company, and dated the 25th of January, 1869, Mayall & Wilson agreed to sell their said works and patents to the company for 30,000*l*., of which 2,000*l*. was to be paid

in cash, and 28,000*l.* in fully paid up shares. But it was arranged between the parties that Mayall & Wilson, the actual vendors, were to receive only the 1,000*l.* cash, and 12,000*l.* in shares, for which they had agreed with Tucker to sell the property, and that the other 1,000*l.* cash and the additional shares, which formed the balance of the consideration to be paid by the company, should be paid and allotted to Tucker.

At a meeting of the directors held the same 25th of January, 1869, it was resolved "that the shares agreed to be paid to Mayall & Wilson be at once allotted, and that the secretary be instructed to prepare the certificates to be handed over on the execution of the transfer." And on the same day an entry was made in the journal of the company that 2,400 shares had been allotted to Mayall & Wilson, and 3,200 to Tucker as their nominee.

The deed conveying the Lifford Mills and other property to the company was dated the 1st of February, 1869.

On the 24th of March, 1869, the contract of the 25th of January, 1869, entered into between Mayall & Wilson and the company, was filed with the Registrar of Joint Stock Companies.

The certificates of the shares issued to Tucker bore different dates, but those of the twenty shares now in question were dated the 7th of April, 1869. These last mentioned shares were in March, 1870, sold by Tucker to Mr. Bush as fully paid up shares, and the transfer was registered on the 21st of March, 1870. On the 7th of April, 1870, Bush received from the company a certificate for these shares which stated them to be fully paid up.

The company having been ordered to be wound up the official liquidator placed Mr. Bush's name on the list of contributories in respect of these twenty shares. Mr. Bush objected to this, and upon the case having been adjourned into Court, Vice-Chancellor Bacon ordered his name to be taken off the list of contributories. From this order the official liquidator now appealed.

Mr. Swanston and Mr. Graham Hastings (with whom was *Mr. Ince*), for the appellant.—The question is whether the registra-

tion of the contract between Mayall & Wilson and the company was sufficient to satisfy the 25th section of the Companies Act, 1867 (30 & 31 Vict. c. 131). We say that that section has not been complied with, because the real agreement for the purchase of the property was not that which was registered; there really was no contract made in the terms of that which was registered. But even if the registration of such a document were sufficient, the shares were issued before the registration. Tucker became absolutely entitled to these shares on the 25th of January, at any rate on the 1st of February, 1869, when the deed of conveyance was executed. The issue of a share within the meaning of the 25th section is the date of allotment—

Maynard's Case, ante, p. 146; s. c. Law Rep. 9 Chanc. 60.

The issue of the certificate is quite another thing, and is mere evidence of title. Bush cannot be in a better position with regard to these shares than Tucker was. The doctrine of purchaser for value without notice, cannot be applied to shares which are *choses in action*—

Phillips v. Phillips, 4 De Gex, F. & J. 208; s. c. 31 Law J. Rep. (N.S.) Chanc. 321.

The burden is on Bush to shew that these shares are to be taken as fully paid up under the 25th section. If he is obliged to pay he can recover from Tucker.

Mr. Kay and Mr. Romer, for Mr. Bush, were not called upon.

JAMES, L.J.—This is an idle and vexatious appeal. Mr. Bush was the holder of transferred shares, which he bought from a person recognised as the holder of them. He received from the company a certificate upon which it was stated that they were fully paid up. The 25th section of the Act certainly says that shares so issued shall be deemed unpaid unless there is a contract duly made in writing, and filed with the Registrar of Joint Stock Companies to shew the contrary; but here there is a contract in writing made between the company on the one side and the vendors on the other, which is connected with these shares, and in that contract it is said that certain shares, in-

cluding these shares, are to be fully paid up shares, and to be taken as part of the purchase money, and that contract was registered. There is no evidence that the shares ever left the control of the company or ever became the property of Mr. Tucker until the certificate was issued to him. Tucker had then a perfect title and Bush bought from him. Under those circumstances it would be an act of the grossest injustice to Mr. Bush if we were to endeavour to render him liable on these shares.

I am bound to express my regret that liquidators should think that the object of the 25th section is to enable innocent people to be made liable to pay money which it was never intended they should pay. The appeal must be dismissed with costs.

MELLISH, L.J., concurred.

Solicitors—Messrs. Harper, Broad & Battecock, for the appellant; Messrs. Linklater, Hackwood, Addison & Brown, for Mr. Bush.

LORDS JUSTICES. }
1874.
April 29. }

MARZIALS v. GIBBONS.

Copyright—5 & 6 Vict. c. 45. s. 4—Extension of Term—Owner—Benefit to Author.

A committee of seven persons on behalf of a religious body compiled a hymn-book, which was registered under 54 Geo. 3. c. 156 as the property of the compilers, but was published by and sold for the benefit of the religious body. No minute of consent having been registered under the Act of 5 & 6 Vict. c. 45,—Held, that the term of the copyright had not been extended under that Act, but ceased on the death of the last survivor of the seven compilers.

This was an appeal motion from the Master of the Rolls.

In 1831 seven persons, acting as a committee of the Wesleyan Conference, the governing body of the Wesleyan Society, compiled a hymn-book, styled "A Collection of Hymns for the use of the people

called Methodists, with a Supplement." The body of the book consisted of hymns which had previously been published by John Wesley, but the supplement, containing a number of other hymns, was quite a new compilation. The book was published and sold by the Conference, who had the entire disposition of the profits for charitable or religious purposes, the compilers having no beneficial interest therein.

On the 15th of September, 1831, the book was registered at Stationers' Hall, in accordance with the provisions of the Act 54 Geo. 3. c. 156, as the property of the seven compilers.

The last survivor of the compilers, Thomas Jackson, died in 1873, having by his will appointed the plaintiff, T. P. Marzials, his sole executor.

W. Gibbons and John Haddon, the defendants, in the beginning of 1874, published a cheaper edition of the hymn-book, entitled "A New Copyright Edition of the Wesleyan Methodist Hymn-book," and the plaintiff filed this bill, and made an interlocutory application to the Master of the Rolls for an injunction to restrain the defendants from publishing the same. This the Master of the Rolls refused to grant, and the plaintiff now appealed.

Mr. Fry and Mr. Bunting appeared for the plaintiff, and contended that the copyright which the seven compilers had, had been extended, by 5 & 6 Vict. c. 45. s. 4, for an additional term of seven years, commencing from the death of the survivor in 1873. The plaintiff, as the legal personal representative of the last survivor of the compilers, was, they submitted, the owner of the copyright, for the Conference themselves were only trustees for the charity. It was a mere slip that the minute of consent had not been entered.

Mr. Southgate and Mr. Millar, for the defendants, were not called upon.

LORD JUSTICE JAMES.—I am afraid that I must come to the same conclusion as the Master of the Rolls, and with the same regret as he expressed.

At first sight it may not appear why the Wesleyan body should not have the benefit of this Act as well as any other owner of a copyright. But we must

look at what was the origin and object of the Act. First, its object was to afford greater encouragement to the production of literary works of lasting benefit to the world, and the third section, therefore, extended the duration of the term of copyright for the future. Then the Legislature thought that the benefit ought to be extended to existing copyrights, and therefore, intending to benefit the author or his representatives only, they made the retrospective provision contained in the fourth section.

That section enacts "that the copyright which at the time of the passing of this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended to and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing this Act shall be the proprietor of such copyright."

In this case the copyright had not in terms passed out of the original owner, and would have been, as Mr. Fry has argued, the property of the plaintiff, as the legal representative of his testator, if he was the proprietor at the passing of the Act. It was essential to his title to make out that he was the proprietor at that time. But was he the proprietor? because section 4 goes on, "Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act." In my opinion it did not belong to him at all, and therefore it did not belong to him in whole or in part. Then Mr. Bunting urged, and with some plausibility, that there is no person to whom it belongs, that it was simply a charity or trust from the outset. But I do not think that that argument will really avail him, because the meaning of the proviso in the section is that where the author is not the sole and absolute owner of the copyright, and has not given it for natural love and affection, the Act shall not apply, unless the author for his own benefit shall, before the ex-

piration of the existing copyright, have entered into an agreement with the then owner. That was not done here. The real owner is not the author. The plaintiff does not claim any beneficial interest, and there has been no such minute of consent as required by the Act entered at the proper registry.

The words of the statute appear to me too strong to be got over. Of course, such a case as this was never contemplated by the Legislature. It was not thought of at the time by the Wesleyan Society, otherwise they might have got over the difficulty by treating the Conference, or some one on behalf of it, as the beneficial owner, as it probably might be treated for the purposes of this Act.

But having regard to the words of this 4th section, I am of opinion that the Master of the Rolls made the right order, and that this appeal motion must be refused with costs.

Solicitors—Messrs. Walker & Battiscombe, for plaintiff; Messrs. Watson & Sons, for defendants.

MALINS, V.C. }
1874.
April 17. }

PERRING v. TRAIL.

Mortmain—Will—Legacy to Charity payable out of Realty and Personality—Statutory Power to acquire Lands—Implication of Power to devise Lands—Westminster Hospital; 6 Will. 4. c. xx.

A statute which in terms conferred upon a charity the power to acquire real estate by will, was held by implication to empower testators to devise real estate to the charity, and the charity was held entitled to have a legacy payable out of mixed realty and personality paid in full, although the pure personality was insufficient.

Mr. John Perring, by his will, dated the 28th of August, 1863, gave all his real and personal estate to trustees upon trust for sale and conversion; and upon trust out of the proceeds, after payment of his debts, to pay numerous legacies to charities, amongst which was a legacy of

100*l.* to the treasurer for the time being of the Westminster Hospital. The pure personal estate of the testator was insufficient to pay the charitable legacies in full; a suit was instituted to administer the testator's estate, and it now came on for hearing upon further consideration, when the only question argued was whether the Westminster Hospital was not, under the terms of its Act of Incorporation (6 Will. 4. c. xx.), entitled to have the amount of its legacy made up out of the impure personal estate of the testator, which consisted of the proceeds of leaseholds.

The Act in question in section 1, after incorporating the president, vice-presidents, treasurers and governors of the hospital as a body politic, enacted that they should be able and capable to hold and retain, for the purposes of the hospital, without incurring the penalties or forfeitures of the statutes of mortmain, the hospital and grounds in Broad Sanctuary and James Street; "and by will, gift, purchase or otherwise to obtain, acquire, hold and retain, for the purposes of the said hospital, any manors, messuages, lands, tenements and hereditaments of any kind, name, quality or sort, either in fee or for terms of life or years or otherwise howsoever, so as such manors, messuages, lands, tenements and hereditaments" (exclusive of the hospital grounds and any hereditaments vested in the corporation by way of mortgage), should not in the whole exceed the clear yearly value of 20,000*l.* "And also by will, gift, purchase or otherwise to obtain, acquire, hold and retain, for the purposes of the said hospital, any kind of personal estate, and any moneys and property of what nature or kind soever, including money secured on mortgage of or charged on any manors, messuages, lands, tenements or hereditaments."

Mr. Glasse and *Mr. W. W. Karlake*, for the plaintiff.—The Act does not appear to go far enough. It empowers the hospital to hold lands, but does not empower persons to devise lands to it. They referred to

Nethersole v. The School for the Indigent Blind, Law Rep. 11 Eq. 1;

Chester v. Chester, Law Rep. 12 Eq. 444;

Robinson v. The Governors of the London Hospital, 10 Hare 19, 25; s. c. 22 Law J. Rep. (N.S.) Chanc. 754;

Mr. W. S. Owen, for the defendants.

Mr. Hull and *Mr. Oates*, for other charities.

Mr. Phear, for the Westminster Hospital.—The Act expressly empowers the hospital to acquire real estate by will, which was not the case in

Nethersole v. The School for the Indigent Blind (*ubi supra*)

and

Chester v. Chester (*ubi supra*);

and to hold that this did not empower persons to devise land to it would be to render the Act nugatory.

Mr. Glasse in reply.

MALINS, V.C., said—How were this corporation to acquire lands by will if no one could give them lands by will? He must put a rational construction upon the Act, which would give effect to its words. There being an express power given to the corporation to acquire by will any lands of any tenure, it would be rendering the Act nugatory to hold that this did not empower persons to give by will that which the corporation were empowered to take by will. This power was, it was true, conferred in more express terms in the case of *Robinson v. The Governors of the London Hospital* (*ubi supra*), but his Honour thought that the words were sufficient in the present case, and there must be a declaration that the Westminster Hospital was entitled to receive its legacy in full.

Solicitors—*Mr. T. Sismey*, for plaintiff; *Mr. Henry Cockle*, for defendants; *Messrs. Fladgate, Clarke & Smith*, for the Westminster Hospital.

JESSEL, M.R. }

1874.

August 5.

AYNSLEY v. GLOVER.

Light and Air—Enlargement of Windows—User of Room—Damages—Cairns' Act, 21 & 22 Vict. c. 27—Undertaking to pull down.

The fact that an owner of ancient lights has enlarged his windows does not disentitle him to an injunction to protect the ancient lights.

In a light and air case it is immaterial that the plaintiffs are using the premises affected for a purpose for which light and air are unnecessary. It is sufficient that the premises are capable of being used for purposes requiring light and air.

Wherever a plaintiff would recover substantial damages at law he has a right to sue in a Court of Equity, but there may be cases where the Court of Equity will exercise the power conferred on it by Cairns' Act, 21 & 22 Vict. c. 27, and give damages instead of an injunction.

But the Court will not let the defendant gain an advantage in this respect by refusing an interlocutory injunction, and merely putting him on an undertaking to pull down if ordered at the hearing.

This was a motion for an interlocutory injunction in a light and air case.

Mr. Southgate and Mr. Keary appeared for the plaintiffs.

Mr. Roxburgh and Mr. Oracknall, for the defendants.

The injunction was resisted on four grounds—

First. The defendants shewed that the plaintiffs had enlarged their ancient lights, and objected that the effect of an injunction would be to turn their modern lights into ancient ones. On this point they cited—

Heath v. Bucknall, 38 Law J. Rep. (N.S.) Chanc. 372; s. c. Law Rep. 8 Eq. 1,

in opposition to which the plaintiffs relied on—

Staight v. Burn, 39 Law J. Rep. (N.S.) Chanc. 289; s. c. Law Rep. 5 Chanc. 163,

and

Tapling v. Jones, 34 Law J. Rep.

NEW SERIES, 43.—CHANC.

(N.S.) C.P. 342; s. c. 11 H. L. Cas. 290.

Secondly. The defendants contended that the plaintiffs' room was a smoking room and only used for purposes for which light and air were unnecessary, and cited accordingly—

Jackson v. The Duke of Newcastle, 33 Law J. Rep. (N.S.) Chanc. 698, in opposition to which the plaintiffs contended that it was sufficient that the room might be used for purposes requiring light and air, and cited—

Yates v. Jack, 35 Law J. Rep. (N.S.) Chanc. 539; s. c. Law Rep. 1 Chanc. 295;

Dent v. The Auction Mart Company, 35 Law J. Rep. (N.S.) Chanc. 555; s. c. Law Rep. 2 Eq. 238,

and

Martin v. Goble, 1 Campb. 320.

Thirdly. The defendants submitted that it was not a case for an injunction at all, but that the plaintiffs should be left to sue for damages at law; or at most that the Court would give them damages in equity in lieu of an injunction. They cited on this point—

The Attorney-General v. Nichol, 16 Ves. 338.

Fourthly. They submitted that they ought to be allowed to continue their buildings on an undertaking to pull them down if so ordered at the hearing. On this point reference was made to—

The Curriers' Company v. Corbett, 2 Dr. & S. 355; s. c. on appeal 13 Law Times, N.S. 154.

THE MASTER OF THE ROLLS.—Mr. Southgate, I will not trouble you further upon the present occasion, whatever may happen at the hearing.

It is very greatly to be lamented that the views of the various branches of the Court of Equity have differed so immensely upon this question of ancient lights.

I wish to state my own views clearly, so that if they are wrong they can be corrected elsewhere, and if they are right they may serve as a guide for the future.

Now first of all this case is a simple one as regards the facts. The defendant is about to build opposite some windows

of the plaintiffs, which for this purpose at the moment I will assume are ancient lights, a wall at a distance of three feet which will be thirty-six feet high. The sills of the windows in question, or at least the most important of them, being eleven feet above the ground, of course it is obvious and it has not been denied by counsel for the defendants that such a wall as that must seriously and materially impede the access of light to these windows. Upon that point we are fortunately in this case not subject to any conflict of evidence or to any dispute whatever.

The next point that is raised by the defendant is this, that the title of the plaintiffs to these ancient windows or alleged ancient windows is not clearly proved. I think it is sufficiently proved for the purpose of an interlocutory injunction, that is, I do not hold it to be as conclusively proved as that the defendants may not be able to disprove it hereafter, but upon the present evidence it is proved to my mind, and if no further evidence is adduced at the hearing I shall hold it clearly proved at the hearing. That is what I mean by saying it is sufficiently proved for the purposes of an interlocutory injunction. As regards the smaller windows, the ones below, they appear to be ancient windows, but they appear to have been severally enlarged, I should think nearly doubled in size. The question remains whether the material portion of them, about half, is not ancient lights. Upon this there is the evidence of a man who proves most conclusively, if he is worthy of credit, that they are. The only objection raised by the defendant is that from some period, from 1842, giving them the earliest time, there has been a joint occupation of a piece of land upon which the defendant is about to build with the public-house or inn belonging to the plaintiffs. That is disputed. The plaintiffs say that that joint occupation only began in 1861. Whether it began in 1861 or in 1842, there is an old witness on the part of the plaintiffs who says that these windows were there before that. Therefore the antiquity of the lights does not depend upon this disputed question of joint occupation.

That being so, I hold it proved that the plaintiffs have ancient lights, but altered no doubt as regards the material lights in a very substantial manner.

Now the first question I have to decide is whether by reason of this alteration the plaintiffs are deprived of their right to an injunction.

No doubt if the case of *Heath v. Bucknall* (*ubi supra*) were well decided, and there were no other cases upon the subject, I should still have great difficulty in holding that the plaintiffs are not so entitled. The principle of that case appears to me to be this, that when the plaintiff has altered his ancient lights materially and in such a manner that the defendant cannot obstruct the additional or new lights without to some extent obstructing the ancient lights, so that by reason of the alteration the plaintiff must in time, that is in twenty years, gain a right to the new lights or additional lights similar to that which he enjoyed as regards the ancient lights, then it is said the Court of Equity will not interfere at the instance of the plaintiff to grant an injunction which will in effect not only preserve the ancient lights, but enable him to acquire a title to the new lights. That is the principle as I understand it of *Heath v. Bucknall* (*ubi supra*). But *Heath v. Bucknall* (*ubi supra*) was in my view of the case overruled by the case which came before Lord Justice Giffard of *Staight v. Burn* (*ubi supra*). In the case of *Staight v. Burn* (*ubi supra*), Lord Justice Giffard says this—"But if this case," that is *Heath v. Bucknall* (*ubi supra*) "is supposed to lay down the proposition that a plaintiff who according to *Tapling v. Jones* (*ubi supra*) has clear legal rights cannot come to this Court and get protection for those rights, I entirely demur to such a conclusion. If for instance there is a house with these ancient windows, and it is desirable to add at no great distance from those three ancient windows two other windows, is it to be said that because those two other windows are to be placed in that position, the plaintiff is not to come into Court to preserve what has been decided in *Tapling v. Jones* (*ubi supra*) to be his clear legal right? Such a conclusion would not be

either according to principle or to the course of this Court. I take the course of this Court to be that when there is a material injury to that which is a clear legal right, and it appears that damages from the nature of the case would not be a complete compensation this Court will interfere by injunction." (Law Rep. 5 Chanc. 167.) That amounts in my view of the case to a decision to this effect, that although by alteration of the windows themselves, that is by adding new lights close to the old windows, the plaintiff has altered the quantity of access of light, yet according to the decision in *Tapling v. Jones* (*ubi supra*), he is still entitled to damages at law for any injury done to the ancient lights; and being so entitled, if his case is otherwise one in which a Court of Equity would grant an injunction, his title to that injunction is not affected by the circumstance either that he has added to the windows, that is the ancient lights themselves, or made new windows in close proximity to the ancient windows. Therefore following the decision of the Lord Justice, which indeed I am bound to follow, and considering, whatever he said, that he meant to overrule *Heath v. Bucknall* (*ubi supra*), and that the principle which he has enunciated is not reconcilable with the principle upon which I consider *Heath v. Bucknall* (*ubi supra*) to be decided, I consider the defence which has been urged upon me arising from the case of *Heath v. Bucknall* (*ubi supra*) cannot be sustained. That disposes of the first objection.

The next objection is one which does not, I think, arise upon the evidence as it stands. It may arise hereafter. The only evidence I have got really is the description on the plan which calls it a "smoke room," which I am told means a smoking room, but there is no distinct evidence as to the use to which the room has been put. It is said, however, that if it is used as a smoking room the injury to the light, great and material though it be, will not be such as to interfere with the comfort of those who use the room as a smoking room. That may or may not be the case; as I said before, there is no distinct evidence upon the

subject; but even if there were I do not think it would make any difference. Here again we have a great conflict of authority. There is no doubt that in the case of *Jackson v. The Duke of Newcastle* (*ubi supra*), Lord Westbury decided, upon an interlocutory application, that if you did not interfere with the use of the room for the purpose for which it was then being used, that is, did not interfere materially, no injunction ought to be granted by this Court, and that the Court could not look at any future use to which the room might be applied. That I may observe was a case of a tenant; the reversioner does not seem to have been a defendant to the suit. If *Jackson v. The Duke of Newcastle* (*ubi supra*) were law, and if it had been proved satisfactorily in this case that this room was used as a smoking room, and the comfort of those using it would not be materially interfered with, then I should not be able to grant an injunction. But I must express my decided opinion that *Jackson v. The Duke of Newcastle* (*ubi supra*) is not law. Of course I should have no right to say so if there had been no other decision of equal jurisdiction, but there is such a decision and it is a decision of Lord Cranworth subsequent in point of date. *Yates v. Jack* (*ubi supra*) was entirely in conflict with the decision of Lord Westbury in *Jackson v. The Duke of Newcastle* (*ubi supra*). What Lord Cranworth says is this—"The right conferred or recognised by the statute 2 & 3 Will. 4. c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence, unless he had shewn that for whatever purpose the plaintiffs might wish to employ the light there would be no material interference with it."

That I think is a correct interpretation of the law, and, if indeed I thought otherwise, it being a later decision of the Lord Chancellor, I should be bound

to follow the later decision. I may mention, although it is not conclusive, that Lord Hatherley, when Vice-Chancellor, had occasion to consider the decisions both of *Jackson v. The Duke of Newcastle* (*ubi supra*), and of *Yates v. Jack* (*ubi supra*), and he certainly adhered, and so far of course as Vice-Chancellor he was bound to adhere, but he expressed an opinion in favour of the view taken by Lord Cranworth in *Yates v. Jack* (*ubi supra*), *Dent v. The Auction Mart Company* (*ubi supra*). If the authority wanted to be strengthened in order to be binding upon me, which it does not, I might refer to the view expressed by Vice-Chancellor Wood. That disposes of the second ground.

I might mention that that very point of *Jackson v. The Duke of Newcastle* (*ubi supra*) is actually in Coke's Reports. It is *Luttrell's Case* (1), and there are some remarks in it upon easements generally and upon the mode of their destruction which bear upon all these cases. The real point there was that fulling mills could be altered so that they would retain the same rights, whether it was a fulling mill or a grist mill or anything else. "So that the mill is the substance and thing to be demanded, and the addition of grist or fulling are but to shew the quality or nature of the mill, and therefore if the plaintiff had prescribed to have said watercourse to his mill generally (as he well might), then the case would be without question that he might alter the mill into what nature of a mill he pleases, provided always that no prejudice should thereby arise either by diverting or stopping of the water as it was before; and it should be intended that the grant to have the watercourse was before the building of the mills, for nobody will build a mill before he is sure to have water, and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure as is aforesaid; so if a man has estovers either by grant or prescription to his house, although he alter the rooms and chambers of his house as to make a parlour where it was the hall, or the hall where the parlour was,

and the like alteration of the qualities and not of the house itself—that means the qualities of the rooms and not of the house itself—and without making new chimneys by which no prejudice occurs to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed; and although he builds a new chimney or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys or in the part newly added; the same law of conduit and water pipes, and the like; so if a man has an old window to his hall and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house." It appears, therefore, in Coke's time that they took that view of the alteration of a room. Now in the case of *Dent v. The Auction Mart Company* (*ubi supra*), the Vice-Chancellor had to consider what might possibly be the result of that, and he says this at page 249 (Law Rep. 2 Eq.)—"I observe also that in *Yates v. Jack* (*ubi supra*) the Lord Chancellor considered that it was no answer to a plaintiff complaining that his light had been obstructed to shew that other persons had been able to carry on trade successfully with less light than would remain to the complaining party after the obstruction had been set up. Further than that, he says (which perhaps, if I may be allowed to say so, is going a little beyond what as far as I am aware any previous case has decided) that the plaintiffs' right to an injunction does not depend on the obstruction being injurious to them in the trade for which they actually used the premises, but is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it had been used. Now that observation certainly goes further than any case has gone since it was decided in *Martin v. Goble* (*ubi supra*) that property which has been used for a malt-house could not claim the same privilege as if it had been used for a dwelling house. But the two authorities may be easily reconciled by saying that the Lord

(1) 4 Rep. 87 A.

Chancellor's observations may apply to the user of an house as it stands for any purpose for which it may be used in that condition, not to the user of a house when its whole character has been changed and it has been rebuilt leaving the old windows untouched as in the malt-house case." So that without going into it the Vice-Chancellor has taken the same view as was taken in Coke's reports, that you may certainly alter the use of the rooms. He then continues—"But the doctrine has an application to the case before me on the contested question of the sample room. Although I think upon the evidence there is very little doubt that the room in Messrs. Dent's case has been occasionally used as a sample room, the observations of the Lord Chancellor would apply to this, that if the Messrs. Dent were minded to use it as a sample room it is immaterial whether they have been so using it for the last several years or not." Therefore I think it must be settled, or considered settled, at all events in a case when the reversioner is a party, that the change of use of a room will not deprive the party complaining of his right to the access of light, and conversely, in considering the injury to the light, the Court is bound to consider that the room may be used for some other purpose than that for which it is used at the moment when the injunction is applied for.

Now the next point is a serious one—In what cases is the Court to grant an injunction at all? It has been argued before me that no case of irremediable damage has been shewn and nothing for which pecuniary compensation will not be sufficient. That of course is a very important point. I have upon previous occasions, and I shall for the future, unless my decision upon this point is reversed by the Court of Appeal, follow the decision of Vice-Chancellor Wood in *Dent v. The Auction Mart Company* (*ubi supra*).

It must not be forgotten that whatever observations fell from Lord Eldon in the case of *The Attorney-General v. Nichol* (*ubi supra*), or from Lord Westbury in *Jackson v. The Duke of Newcastle* (*ubi supra*), it is now settled law, as laid down in *Back v. Stacey* (2), with the (2) 2 C. & P. 466.

slight alteration of the single word "or" into "and." In order to give a right of action and sustain the issue there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done." Now that is necessary in order to get damages at law. Whether it was always so I am by no means sure. If that is necessary to get damages at law, those are the very circumstances which entitle the plaintiff to an injunction in equity, subject to this, that the damages must be substantial, though one can hardly conceive a case in which, if the doctrine of *Back v. Stacey* (*ubi supra*) is well founded, and I believe it is, and it has been followed, the tenant in possession would not get substantial damages. The only case in which I conceive there would be damages not substantial would be the case of a reversioner, who would not sustain any immediate damage, and who might bring an action to try the right. Then Vice-Chancellor Wood says (Law Rep. 2 Eq. 246)—"Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty that in Equity we must not always give relief (it was so laid down by Lord Eldon and by Lord Westbury) when there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this—that where substantial damages would be given at law, as distinguished from some small sum of 5*l.*, 10*l.*, or 20*l.*, this Court will interfere; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour, have a right to purchase him out, without any Act of Parliament for that purpose having been obtained."

Therefore it seems to me that that gives you a reasonable rule, and that rule is reasonable whatever the law may have been in former times. An action could have been maintained at law for a bare obstruction, but since the case of *Back*

v. Stacey (ubi supra), it can no longer be maintainable, as I understand it now. I shall so decide, unless their Lordships ultimately decide differently, that whenever an action can be maintained at law, and really substantial damages—considerable damages; some people may say that 20*l.* is substantial damages—can be recovered at law, then the injunction ought to follow, generally, in Equity; not universally, because I have something to add upon that subject. In this case I do not think that anybody would doubt the damages would be substantial. It would, in fact, destroy the use of the room altogether, it would so darken it that, perhaps, it might be used for a cellar or a similar purpose, where no light was required; but for ordinary purposes it would destroy the ordinary use of the room.

The next point urged by the defendants was this—they said, "At all events, this being an interlocutory application, let us continue our building, and we will undertake to pull down, if the Court shall so think fit." That is a very specious argument to address to the Court, but we must have regard to the effect of allowing such a proceeding. Supposing a defendant erects a building at great cost, when he comes to the hearing he will say to this Court—"Compare the injury to me in pulling down the building with the injury to the plaintiff in allowing the building to remain." Ought or ought not the Court to give weight to such a suggestion? I think upon this point the observations of Vice-Chancellor Kindersley in the case of *The Curriers' Company v. Corbett (ubi supra)* are very important. The Vice-Chancellor says—"If the defendants' buildings had not been completed there would have been ground for interference by injunction; but as they have been completed, the question is whether the Court ought to or would order the pulling down of the buildings, or give compensation in damages. The defendants' new buildings are of considerable magnitude and importance, while the two houses of the plaintiffs are comparatively of small value and importance, and it has been decided that in such a case the Court will not, as a matter of course, order the de-

fendant to pull down his new buildings, but will give to the party injured by the erection of those buildings compensation in damages. It appears to me that this is precisely one of such cases." Consequently the learned Vice-Chancellor considered that the buildings being erected, the difference of the comparative value of the defendants' buildings and the plaintiffs' was sufficient to induce him to refrain from granting an injunction in a case where, if the buildings had not been erected, he would have granted the injunction.

Well now, if that is so, and if those considerations are to weigh with the Court upon the question of damages or injunction, I ought not to allow the defendant to proceed with his building, which will put him in such an advantageous position as regards the plaintiffs when the case comes to a hearing. I may mention that in this particular case I have an additional reason; the plaintiffs gave notice to the defendant in October of last year, but he chose, for some reason or other, to begin building on the 18th of July of this year. Therefore if he can wait from October to July before he commences to build, he can very well wait till November before he goes on with the buildings.

There is only one other point remaining, that is this—I was strongly urged by the defendant to say that this was a case of injury of such a nature that the Court would at the hearing (I suppose that is what he meant) not grant an injunction but give damages. It is necessary to consider a point which I have previously considered, and on which I know I have expressed previously an opinion, namely, the effect of the Act commonly called Lord Cairns's Act as to the jurisdiction of this Court. Now it appears to me that the second section of that Act gave a new power to the Court of Chancery. The words are these—"In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, it shall be lawful for the said Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction." Now the first remark upon that is this, it only

arises when the Court of Chancery has jurisdiction to grant an injunction. It can only apply to those cases in which the Court could have granted an injunction at all events, at the time of the passing the Act; and if the Court could have granted an injunction, it ought to have granted the injunction. Therefore it must apply to cases in which, before the passing of the Act, the Court would have granted an injunction, and it gives, therefore, a new power to the Court, purely discretionary. The words are, "if it shall think fit," to substitute damages in some one or more cases in which, before the passing of the Act, this Court would grant an injunction. No doubt this power was only to be exercised at the hearing, and not upon interlocutory application, from the nature of the case, and it will deserve the most serious consideration hereafter as to what class or classes of cases this enactment is to be held to apply to. Although in terms so wide and so large, it never could have been meant, and I do not suppose it will be ever held to mean, that in all cases the Court, of its own will and pleasure, at its own mere caprice, will substitute damages for injury sustained. That cannot be. It must be for the Court to decide, upon consideration, to what cases the enactment should be held to apply. In the case of *The Curriers' Company v. Corbett* (*ubi supra*) we have an instance in which a Judge has said the Act ought to apply. In some cases—I had one before me in which, there being a very comparatively trifling injury, although sufficient, perhaps, to maintain an injunction, comparing the injury inflicted upon the defendant, I thought, under the special circumstances of the case, damages should be given instead of granting an injunction. I am not now going, and I do not suppose that any Judge will ever do so, to lay down a rule which, so to say, will bind the hands of the Court. The discretion being a reasonable discretion I think it should be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes exerted,

and the purpose to which suits are put, by which a plaintiff is enabled, I do not like to use the word extort, but to obtain a very large sum of money from the defendant, merely because the plaintiff has a legal right to an injunction. I think it was meant, in some sense or another, to prevent that course being successfully adopted. But there may be some other special cases, in addition to those mentioned by Vice-Chancellor Kindersley, and those I have myself mentioned, to which the Act may be safely applied. I do not intend to lay down any rule upon the subject. If I had found by the evidence that there was in this case a clear instance of a very slight damage to the plaintiff, that is something over 20*l.*, 30*l.*, or 40*l.*, but still very slight, and a very large material substantial damage to the defendants, I should be disposed to hold that that was a case in which this Court would decline to interfere by injunction, having regard to the new power conferred upon me by Lord Cairns's Act to substitute damages for it. As I do not, however, consider such a case proved now, whatever may happen at the hearing, I shall simply grant an injunction in the usual terms until the hearing on further order, and I will, upon the application of either party on or after November, advance the hearing of the cause.

Solicitors—Messrs. Wedlake & Letts, agents for Messrs. Keary & Marshall, Stoke-upon-Trent, for the plaintiffs; Mr. F. C. Greenfield, agent for Mr. E. Young, Longton, for the defendants.

MALINS, V.C. } QUINTON AND OTHERS v. THE
1874. } MAYOR, ALDERMEN AND
Feb. 28. } BURGESSES OF BRISTOL.

Local Board of Health—Power to take Lands—Public Improvements—Right to take more Land than actually wanted for Works.

A corporation being, as the sanitary authority for a city, duly empowered to take certain lands specified in the schedule to their provisional order, for the purpose of public improvements, served notice to treat in respect thereof upon the trustees of a charity, who were the owners of the lands.

The lands comprised in the notice were more than were actually required for the purpose of the works :—Held, that the cases deciding that a railway company cannot take compulsorily more land than is actually required for its works did not apply to a corporation taking lands for public improvements, and that the corporation were entitled to take compulsorily the whole of the lands comprised in the notice.

Observations upon Galloway v. The Mayor of London (2 De Gex, J. & S. 213, 639; s. c. on app. 35 Law J. Rep. (N.S.) Chanc. 477; s. c. Law Rep. 1 E. & I. App. 34).

This was a motion on behalf of the plaintiffs, who are, as feoffees and trustees for a charity called "St. Nicholas' Church Lands," the owners of certain houses and property in Baldwin Street and St. Nicholas' Steps, Bristol, which were required by the defendants for the purpose of local improvements, for an injunction to

restrain the defendants from compelling the plaintiffs to sell the whole of such lands and property. The defendants, who were the Local Board of Health for the district of Bristol, and are now the Bristol Urban Sanitary Authority, were, by a provisional order of the Secretary of State, dated the 20th of May, 1868, made in pursuance of the Local Government Act, 1858, and confirmed by the Local Government Supplemental Act, 1868, empowered to put in force the compulsory powers of the Lands Clauses Consolidation Act, 1845, with reference to certain lands described in the schedule to the order. The property in question in the suit was thus described in the schedule—

"Lands and buildings intended to be taken for the purpose of widening, altering and improving Baldwin Street and Corn Street." The quantity of land required for this undertaking will be 840 superficial yards.

Parish of St. Nicholas.

No. on Plan	Description of Lands, Messuages, Buildings and Premises	Names of Owners or Reputed Owners	Names of Lessees or Reputed Lessees	Occupiers
9 10	Shop and outhouse	The Feoffees of St. Nicholas' Church Lands	Richard Lewis, Robert Henry Webb	Elizabeth Crawford
12	House and shop	Same	Same	John Pinneger
14	Public-house	Same	Same	Elizabeth Crawford
	Cellar, kitchen and refreshment-room	Same	Same	Elizabeth Crawford and John Pinneger

The premises numbered 9, 10, 12 and 14 in the schedule and in the plan deposited were the messuages belonging to the plaintiffs in Baldwin Street and St. Nicholas' Steps, except that a cellar under St. Nicholas' Steps, and another cellar at the back of the premises, both belonging to the plaintiffs, were not shewn upon the plans. At the date of the Act of 1868, Elizabeth Crawford rented of Lewis & Webb, the plaintiffs' lessees, the premises numbered 12, the cellar forming part of No. 14 and the cellar under St. Nicholas' Steps, with the passage from Baldwin Street leading to

it, but this cellar, with the use of the passage, was subsequently occupied by another person as under tenant to Hannah Williams, who succeeded Elizabeth Crawford as under tenant of the premises.

The defendants in January, 1872, gave notice to the plaintiffs to treat for the purchase of the premises described in the schedule, and the plaintiffs were willing to sell so much of the property comprised in the notice as was actually necessary for the purpose of the projected improvements; but they desired to retain the portions which were not actually so required, contending that the charity they

represented and not the defendants ought to have the profit on resale after the improvements were effected. It appeared that the portion actually required for widening the street was a strip off the houses and property in question, about nine feet in depth at the west and thirteen feet in depth at the east of a line, drawn from the front of a shop occupied by one Barry, to the foot of St. Nicholas' Steps.

The plaintiffs contended that the defendants were only entitled to take this strip, and ought to refront their houses; they also maintained that the cellars under St. Nicholas' Steps and at the back of No. 14 were not specified in the plan, or included in the notice to treat. The defendants insisted on their right to take the whole of the property, and not merely the portion actually required for their works, and, after some negotiations, the plaintiffs filed their bill and now moved for an injunction accordingly.

Mr. Cotton, Mr. Shebheare and Mr. A. Glen, for the plaintiffs in support of the motion.—Although the whole of the property now in question, except the cellar under St. Nicholas' Steps, is within the limits to which the compulsory powers of the plaintiffs extend, they are only entitled to take and permanently hold so much and such parts of the property as are actually necessary for the purpose of widening the street. All that they actually require for the purpose of their works is a strip of the plaintiffs' land, and they merely want the additional land for the purpose of selling it at an enhanced price, and so recouping themselves part of the expenses of their improvements. The principle for which we contend is established by numerous cases, amongst which are—

Eversfield v. The Mid Sussex Railway Company, 3 De Gex & J. 286; s. c. 1 Giff. 153; s. c. 28 Law J. Rep. (N.S.) Chanc. 107;

Dodd v. The Salisbury and Yeovil Railway Company, 1 Giff. 158.

The cellar was not specified in the notice, and is not included in the site comprised therein.

Mr. John Pearson and Mr. E. S. Ford, for the defendants.—The cases cited
NEW SERIES, 43.—CHANC.

are railway cases, and although the restriction for which the plaintiffs contend may apply to railway companies which are private speculations, it does not hold good in the case of corporations which, like the defendants, are entrusted with powers to make public improvements. This distinction was clearly recognised by the House of Lords in

Galloway v. The Mayor of London
(*ubi supra*),

and is a most reasonable one, for as the improvements are not for private profit and the cost of them must be defrayed by the ratepayers, the corporation should have the power of relieving the ratepayers by taking enough land to build a remunerative class of houses. The cellar is appurtenant to one of the houses comprised in the notice, though now let to a different tenant.

Mr. Cotton in reply—

Galloway v. The Mayor of London
(*ubi supra*)

turned upon the particular Act of Parliament in question in the case.

MALINS, V.C.—This is a motion to restrain the defendants from taking any further proceedings to compel the plaintiffs to sell the whole of certain premises in the city of Bristol, which the defendants require to take for the purpose of improving the town, and in particular for widening a street called Baldwin Street. The plaintiffs are a numerous body of trustees, who hold this property for the benefit of a particular church called St. Nicholas, in the city of Bristol. They come here to protect their property upon the ground that what the defendants are about to do will be injurious to their interests. I am unable, however, to see that their interests would be affected, for whether the defendants take the whole or only part of this property the plaintiffs will get the full value for what is taken, and their property will be situated in a much better street than it is now. However, I must decide the question according to the rights of the parties.

The question arises thus—Proceedings have been taken by the corporation for the purpose of obtaining certain property

necessary for improving the city and widening this particular street, which have resulted in an order of the Secretary of State, duly confirmed by the Act 31 & 32 Vict. c. lxxxvi. It is admitted by the plaintiffs that they were duly served with notice to treat for the purpose of taking the whole of several houses. There are, at all events, four houses comprised in the notice. The whole of the houses (including, in my view, the appurtenances) are described in the schedule annexed to the order, and shewn on the deposited plan. But the plaintiffs say that although the defendants have powers to take the whole, they can only take so much as they actually require for their works, *i.e.*, for the purpose of widening the street, and this is a numerous class of cases, perhaps not the most reasonable in our reports, in which railway companies with Parliamentary powers to take lands have been restricted to taking only so much of those lands as was actually required for the purpose of their works. Of this class the two cases cited—*Dodd v. The Salisbury and Yeovil Railway Company* (*ubi supra*), which was affirmed on appeal, and *Eversfield v. The Mid Sussex Railway Company* (*ubi supra*), are prominent instances, and in them the railway companies were restricted to the narrowest limits necessary for the construction of their works. I was at first under the impression that a similar principle would apply to a corporation taking houses for the purpose of improvements, but upon consideration and upon the authorities cited by Mr. Pearson, as well as upon good sense, I feel bound to come to the opposite conclusion.

Now there have been many cases in which it has been contended that the company could not take a part of a house without taking the whole, but I may say that I do not remember a case in which the question has arisen, as here, as to the taking of part of a house instead of the whole; for here the plaintiffs say that the corporation are only entitled to take a part of the house, and that there is an obligation upon them to put a new front to it and make it habitable. I believe, however, that if so treated these houses would be uninhabitable and useless.

Therefore, considering that this property is required not for the purpose of a railway, but for the purpose of improving a town, and that the plaintiffs had notice of the intention of the corporation to take the whole of the houses, I think that the plain sense of the thing is that the plaintiffs must have understood, not that the defendants were to take a small part or slice of the house, and leave the rest, but to take the whole if they wanted it. The plaintiffs must have understood that the defendants having asked for the power to take the whole of the houses, by not opposing they, in fact, gave the defendants power to take the whole.

But, moreover, I think the passage cited from Lord Cranworth's judgment in *Galloway v. The Mayor of London* (*ubi supra*) is entirely applicable to this case and shews the distinction between a case of this sort and railway cases, for the corporation are not taking the houses for the purpose of profit, but for the purpose of improving the street. Lord Cranworth says (35 Law J. Rep. (N.S.) Chanc. p. 484), "It must be observed that the Legislature in providing for such an object as that of widening and improving the streets of the metropolis, has to deal with a subject totally different from that of enabling a body of adventurers to form a railway. In that latter case the persons seeking the aid of Parliament are bound to shew that what they are proposing to do is of such public importance as to make it reasonable that they should be enabled, so far to interfere with the rights of private property as to compel the owners of the land required for the railway to sell it to them at a fair price. The legislature has no concern with the question as to how the persons embarking in the undertaking are to obtain funds to pay for the construction of the railway. The railway will become the property of the speculators, and will itself repay them (at all events it is anticipated that it will repay them) by the tolls levied on it, the outlay they have made. But in the case of a public body like the mayor and corporation of the city of London undertaking improvements in the metropolis, the matter is very different. When they have made a new or widened an old street they

will necessarily have incurred very great expense, for which they can get no return. The new or improved street is dedicated to the public, and, unlike the railway, yields no profit to those by whom it has been made. In order to meet this difficulty and to enable corporations to reimburse themselves, the course has been to authorise them to take compulsorily not only the buildings actually necessary for forming the streets or other projected improvements but also other neighbouring lands and buildings, the value of which and the proper mode of dealing with which the Legislature considers to be connected with and dependent upon the projected improvements."

The fair meaning of the Act, then, in my opinion is that the defendants are to take the whole of the houses described in the plan, in order that when taken they may so let out the sites as to enable persons taking from them to erect suitable houses.

I think, then, that the principles of the railway cases do not apply to this case, and that the plaintiffs have failed to establish any right to the interference of the Court.

There was another ground of argument which was that there was no power to take the cellar because it was not mentioned in the deposited plans. But although the cellar itself was not mentioned the site was mentioned, and that, I think, was enough, and I must take it as included in the notice to treat. This part of the case, therefore, also fails, and the motion must be refused. I shall not, however, say anything about the costs at present.

Solicitors—Messrs. Abbott, Jenkins & Abbott, for the plaintiffs; Mr. D. Travers Burges, agent for Mr. J. G. Heaven, Bristol, for the defendants.

MALINS, V.C. }

1874.

June 2, 3. }

PAINE v. JONES.

Will made before Wills Act—After acquired Real Estate—Adverse Possession by Trustee—Statute of Limitations.

A testator by his will, dated in 1824, devised all his real estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to trustees, one of whom was his wife, upon trust to pay the rents to his wife for life, with remainders over. After the date of his will the testator purchased a freehold estate. On his death, his widow became sole trustee of the will and entered into possession of the testator's after-acquired real estate as well as the devised estate, under the belief that the whole of the testator's real estate passed by his will. After having been in possession for upwards of twenty years, she was informed that she had acquired a good title to the after-acquired estate by adverse possession, whereupon she sold it to a purchaser for value. A bill filed by a remainderman under the will to oust the purchaser, dismissed.

William Nicoll, by his will dated the 12th of April, 1824, devised all his freehold and copyhold estates, and also all other his estates and effects whatsoever and wheresoever, and of what nature or kind soever, of which he might be possessed at the time of his decease, to his wife, Charlotte Nicoll, and Thomas Harrison, their heirs, executors, administrators and assigns, upon trust to pay the rents and profits to his said wife during her life for her separate use, and after her death to his niece, Ann Hasler, for her life for her separate use, and after her death to convey the same freehold and copyhold estates to the children of Ann Hasler, as tenants in common in fee.

On the 9th of December, 1824, that is, after the date of the will, a small freehold estate called Wheatley's, was, in consideration of the sum of 600*l.*, purchased by and conveyed to the testator to the ordinary dower uses.

On the 20th of December, 1830, the testator died, leaving his nephew, Thomas Nicoll, his heir-at-law. His will was

proved by Charlotte Nicoll only, Thomas Harrison subsequently disclaiming the trusts thereof.

On the death of the testator it was supposed that the Wheatley estate passed under the will, and accordingly Charlotte Nicoll entered into possession of that estate as well as of the remainder of the testator's estate.

In 1831 Ann Hasler married the defendant, William Paine, and had issue seven children, of whom the plaintiff was one, the other children being defendants. In 1852 the children of Ann Paine filed a bill against Charlotte Nicoll for the administration of the testator's estate and appointment of new trustees of his will. Charlotte Nicoll put in an answer admitting that the testator's after-acquired real estate was subject to the trusts of the will. A compromise of the suit was then entered into, and an order was made on the 4th of December, 1852, appointing Charles Brown a trustee of the will jointly with Charlotte Nicoll, and directing her to convey the freehold estates of the testator to the use of herself and Charles Brown.

During the preparation of the conveyance in pursuance of this order it was for the first time discovered that the Wheatley estate did not pass by the will, whereupon Charlotte Nicoll refused to convey the same, and by an order dated the 26th of February, 1853, made on the petition of the plaintiffs in the suit, it was ordered that she should convey only the property which passed by the will.

On the 3rd of August, 1853, Charlotte Nicoll, who claimed to have acquired the fee simple of the Wheatley estate by adverse possession, conveyed the reversion therein expectant on her own life to one Jones in fee for value.

By an indenture dated the 14th of March, 1854, Thomas Nicoll, the testator's heir-at-law, conveyed all his interest in the Wheatley estate to the trustees of the will, to be held by them upon the trusts thereby declared. Charlotte Nicoll was named as a party to this deed, but she never executed it.

In 1858 Charlotte Nicoll died.

In 1860 Jones, for value, conveyed a moiety of the Wheatley estate to John-

stone, who had acted as Charlotte Nicoll's solicitor in the suit.

Ann Paine died in 1868. In 1869 Jones and Johnstone sold the entirety of the estate to Miss Sandford, and she, in the following year, sold and conveyed it to Thomas Salter, who died shortly afterwards, having demised it to Rebecca Salter and George Ridding upon certain trusts.

In 1871 the present bill was filed, alleging that the Wheatley estate was subject to the trusts of the will of the testator, William Nicoll, and that Jones, Johnstone, Sandford and Salter purchased with notice of the fact, and praying that they or their representatives might be ordered to convey the property to the present trustees of the will, and account for the meane profits.

The cause now came on for hearing.

Mr. W. Pearson and *Mr. Warmington*, for the plaintiff, contended that Charlotte Nicoll having entered into possession of the estate, and dealt with it under the belief that it passed under the very extensive words of the will, she was estopped from denying that it passed by the will. She claimed to enter into possession only under the will as she admitted by her answer in the former suit, and having entered under the will she was not entitled to turn round and dispute its validity—

Board v. Board, 43 Law J. Rep. (n.s.) Q.B. 4; s. c. Law Rep. 9 Q.B. 48;

Asher v. Whillock, 35 Law J. Rep. (n.s.) Q.B. 17; s. c. Law Rep. 1 Q.B. 1;

Anstee v. Nelmes, 1 Hurl. & N. 225; s. c. 26 Law J. Rep. (n.s.) Exch. 5;

Hawksbee v. Hawksbee, 11 Hare, 230; s. c. 23 Law J. Rep. (n.s.) Chanc. 521.

She was in fact a trustee for the remaindermen. Moreover, the purchasers from her took with notice of the trust.

Mr. Cotton and *Mr. W. Barber*, for Messrs. Jones and Johnstone, contended that the question had already been virtually decided, for the order of the 26th of February, 1853, which was perfectly right, evidently intended to exempt

Charlotte Nicoll from conveying any after-acquired property of the testator.

Mr. Glasse and *Mr. Graham Hastings*, for *Salter*, and *Mr. Stirling* for *Miss Sandford*, were not called upon, the Vice-Chancellor holding that they were purchasers for value without notice.

Mr. E. B. Cooper for the trustees.

Mr. Pearson in reply.

MALINS, V.C., said the will was governed by the state of the law before the Wills Act, but the widow finding, as she did, that the testator had devised all his property which he might be possessed of at the time of his decease, and considering that she was entitled under the will to the property he purchased after the date of the will, entered into possession of it. But it happened that she had no title whatever to this property, and could not take it under the will. Who, then, was entitled? There could be no doubt that the heir-at-law was the only person entitled, and if he had brought an action of ejectment he would certainly have recovered against the widow; but he was bound to bring his action within twenty years, unless he had been under disability, and then he would have had ten years longer in some cases and twenty in others. It was not suggested, however, that he was under any disability; therefore, in the year 1853, the heir-at-law was absolutely barred, and the widow, either in her own right by adverse possession, or as claiming under the will, acquired an absolute right to the property. It was said that, having entered under the belief that she was entitled under the will, she was bound by the trusts of the will. The conveyance executed by *Thomas Nicoll*, the nephew of the testator, by which he conveyed all his interest in the after-acquired freehold estate to the trustees of the will, was not executed by the widow, and was not relied on by the plaintiff. If the widow had been told the year after the death of the testator that she had no title, but that if she kept quiet for twenty years without saying anything about it she would acquire a good title, the effect would have been that her title could not have been impugned; but she was not told until after the twenty years had expired.

It was not till 1853 that she was told, and the plaintiff now said that the widow must be treated as having taken possession of the property subject to the conditions of the will. If that were so, the plaintiff would have a good title in equity to one-seventh share of the property. It had been argued that the answer put in by *Mrs. Nicoll* in the original suit was an acknowledgment by her that she had entered into possession under the will, and that she must be bound by that admission, but he did not think that she was bound by the admissions in her answer made when she was ignorant of her rights. It was not till after this period that she was told that the property did not pass by the will, and then, knowing for the first time that she had acquired a good title, the transactions took place which had led to this suit. The question was, whether the persons now in possession, claiming under *Salter*, were to retain possession, or whether the plaintiff was entitled to possession. His opinion was that the plaintiff's title failed. The widow, though she thought that she was entering into possession under the will, was, in fact, entitled to treat herself as being in adverse possession. She performed no duty imposed under the will, and the cases relied upon by the plaintiff's counsel had no application. They proceeded on the principle that if parties had no other title than the will, they were estopped from denying the title of persons under the same will. Under this will the widow had no title whatever. He thought this was a distinct case of adverse possession, and the defendants claiming under the widow had acquired a title as against those persons whose title was only under the will. As the plaintiff had no title, the bill must be dismissed with costs.

Eventually an order was made, with consent of all parties, that the bill should be dismissed without costs, except as to the trustees, whose costs were ordered to be paid.

Solicitors—*Mr. A. G. Ditton*, for plaintiff; *Mr. W. N. Ellen*, *Messrs. Gamlen & Son*, agents for *Messrs. Woodbridge & Sons*, *Uxbridge*, *Messrs. Nickinson*, *Prall & Nickinson*, *Messrs. Taylor & Baxter*, for the various defendants.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C. }
 JAMES, L.J. }
 MELLISH, L.J. } GOODSON v. RICHARDSON.
 1874.
 Jan. 13, 14.

Injunction—Trespass—Plaintiff's Title not disputed—Mandatory Injunction.

Where the plaintiff's title is not disputed the Court will grant an injunction to restrain acts of trespass without requiring him first to bring an action at law.

If the plaintiff is guilty of no acquiescence or delay he will be entitled to a mandatory injunction though the works complained of may have been completed before the filing of the bill.

The defendant in this case appealed from a decree of Sir G. Jessel, M.R., granting a perpetual injunction to restrain him from laying down or suffering to remain any water pipes in the soil of a highway, one moiety of which was vested in the plaintiff.

The defendant, who was the owner of some houses at Ramsgate, was desirous of supplying them with water from waterworks of his own, and applied to the highway board for permission to lay down pipes along the highway between Ramsgate and Broadstairs. The board granted him permission to break up the surface of the highway for this purpose, but at the same time the clerk to the board informed him that such permission could only be granted subject to the rights of the owners of the soil. Accordingly in the early part of April, 1873, he commenced laying down pipes along the highway, and on the 9th of that month the plaintiff, who was the owner in fee of a moiety of a piece of land abutting for seventy-four yards on the highway, and was also a shareholder in a waterworks company at Ramsgate, served him with notice not to do so. The defendant, however, proceeded to lay down his pipes, and on the 21st of April the bill was filed.

The Master of the Rolls at the hearing of the cause granted a perpetual mandatory injunction, and the defendant appealed.

Mr. Jackson and Mr. Joseph Beaumont, for the defendant, contended that the

pipes having been already laid the Court would not grant a mandatory injunction—Deere v. Guest, 1 Myl. & Cr. 516; s. c. 6 Law J. Rep. (N.S.) Chanc. 69.

At the most it was only a case for damages—

Bowes v. Law, 39 Law J. Rep. (N.S.) Chanc. 483; s. c. Law Rep. 9 Eq. 636.

But the plaintiff had suffered no injury, and his objection to the acts of the defendant was very unneighbourly.

Mr. Southgate and Mr. Davey were not called upon to support the decree.

THE LORD CHANCELLOR.—It is undoubtedly true that when a legal remedy exists this Court in determining whether it will leave the parties to that legal remedy or will interfere by injunction, has regard to the circumstances of each particular case, amongst which are, no doubt, the time at which the acts complained of were done, and also what will be the result to the parties of the interference of the Court. But I apprehend that the Court has nowhere said when a trespass of this kind has been committed under circumstances at all similar to those which exist in the present case, that the mere fact of the trespass being complete at the time of filing the bill is a ground for refusing an injunction to restrain its continuance.

In this case the plaintiff is the owner of the soil through which these pipes have been laid, and no one has a right to take or use that soil except with the consent of the owner. It is said that, inasmuch as the upper surface of the soil is dedicated to the public for the purpose of a public highway, and the plaintiff cannot use it in any way so as to interfere with the use of it by the public for the purpose of a highway, his right is of little or no value, and it is an unneighbourly thing to object to the laying of the pipes in his land. With regard to the value, it is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, gives his interest in the land precisely the value which his power of veto upon its use creates when such use is desired by any other person; and I confess I see nothing unneighbourly in a

man whose motive for desiring to prevent that interference is collateral to his interest in the land, such, for instance, as his being the proprietor of waterworks which may be injured by the proposed use of it, refusing to allow his land to be taken for the purpose of competing with him.

With regard to the objection that the Court will not interfere by injunction after the work is done, I think, having regard to the nature of the work and the quickness with which it was capable of being done, the plaintiff has been guilty of neither acquiescence nor delay, and the Court is bound to deal with the case exactly as if the bill, instead of being filed a few days afterwards, had been filed the morning of the day on which the work was begun and before any part of it was done.

I cannot look upon the case otherwise than as a deliberate and unlawful invasion of a man's land for the purpose of a continuing trespass, which is in law a series of trespasses, to the gain and profit of the trespasser without the consent of the owner, and, as such, it appears to me to be a proper subject for an injunction.

Two classes of cases have been referred to. One comprises cases of ancient lights, such as *Durell v. Pritchard* (1), or covenant, such as *Bowes v. Law* (*ubi supra*), where a man had once for all done upon his own land something which exposed him to an action. In those cases the thing was done, and in the judgment of the Court it was more equitable to leave the parties to their legal rights and liabilities, or to give damages, than to interfere by injunction. No doubt in such a state of things the *quantum* of damage done to the plaintiff, as compared to the *quantum* of loss to be sustained by the defendant, is a material consideration, but that consideration does not appear to me to arise in the present case.

The other class of cases is that exemplified by *Deere v. Guest* (*ubi supra*), which, when rightly considered, amounted to neither more nor less than an action of ejectment brought in the Court of Chancery, without any equitable circumstances

to induce that Court to assume jurisdiction. The defendant had made a tramway and completed it openly, so that everybody interested in the land either did know, or might, three years before the bill was filed, have known what was taking place. That had been done lawfully with the consent of the tenant, subject to some question of waste, which I will not enter into. That was a case between landlord and tenant, but so far as the possession was concerned, it had been lawfully acquired by the consent of the then occupying tenant. His occupation continued for about three years afterwards, and as far as appears from the statement on the bill (for the case arose upon demurrer) even when the tenancy ceased, the land was relet to a person who, upon the allegation in the bill, must be taken to have consented, so far as he could consent, to the continuance of the occupation of the tramroad by the defendant. The bill, however, contained an allegation which Lord Cottenham thought obscure, that when the land was relet the plaintiff had reserved to himself the tramroad. The allegation was, therefore, that the right to the tramroad, or to the possession of the land, had been originally given by the person in occupation, and was confirmed by the person subsequently in occupation, but that he had no right to confirm it. It also appeared that the owner of the equity of redemption had sold to the defendant the right to have the tramroad; also that the plaintiff had not even the legal title of mortgagee, for he was only the husband of the administratrix of the mortgagee, and interested in the money only, though no doubt he was entitled to call on the person who had the legal estate to defend his rights. He had brought an action of trespass against the defendant on account of this tramroad. In point of law, the defendants having lawfully got possession three years before, were continuing in possession, and the plaintiff's title, or rather that of the trustee for him, as mortgagee, was a purely legal title on the shewing of the bill, and there was no impediment to an action of ejectment or an action of trespass. In that state of circumstances Lord Cottenham

(1) 35 Law J. Rep. (N.S.) Chanc. 223; s. c. Law Rep. 1 Chanc. 244.

thought, and in my judgment correctly thought, that there was no equity whatever to interfere, and that the case was a simple attempt to transfer the jurisdiction in ejectment from law to equity.

Had the circumstances of this case been similar, and had these pipes been laid with the consent of the tenant three years before, and used as part of the system of waterworks during the whole of that interval, and had it been a case of possession originally legal, but now liable to be displaced by ejectment, I have little doubt that I should have come to a similar conclusion. But all the circumstances of the case are entirely different, and the principle upon which this case ought to be dealt with is, in my opinion, that upon which the Master of the Rolls has dealt with it. Therefore, I, for my part, cannot give my voice for disturbing the judgment of the Master of the Rolls.

JAMES, L.J.—I am of the same opinion. The defendant is admittedly a trespasser. He has committed a trespass upon the plaintiff's land without any legal justification or excuse whatever, and he proposes to continue that trespass from day to day, keeping the pipes and allowing the water to go through them for the purpose of making a profit of a trade which he proposes to set up in rivalry to a trade in which the owner of the land upon which he is so trespassing is interested. It is said that we ought to allow this to be done, in fact, to tell the plaintiff to find his way to another Court, in which he is to bring an action for the wrong for which there is no defence whatever. He is to bring that action at his own cost, and having succeeded in that, he is to bring a second and perhaps a third, and having succeeded in one, two or three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him, he is to come back to this Court and obtain a perpetual injunction on the ground of repeated vexation and repeated actions. I do not think that there is any principle in this Court which will compel us to drive the plaintiff to go through all that litigation before he is entitled to that relief which he will ultimately get when he has gone through it.

It is said that something of the kind was

done in *Deere v. Guest* (*ubi supra*). In that case the *ratio decidendi*, which is always to be looked at when you are referring to an authority, was that the defendant was a person in possession, and that the bill was a bill in substance to turn him out of possession, which would be strictly and simply an ejectment bill, and such a bill is not according to the practice of this Court. But here there is nothing like a possession by the defendant. The plaintiff has been in possession, and is in possession, and the defendant has been a wrongdoer and a mere trespasser, who proposes to continue so. The question is, whether under those circumstances the plaintiff had not a right to come here, and so to put an end to that continuous trespass which the defendant has begun and intends to continue, there being no wrong whatever done to the defendant. What is alleged on his behalf here is, that if we grant the injunction we shall deprive him of a very valuable property, because it is essential to the value of his property that he should keep the plaintiff's property, which he has taken against his consent. Even if the defendant did originally unconsciously take that which was not his, yet he very soon became conscious that it was not his, and that he was taking that which was not his for the purpose of a profit to himself against the will of the real owner. Both morally and legally that is an improper taking of another man's property. I am of opinion that the decision of the Master of the Rolls is quite right, and that the injunction ought to be sustained.

MELLISH, L.J.—I am of the same opinion. I think it is quite clear that the defendant has not got into possession of any portion of real property of the plaintiff, so as to make it necessary for the plaintiff to bring an action of ejectment. He has simply committed a trespass, and if that had been the only thing done, it would have been right to leave the plaintiff to recover damages by an action at law. But the defendant was threatening to continue the trespass, to complete his waterworks, and to use as his own and make a profit by, that which was really part of the plaintiff's property.

There is a further reason for coming to

this Court, namely, that, owing to the fact of the surface of the road being dedicated as a highway, the plaintiff has not the ordinary remedy which he would have had if the defendant had dug a trench and laid pipes across the plaintiff's field. In this case the plaintiff would have had great difficulty in himself removing the pipes. If there had been nothing to prevent him from digging them up himself it would be reasonable enough to leave him to remove what had been wrongly put in the soil, and then to bring an action for damages. But in the present case it is extremely doubtful whether he could remove the pipes without rendering himself subject to an indictment by the highway board, and in my opinion he is entitled to be relieved from that difficulty.

Appeal dismissed with costs.

Solicitors—Messrs. Paterson, Snow & Burney, agents for Messrs. M. & O. Daniel, Ramsgate, for the plaintiff; Messrs. Wright and Pilley, for the defendant.

MALINS, V.C. } *In re* APPLETREEWICK LEAD
1874. } MINING COMPANY,
April 22. } LIMITED.

Winding up—Contributory—Paid up Shares—Companies Act, 1867, s. 25—Contract in Writing—Articles of Association.

The persons engaged in working a mine as shareholders in an unlimited company formed themselves into a limited company, for the purpose of acquiring the interests and property of the shareholders in the old company and working the mine, and they subscribed for the whole number of the shares in the new company. By a clause in the articles of association of the new company, it was agreed that each of the shares of the new company (which were of the nominal value of 10l. per share) should be credited with 7l. per share as paid up thereon; and that in consideration thereof, the interest of the parties engaged in working the mine should by the articles be transferred to the new company. No other contract as to the transfer of the

property was entered into. The articles were signed by all the shareholders and duly registered, and the new company took possession of the property of the old company. The shares were duly allotted in accordance with the agreement, and in the register of shareholders and books of the company, each share was credited with the sum of 7l. as paid up thereon:—Held, in the winding up of the new company, that this clause in the articles of association constituted a sufficient contract in writing within the meaning of the 25th section of the Companies Act, 1870, to exonerate the shareholders in the new company from any further payment in respect of the 7l. per share credited as paid up on each share.

This was an appeal from a decision of Mr. Daniel, the Judge of the County Court of Yorkshire, holden at Skipton.

The above-named company was, in the month of April, 1870, formed and registered under the provisions of the Companies Acts of 1862 and 1867, for the purpose, as stated in the memorandum of association, of working certain lead mines or mineral grounds at Burstal, in Yorkshire, and of "acquiring, by purchase or otherwise, the interests or rights of the persons who have or hereafter shall be engaged in working such mineral grounds."

The memorandum, which was dated the 22nd of April, 1870, provided that the capital of the company should be 12,800l., divided into 1,280 shares of 10l. The articles of association, which bore the same date as the memorandum, provided in the second clause as follows—"The subscribers to these articles being the persons engaged in working the mineral grounds of John Yorke, Esq., of Mr. J. Proctor and of Mr. R. Hebden, mentioned in the memorandum of association hereunto annexed, at the date of the said memorandum, and interested in the said premises and in the plant, machinery and materials in and about the same in proportion to the number of shares in respect of which they have respectively signed the said memorandum and these articles of association, it is hereby agreed that each of the 1,280 shares into which the capital of the com-

pany is divided shall be credited with the sum of 7*l.* per share as paid up thereon; and in consideration thereof the interest of the said parties respectively shall by these articles be transferred to and vest in the company."

For some years previously to and at the date of the registration of the company, the various persons who signed the memorandum and articles of association had been working the mines in partnership together as an unregistered company, the capital of which was held in shares with unlimited liability, but transferable at the will of the holder. It being considered desirable that the unregistered company should be converted into a limited liability company, the whole of the persons who had been carrying on the old company signed the memorandum and articles of the new company. And they took the whole number of the shares therein, each of them subscribing in respect of such proportion of 1,280 shares in the new company as represented his relative interest in the old unregistered company.

No independent valuation of the property of the old company was made at the time such property was handed over to the new company; but, as between the shareholders, the value of the property of the old company was estimated with reference to the price at which the shares in the old company were quoted in the public share lists at the time of the agreement for the conversion of the company, viz., 7*l.* per share, at 8,960*l.*, and each of the 1,280 shares in the new company, which were afterwards duly allotted to the shareholders, was credited in the books of the company with the sum of 7*l.* as having been paid thereon.

In the share register of the company, each of the shares serially numbered was in the first money column thereof credited with the sum of 7*l.* as paid up according to the articles of association, clause 2, and in other columns with the amount of each call as subsequently made and paid. Certificates were also issued in respect of the shares, in which the sum of 7*l.* was treated as having been paid up on each share in addition to the amount of the calls actually made and

paid thereon. No cash payment was ever received by the company on account of the 7*l.* per share so credited. No agreement in writing, other than such as was contained in clause 2 of the printed articles, was ever entered into between the company and the allottees of the shares, and the articles were filed with the registrar of joint-stock companies on the 7th of May, 1870. The new company continued in possession of the property of the old company and continued to work the mine, and the sum of 3*l.* per share, the residue of the nominal capital, after giving credit for the 7*l.* credited as paid, was subsequently called up and paid.

Amongst the persons who were shareholders in the old company was Mr. Osmund Rhodes, and he subscribed the memorandum of association of the new company for ninety shares, which were subsequently allotted to him as such subscriber upon the terms above mentioned. After the 3*l.* per share not originally credited as paid up had been called up, Mr. Rhodes transferred for value five of his shares to one William Cookson, and ten others of his shares to one J. Fawcett. These shares were transferred as fully paid up, and certificates were issued to the transferees in which they were certified to be fully paid up. The transferees had no notice, other than such implied notice as they might be considered to have had through the articles, that these shares had not been fully paid up in cash. Others of the original allottees of shares also transferred shares under similar circumstances.

In June, 1872, the company ceased to carry on its business for want of funds. On the 15th of July, 1872, a compulsory order for winding it up was made by the Court; and on the 15th of November, 1872, an order was made, transferring the proceedings in the winding up to the County Court. The company having, apart from such claims (if any) as might be enforceable against its shareholders, no sufficient assets, the official liquidator inserted upon the list of contributories the names of Osmund Rhodes, W. Cookson and J. Fawcett, and the other persons who were shareholders at the date of the

winding up, whether original allottees or transferees, with the view of making such a call upon them, not exceeding 7l. per share, as might be sufficient to meet the liabilities of the company.

To this the shareholders objected, and the case of Mr. Rhodes having been selected as a representative case, it was argued before the learned County Court Judge, who, after taking time to consider his judgment, decided that the name of Mr. Rhodes should be excluded from the list of contributories.

From this decision the liquidator appealed, and the principal questions stated for the opinion of the Vice-Chancellor on the case for appeal were

1st. Whether Mr. Rhodes and the other original shareholders of the company who subscribed the memorandum and articles of association were liable to be made contributories of the company in respect of the shares held by them to the extent of the 7l. credited as paid up. 2ndly. Whether the transferees were so liable; and if not, whether the original subscriber for the transferred shares was so liable.

It will be seen that the Vice-Chancellor's decision of the first question in the negative rendered any decision of the second unnecessary.

Mr. Glasse, Mr. Higgins and Mr. Bradford, for the official liquidator, in support of the appeal.—The 25th section of the Companies Act of 1867 provides that, "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares." Here the only contract entered into between the shareholders of the company was that embodied in the printed articles of association, and that was not a contract within the meaning of the 25th section. To satisfy the requirements of the section, the contract should be an independent contract in writing, separate and distinct from the articles of association, because the articles may be altered from time to

time, and duly filed at or before the issue of the particular shares to be exonerated. The policy of the Legislature intended to be carried out by means of the 25th section was to prevent the issue of shares on any other terms than the payment of the whole amount thereof in cash or for such consideration as should be in value equivalent to cash for the whole nominal amount thereof. In this case no proper valuation of the property of the old company was ever made. It is not shewn that the interests of the shareholders in the unregistered company were equivalent in cash value to the amount of 7l. per share on the shares allotted to them; and the price per share as quoted in the public share list is not a proper criterion of the value of the property as a whole.

The authorities are in our favour.

In re Tavarone Mining Company; Pritchard's Case, 42 Law J. Rep. (N.S.) Chanc. 768; s. c. Law Rep. 8 Chanc. 956,

the Lords Justices held, affirming Wickens, V.C., that articles of association, providing for the purchase of a mine, which was to be paid for partly in cash and partly in paid-up shares, did not constitute a contract in writing between the vendor of the mine and the company, within the 25th section.

In

The Metropolitan Public Carriage and Repository Company; Cleland's Case, 41 Law J. Rep. (N.S.) Chanc. 652; s. c. Law Rep. 14 Eq. 387,

Wickens, V.C., held the holder of shares allotted to him as "fully paid-up," must shew that they were paid for in cash, or that the 25th section was otherwise complied with, and that the cancellation of a debt for service (and in this case the consideration is the cancellation of a debt) is not payment in cash. Moreover, there is

In re Pen 'Alt Silver Lead Mining Company; Fothergill's Case, Law Rep. 8 Chanc. 270; s. c. 42 Law J. Rep. (N.S.) Chanc. 481,

which is more directly in point, and which was under appeal at the time of Mr. Daniel's judgment, and has since been decided.

Mr. Cotton and Mr. Everitt, for Mr. Rhodes and the other shareholders.—The

articles of association, though printed, were signed by the old shareholders, which was a sufficient writing, within the section. They were duly filed with the Registrar of Joint Stock Companies, and, under these circumstances, clause 2 of these articles constitutes a contract, within the meaning of the 25th section, and gives the public all the information to which they are entitled. The company have accepted and adopted the contract, and are therefore bound by the provisions contained in the 2nd clause, and it is a contract of which the Court of Chancery, upon a bill filed, would have enforced specific performance. Creditors claiming through the official liquidator can have no further rights against the individual shareholder than the company itself could have, and the 25th section does not require that the contract should be *separate and distinct* from the articles of association. As to the transferees of shares in the company, they purchased and became transferees without actual notice that their shares had not been fully paid up in cash to the extent appearing from the certificates issued by the company, and they cannot be made liable for the consequences of the conditions required by the 25th section of the Companies Act, 1867, not having been complied with, even if such conditions had not, in fact, been complied with.

In

Pritchard's Case (ubi supra)

there was no actual contract with the vendor of the mine contained in the articles of association, but merely a reference to a contract which was, after incorporation, to be entered into with him, and all that was decided was that the articles did not in that case constitute a sufficient contract within the section.

In

Fothergill's Case (ubi supra)

there was no connection on the face of the registered documents between the shares for which the vendor subscribed and the paid-up shares he was to receive. In the present case the articles fully disclose the nature of the transaction, and they contain, as it is perfectly competent for them to contain, a contract within the 25th section. But, even supposing

that the articles here do not constitute a sufficient contract within the section, in this case payment in money's worth, which is equivalent to cash, has been actually made by the transfer of the property of the old company. The case is therefore governed by

In re The Baglan Hall Collieries Company, 39 Law J. Rep. (N.S.) Chanc. 591; s. c. Law Rep. 5 Chanc. 346;

In re The Harmony and Montague Tin and Copper Mining Company; Spargo's Case, 42 Law J. Rep. (N.S.) Chanc. 488; s. c. Law Rep. 8 Chanc. 407;

and the recent case before this branch of the Court—

In re The Limehouse Works Company; Coates' Case, Law Rep. 17 Eq. 169,

which is nearly on all fours with the present case.

Mr. Glasse, in reply.

MALINS, V.C., after observing that if he had come to a conclusion opposed to that of the learned County Court Judge, for whom he entertained great respect, he should have hesitated to decide the case without further consideration, but that, as he agreed with him, it was not necessary for him to defer judgment, proceeded—The case involves questions of great importance, and is of a peculiar character. It seems to have occurred to the shareholders in the old company that it would be more advantageous to turn their company into a limited liability company, and I agree with the argument on behalf of the liquidator, that they were bound in so doing to act fairly in every respect, so as not to deceive persons who might deal with them. This is, I believe, the first case in which the memorandum of association has been signed for every share which could be taken in the company, for no subscriptions were invited, and the existing shareholders in the old company formed themselves into the limited liability company, and took up between them all the 1,280 shares in it, which were to be allotted. As part of the same arrangement, they agreed that the property of the old company should become

the property of the new company, and the market value of the old shares being 7*l.*, they also agreed that of the 10*l.*, constituting the amount of the new shares, 7*l.* should be considered as paid-up, and that they should only have to pay up the remaining 3*l.* upon each share. This was provided for in the 2nd clause of the articles of association, upon which the question now turns.

Now it is clear that if, instead of framing the memorandum of association in the manner they did, they had provided, as they might have done, that the property should be taken as worth 7*l.* per share, and that the shares should be 3*l.* shares only, in this form the matter would have been free from all objection. But that is not the form which they adopted. They agreed that the nominal shares should be 10*l.* each, of which 7*l.* was to be considered as paid up. Now, was there anything improper in this arrangement? The principle of limited liability is plain. The object of the Legislature was to enable persons to associate together in trade and to carry on business, not upon the footing that every partner should be liable to the extent of the last farthing of his property, but upon the footing that each partner should be liable only for the amount of the shares taken by him; and, provided the public have the protection provided by the statute, no one dealing with the shareholders has any reason to complain of this limitation of liability. This system, however, was found to be subject to great abuses, and it was to prevent these abuses that the Act of 1867 (31 & 32 Vict. c. 131), containing the 25th section, was passed. Now, the argument is that this 25th section has not been complied with, and that the contract to be filed with the Registrar must be a separate contract, and not the contract contained in the articles of association. But this section was intended for the protection of the public, and it is impossible that any one dealing with this company could be deceived, for each of the shares was credited with 7*l.* per share as paid up, not only in the books of the company but in the register of shareholders, which every company is bound to keep for inspection.

Mr. Rhodes's name is entered as the holder of ninety shares, and he is credited with 7*l.* per share, and afterwards with the calls made upon the shares, and paid by him, to the amount of the 3*l.*, which was the remaining sum due upon each share.

If these books had not been accessible to the public, that would not have been enough; but in the office of the company there is the register of shareholders, which may be seen by anyone. Thus a man about to deal with this company, having access to the register, could ascertain at once that the shares were paid up to the extent of 7*l.*, and that he had only the 3*l.* unpaid to look to.

Take the case of a man asked to give this company credit for goods. He knows he is dealing with a company with limited liability, and must look after his own interest, and see what amount remains to be called up on the shares. He finds out from the register that the shares are all fully paid up, and he knows he has nothing to look to but the property and the assets of the company, or, as in this case, he finds that Rhodes is a shareholder to the extent of 900*l.*, but is only liable to pay 270*l.* Of all this the creditor has notice, and if, under these circumstances, he chooses to contract with the company, he has only himself to blame for any loss he may incur.

Every man dealing with a limited liability company is bound to look to the register which is there for this purpose. No doubt a grievous hardship occurs when persons of ignorant character and humble position, who are not of sufficient intelligence or skill to avail themselves of these precautions, are misled into giving credit for their services under such circumstances, but no exception can be made in their favour. They are bound in all cases to look out for themselves.

Now my judgment in *Coates's case* (*ubi supra*) has been appealed to, and this passage was read—"It is argued that there are here creditors to be protected, but these are transactions by which no creditor can possibly be deceived, because, although a creditor may originally look at the memorandum of association, what he really ought to rely

on is the register of shareholders, kept in the office of the company, and, as has been pointed out, Mr. Coates is entered in the register as holding only shares fully paid up." So here the creditors could see that Rhodes subscribed for ninety shares of 10*l.* each, and that he had paid up 7*l.*, and the other shareholders a similar amount, and it is for them to consider whether they will trust them or not.

On principle, therefore, I can see nothing in favour of the case of the official liquidator, who here represents the creditors; and I think that, under the circumstances, the creditors have only themselves to blame if they have delivered their property to a company without the means to pay them.

The great argument, however, is upon the 25th section, and it is said that under that section there must be a separate contract in writing, and that a contract in the articles will not do. Now the contract between the shareholders here is that each is to be the holder of a certain number of shares, upon which they are to pay only 3*l.*, bringing in property to the value of the remaining 7*l.*; and what harm could this contract do? Again, every shareholder in the old company signed the articles of association of the new company, and who were they to contract with?

Moreover, section 25 does not require, nor do the authorities shew, that the contract must be separate from the articles of association, and never can be contained in them. In this case the exception of these shares from greater liability than 3*l.*, appears as clearly as the constitution of the company.

The case of *In re The Baglan Hall Collieries Company* (*ubi supra*) has been commented upon. That case first came before me, and I considered the effect of the arrangement between the shareholders of that company to be that they could go on working the colliery without being liable to be called upon by any labourer or tradesman who supplied them with goods to pay a single farthing; so that they were to have the chance of making large profits, and the benefit of all the gains they made; while, if they made losses, they

would lose nothing themselves. I considered that unfair, and I directed their names to be put upon the list of contributions. My decision was reversed by Lord Justice Giffard, sitting alone, and his decision being that of a single Judge, I do not know that I should have considered myself bound by it; but it has since been approved of by the Lord Chancellor and the two present Lords Justices in *Fothergill's case* (*ubi supra*); and I am not, therefore, at liberty to indulge in my own opinion, and must take that decision as a correct one, by which I am to be bound.

In my opinion the second clause of the articles of association in this case gave distinct notice that the shares were paid up to the extent of 7*l.* per share, and they being signed and registered with the registrar of joint-stock companies, I think that no creditor has a right to complain that he can only come upon the remaining 3*l.*

Then it is said that I am bound by *Pritchard's case* (*ubi supra*), the decision in which was in July, 1873. If that case involved the same principles as this, I should, of course, follow it; but I am satisfied that it does not bind the present case. It does not, I think, go to the extent that under no circumstances can a contract which is to exonerate the holders of fully paid up shares from still paying upon them, be constituted by articles of association, nor, in my opinion, ought it. Where the circumstances are such that the contract could take no other form, and the public are given all the information to which they are entitled, I see in that case no objection to such a contract. The only object of section 25 is that an exoneration of shares from payment should appear as distinctly as the company itself. And here the exoneration of these shares appears as distinctly as the constitution of the company itself. [His Honour then stated the facts of *Pritchard's case*, and continued—] In giving judgment, Lord Justice Mellish expressed concurrence in the decision of Vice-Chancellor Wickens, and said (1), "The articles of association cannot be considered as a contract in writing between De Thierry

(1) Law Rep. 8 Chanc. 960.

and the company for the sale of the mine to them. It may, no doubt, be the case if no other contract was entered into and if De Thierry signed these articles and they were acted upon, that a Court of Equity would hold that as between him and the company, from their acting upon it, there was a binding contract; but in themselves the articles of association are simply a contract as between the shareholders *inter se* in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree *inter se*; and the effect of the articles as respects the purchase of this mine was, in my opinion, simply to give to the directors authority to make a contract with De Thierry for the purchase of the mine on certain terms specified in the articles." So when the contract was subsequently entered into, that was the contract which ought to have been filed with the registrar. That case, therefore, amounts to this—that where no other contract is entered into, then the articles of association may have the effect of doing what the Act requires. Then Lord Justice Mellish further says, "The shares appear to me to have been issued before, according to the terms of the articles, they ought to have been issued; and any person who looked at the articles, knowing that the proper amount had not been subscribed for and paid up, so as to make the purchase binding, might very well assume that these were some other shares, and not the paid up shares, to be allotted to De Thierry," and Lord Justice James said that in his opinion it was "quite clear that the shares were never issued under the contract, and that the directors had no authority whatever to issue any of these paid up shares, except upon the completion of the purchase." Therefore it was because the articles were a mere authority to purchase, and until the purchase was made there was no right to issue the shares, that the Lords Justices came to that decision, and the case does not shew, that the contract must be distinct from, and never can be contained in the articles. In this case I think the public have had all the information they are entitled to have; there is a sufficient contract in writing,

duly registered, fulfilling all the requirements of the 25th section of the Act of 1867; and I hold that the County Court Judge was right in considering that these shareholders are not liable to be made contributories of the company.

I have only to add that, although as a general rule, the costs upon an appeal from a County Court follow the result, I think in this case it is right to order the costs to be paid out of the estate.

Solicitors—Mr. Walter Webb, for the Official Liquidator; Messrs. Torr & Co., agents for Messrs. Middleton & Sons, Leeds, for Mr. Rhodes and the other shareholders.

MALINS, V.C. }
1874. }
March 11. }

THOMAS v. HOWELL.

Will — Charitable Bequest — General Legacy.

A bequest of 200l. "to each of ten poor clergymen of the Church of England, to be selected by A." is not a charitable bequest.

This was a suit to administer the estate of the late Mr. John Howell, of 41, Cadogan Place. The testator left personal estate to the amount of about 140,000l., but by far the larger portion of it consisted of leaseholds, and the amount of "pure personality" was inconsiderable. By his will he left many legacies, some of which were to charitable institutions, and he directed that "any legacies other than legacies to charities or for charitable purposes should be paid and satisfied out of such part of my said estate as cannot legally be applied to charitable purposes, and that my legacies to charitable institutions or for charitable purposes shall be paid only out of such part of my estate as shall be legally applicable for that purpose." One of the bequests in his will was in the following terms—

"And I give to each of ten poor clergymen of the Church of England, whether holding benefices or not, to be selected by my friend, the said Joseph Butterworth Owen, if alive, or, if dead, then by the acting executor of my will, and in his or

their judgment, not holding High Church or Puseyite doctrines, 200*l*."

The question then arose whether this last mentioned bequest was, in fact, a charitable legacy, as if so it would have to abate in consequence of the pure personality being insufficient to satisfy all the charitable legacies in full.

Mr. Glasse and Mr. North, for the plaintiffs, the trustees of the will.—These bequests to ten poor clergymen are charitable bequests, and being payable out of the pure personality must abate. The poverty of the recipient is the motive of the gift, and the word "poor" extends throughout the whole sentence, as in

Nash v. Morley, 5 Beav. 177; s. c.

11 Law J. Rep. (N.S.) Chanc. 336;

where the gift was to be divided "among poor pious persons, male or female, old or infirm, as the executors should see fit." So also in

The Attorney-General v. Baxter, 1

Vern. 248; on app. nom. *Attorney-*

General v. Hughes, 2 Vern. 105;

and in both these cases the gifts were held to be valid charitable bequests.

Mr. Cotton and Mr. Davey, for some of the residuary legatees, supported the same contention. In

White v. White, 7 Ves. 423,

a bequest for the purpose of putting out "our poor relations" apprentices was sustained as a charitable legacy, and this case was followed in

The Attorney-General v. Price, 17 Ves. 871,

where the gift was to A. and his heirs for distribution according to his and their discretion among the testator's "poor kinsmen and kinswomen and amongst their offspring and issue which shall dwell within the county of B.;" and in

Russell v. Kellett, 3 Sm. & G. 264,

where there were gifts to "poor widows," "poor credible industrious persons" and "poor people" residing at a certain place.

Mr. Higgins and Mr. E. A. Owen of the common law bar, for the representative of a deceased residuary legatee in the same interest.—Gifts to the poor, either indefinitely or of a particular place, are within the statute of charitable uses (43 Eliz., c. 4, *Tudor on Charitable Trusts*, pp. 6, 10, 2nd edition); and in this case the

gift is doubly charitable, for there is not only the element of poverty, but also that of religion. They referred to

Isaac v. De Friez, Amb. 595; s. c. 17 Ves. 373 note,

and

The Attorney-General v. Comber, 2 Sim. & S. 93.

Mr. Vaughan Hawkins, for some of the other charitable legatees.—The legacies to these ten poor clergymen to be selected by *Mr. Owen* are general and not charitable legacies. The case most similar to this is

Brunsdon v. Woolridge, Amb. 507, where a bequest to such of the testator's "mother's poor relations," as *Woolridge* should think objects of charity was construed as a gift to relations who were poor and objects of charity, and personal estate savouring of the realty was ordered to be distributed among them as *Woolridge* should think fit, shewing that the gift was not considered charitable within the statute of Mortmain. In

Nash v. Morley (*ubi supra*),

White v. White (*ubi supra*),

The Attorney General v. Price (*ubi supra*),

the gift was to have a perpetual continuance; so also in

Gillam v. Taylor, Law Rep. 16 Eq.

581; s. c. 42 Law J. Rep. (N.S.)

Chanc. 674,

whereas here it is immediate, and a gift to ten persons to be named by a selected person is the same thing as a gift to ten persons by name.

Mr. W. F. Robinson, for other charitable legatees in the same interest, referred to

Lelly v. Hey, 1 Hare 580; s. c. 11

Law J. Rep. (N.S.) Chanc. 415.

Mr. Holland, for two of the clergymen who had been selected by *Mr. Butterworth Owen*.—The ten clergymen have been selected, and the gift must be construed as if the testator himself had named them in his will. The legacies to them are not charitable legacies, and no authority has been cited deciding that they must be so considered.

The Attorney-General v. Baxter (*ubi supra*)

is explained in

Moggridge v. Thackwell, 7 Ves. 36,



where Lord Eldon says that *The Attorney-General v. Baxter* is mentioned in Lord Hardwicke's note book thus: "The case of Mr. Baxter upon Mayo's will: the decree reversed: not upon anything contradicting the general principle reported to have been stated, but because really a legacy to sixty particular ejected ministers to be named by Baxter, and as if a legacy to those sixty individuals."

Mr. Hemming, for the Attorney-General; *Mr. Alexander*, for one of the selected clergymen.

Mr. Cotton, in reply.—Who would be the recipients of this gift was absolutely unknown to the testator, and their poverty therefore was clearly the motive of this gift. This makes it a charitable legacy within 13 Eliz., c. 4; and a legacy cannot be charitable under one Act and not under another. The word "poor" is the essence of the whole thing. He also referred to

Mahon v. Savage, 1 Sch. & Lef. 111;
Thompson v. Corby, 27 Beav. 649.

MALINS, V.C., said that a very elaborate argument had been addressed to him, but the only question was whether this was a charitable bequest within the meaning of the Act 9 Geo. 2. c. 36. If the case came within that statute, then these legacies must abate, for though there was ample personal estate to pay all the legacies, the pure personal estate was not sufficient to pay the charitable legacies in full. (The Vice-Chancellor here read the statute and the words of the gift, and continued): The testator gave 200*l.* to each of ten clergymen, because they being poor required it.

No doubt the intention of the testator was to confer a benefit upon those who required it, and in a certain limited sense of the word this was a charity, and so was every legacy which a man gave to a needy person in a certain sense a charity. But it would be carrying this doctrine to an extreme extent to hold that because a man has a legacy left him on account of his being poor, it is therefore a charitable bequest within the meaning of the statute of Mortmain. Suppose in this case, instead of a bequest to ten clergymen, there had been a bequest to only one, what a monstrous injustice it would be

that he was not to have his legacy in full because he was poor! Could it be said that in this case there was in any sense the creation of a charity? That question would in every case depend, not upon whether there was a gift to designated individuals, but whether there was a gift to persons who were to sustain a particular character at a given time. But it would be monstrous to hold that because the recipients were described as poor they could only have their legacies out of the pure personalty. In his Honour's opinion the case was precisely the same as if the individual takers had been described in the will, and the testator had himself named them. Upon principle everything was in favour of the validity of the gift as a general legacy.

Then as to the authorities: in *The Attorney-General v. Baxter* (*ubi supra*) the testator in giving 600*l.* to Mr. Baxter to be distributed by him amongst sixty pious ejected ministers, himself says in his will, "I do not give it them for the sake of their nonconformity, but because I know many of them to be pious and good men and in great want." There the words were much stronger than the expression "ten poor clergymen" in the present case, and the motive was clearly charity, so that if every gift the motive of which was charity was to be a charitable bequest there was a case in point. But upon appeal the decision of the Court below was reversed, and the money remaining in Court was ordered to be paid out to Baxter to be distributed by him according to the will, the legacy to the sixty ejected ministers to be named by Baxter being treated as a legacy to those sixty individuals. His Honour entirely dissented from the argument that because the motive of a gift was charity it was a charitable bequest. It was not a charitable bequest within the statute unless it was for the maintenance of a charity.

In *Brunsdon v. Woolridge* (*ubi supra*), which was decided about thirty years after the statute of Mortmain, the testator had bequeathed a fund, part of which was the proceeds of the sale of land, "amongst his mother's poor relations," and Sir Thomas Sewell, M.R., in his judgment said, "Q. Whether the

word *poor* will make any difference? I am of opinion the true construction of the words is, 'such of my mother's relations as are poor and proper objects'; and the fund was ordered to be distributed amongst such of the poor relations of the mother as Woolridge should think fit. No case had been decided in opposition to this view. Upon principle therefore, and upon authority, his Honour decided that these were general and not charitable legacies, and must be paid out of the general estate.

Solicitors—Messrs. Bower & Cotton, for plaintiff; Messrs. Farrer, Ouvry & Co., Messrs. Norris, Allens & Carter and Messrs. Merriman & Pike, for other parties.

BACON, V.C. }
1874. } PARKER v. M'KENNA.
July 14. }

Evidence—Order of the 6th of February, 1861—Rule 19—Answer—Cross-examination.

The answer of a defendant who was unable to be cross-examined on account of illness was not allowed to be read as evidence on his behalf.

Mr. H. Lewis, one of the defendants in this case, had sworn to an answer which was put in as evidence. The plaintiff gave notice to cross-examine, but the witness was so ill that he could not be produced at the hearing of the cause.

Mr. Graham Hastings, for the plaintiff, objected to the answer of Mr. Lewis being read as evidence—

In

Parker v. Lewis (not reported on this point), a similar suit to this between almost the same parties, the plaintiff had filed affidavits by two persons who could not be cross-examined, one on account of illness, the other of absence, both affidavits were rejected on the authority of

Bingley v. Marshall, 6 Law Times, N.S. 682,

in which the cases of

Morley v. Morley, 5 De Gex, M. & G. 610;

Abadom v. Abadom, 24 Beav. 243;

Braithwaite v. Kearns, 34 Beav. 202, which were cases where the witness was dead, were cited.

Mr. Horace Davey, for the defendant, Lewis, contended that there was much the same necessity to read the answer as in the case of the affidavit of a dead person, and cited in addition—

Davies v. Otley, 35 Beav. 208.

BACON, V.C., said, about receiving the answer there is no difficulty. Reading it as evidence is that which gives rise to the present question. The rule which has been referred to is clear and distinct in its terms. Of the cases which have been referred to in which there has been a dispensation with the rule, all those cases have been founded on an actual necessity, the death of a witness, or the incapacity of a witness which created a necessity for admitting the evidence. But no such thing arises in this case. The defendant, with the assistance of his counsel, puts in his answer, that is to say, he puts in a long pleading which consists in some part, and of necessity only in a small part, of statements of facts. The rest is all pleading. As to that which is mere pleading and argument and explanation the defendant who does not submit to be cross-examined has the benefit of the pleading. All that he is excluded from by the operation of this rule is what he has asserted as matter of fact, which could not be received as evidence, if it had not been decided as, in my opinion, it has been decided, so as to guide me if not bind me in *Parker v. Lewis* (*ubi supra*), and I must reject this evidence. I do not think that I do any injustice, or in fact any hardship to Mr. Lewis, in refusing to receive his statement as evidence upon the issues in the cause between himself and the plaintiff. But the answer may or must be read. It may be read by his counsel and relied on, but he cannot read it or any part of it which states a matter of fact, and ask the Court to receive that as fact proved on behalf of that defendant who is not cross-examined.

It would be a most dangerous thing to relax the rules of the Court in that respect. Nothing short of an absolute necessity justifies the Court in relaxing that rule. I have heard of no such necessity in this case, and I must, therefore, refuse to receive as evidence, the statements of fact put in Mr. Lewis's answer.

Solicitors—Messrs. W. Tatham & Son, for plaintiff; Messrs. Tathams, Curling & Pym, for the defendant, H. Lewis.

MALINS, V.C. }
1874. }
June 8, 9. } PLUMBER v. GREGORY (No 2).
August 1. }

Solicitor and Client—Solicitor Partnership—Advance by Client to one Partner—Liability of other Partner for Mis-application of money—Scope of Partnership Business—Release by Deed—Misrepresentation.

In order to render one partner in a firm of solicitors liable for the misapplication of money entrusted by a client of the firm to the other partner, it must be shown that the money was received by that other partner in the ordinary course of business for the purpose of being invested on a specific security. A mere general statement to the client by the partner who receives the money that the money is to be lent on security to another client is not sufficient to bind the other partner; the receipt of money for the purpose of laying it out generally not being part of a solicitor's business, or within the scope of a solicitor partnership.

The plaintiff advanced to W., a member of the firm of J. & W., solicitors, a sum of 1,300l., which J. & W., by an agreement signed by them both, agreed to invest on a mortgage of certain specified property. Subsequently the plaintiff advanced to W. a further sum of 1,700l. on the alleged representation that "his firm had a client who wanted to borrow the money on landed security," but it did not appear that J. was aware of the latter advance to his partner. W. himself paid the plaintiff interest on both sums during his lifetime,

the plaintiff believing that they had been duly invested on mortgage. W. survived his partner J. some years, and then died insolvent, when the plaintiff found that there was no investment existing of either of the sums, and that they had in fact been applied by W. to his own use. Thereupon the plaintiff filed a bill to establish the liability of J.'s estate to repay to her the whole amount, J.'s assets being sufficient to answer the claim:—Held, that J.'s estate was liable for the 1,300l. only, the payment of the 1,700l. to W. being out of the ordinary course of business, and was not discharged from such liability by a deed which W. had, shortly after J.'s death, induced the plaintiff by misrepresentation to execute, and which purported to give W. alone complete control over both sums.

In the year 1859, Jonas Gregory and his son, William Gregory, were carrying on the business of solicitors in partnership, in London. The plaintiff, Mrs. Jessica Plumer, the wife of the defendant, Captain Plumer, was then, and had been for some time previously on terms of great friendship with them both, especially with William Gregory and his family, and both Captain and Mrs. Plumer stated that throughout the transactions in question in the suit, they employed the Gregorlys as their solicitors, and placed implicit confidence in them as such.

In the month of April, 1859, the plaintiff, having in her hands a sum of 3,000l. belonging to her for her separate use, was applied to by William Gregory for an advance of a sum of money to enable his firm, as he alleged, to purchase a particular advowson for a client of theirs, the Rev. T. Bewsher. She consented to make an advance of 1,300l., and by a memorandum of agreement dated the 14th of April, 1859, and made between Jonas Gregory and William Gregory of the one part and the plaintiff of the other part; after reciting that the said Jonas Gregory and William Gregory having occasion for the sum of 1,300l. to enable them to complete the purchase of the said advowson, had applied to the plaintiff to advance them the same, which she had agreed to do upon having the same

secured to her by that agreement, and in manner thereafter provided; and also reciting that the plaintiff had that day paid to the said Jonas Gregory and William Gregory the said sum of 1,300*l.*, as they did thereby admit and acknowledge; in consideration of the said advance the said Jonas Gregory and William Gregory did undertake and agree that immediately upon the completion of the said purchase they would deposit the title-deeds of the said advowson with the plaintiff as an equitable security for the advance of 1,300*l.*, and would, when called upon by her, execute a proper mortgage of the said advowson; and that until the execution of such mortgage they would stand possessed of the said advowson upon trust for her as a security for the said sum and interest at five per cent. per annum. This agreement was signed by both Jonas and William Gregory.

Shortly afterwards, in the same year, the plaintiff was, as she stated in her affidavit, prevailed upon by William Gregory to hand over to him a sum of 1,700*l.*, being the remainder of her 3,000*l.*, on the representation that "his firm had a client, Captain Frederick, who wanted to borrow some money on landed security in Wales, and that she should receive five per cent. for her money." She stated that she understood when she advanced the 1,700*l.* that the Gregorys would, as her solicitors, procure a proper mortgage to be executed by Captain Frederick, and gave no more thought to the matter at the time. She did not, however, receive any security for the 1,700*l.* until the month of August, 1864, when, upon the suggestion of a friend, she applied to William Gregory (Jonas Gregory having then retired from business) for some explanation as to its investment, whereupon he executed to her a bond, dated the 14th of August, 1864, conditioned for payment to her of 1,700*l.* on the 14th of August, 1869, with interest at five per cent.

In August, 1862, Jonas Gregory retired from business, and in January, 1865, he died, possessed of considerable personal estate, and having by his will appointed the defendants Thomas Gregory and Ann Parker his executor and executrix.

In the month of May, 1865, William

Gregory went to stay on a visit of some days with Captain and Mrs. Plumer at their residence, Waterford House, Hertfordshire, and during his visit (so the plaintiff stated in her affidavit) William Gregory advised them, in consequence of Captain Plumer having been in somewhat embarrassed circumstances, to have all the furniture and effects in and about Waterford House settled to Mrs. Plumer's separate use, and thus preserved from the claims of her husband's creditors. To this they both assented, and accordingly William Gregory brought to them for execution a document which he stated was a deed for carrying out the above object. The deed was then executed by Captain and Mrs. Plumer, in the presence of William Gregory, and was immediately afterwards taken away by him. It was dated the 29th of May, 1865, and made between Captain Plumer of the first part, Mrs. Plumer of the second part, and William Gregory of the third part. After reciting that Mrs. Plumer, or Captain Plumer in her right, was possessed of household furniture and effects in or about Waterford House, "and also of the sum of 3,000*l.* now in the hands of the said William Gregory as a trustee for the said Jessica Plumer, all which property was purchased with or arose from money belonging to the separate use of the said Jessica Plumer," it was witnessed that Captain Plumer thereby assigned all the said household furniture and effects unto the said William Gregory, his executors, administrators and assigns, upon trust for Mrs. Plumer for her separate use; and it was further declared that William Gregory should stand possessed of the said sum of 3,000*l.* upon trust either to permit the same to remain in its actual state of investment, or to invest the same upon any security he or Mrs. Plumer should think fit, without his being liable for any loss; and to pay the income thereof to Mrs. Plumer for her separate use, and to pay or transfer the capital to such persons as Mrs. Plumer should by deed or will appoint, and in default of such appointment, for Mrs. Plumer absolutely.

Captain and Mrs. Plumer alleged that William Gregory in no way ever explained to either of them, and that they had no

idea or reason to suppose, that this deed had any reference to the said sums of 1,300*l.* and 1,700*l.*, or gave William Gregory any power in relation thereto, until they saw a copy of it shortly before the institution of the suit; and that they in fact executed the deed without understanding its contents, and relying implicitly on the integrity and sound legal advice of William Gregory.

Until the month of November, 1871, Mrs. Plumer received interest at five per cent. on her 3,000*l.* from William Gregory himself, though the interest during the latter years of his life fell considerably into arrear before being paid. She fully believed (so she stated) that the 1,300*l.* was then secured on mortgage of the advowson, and the 1,700*l.* on mortgage of Captain Frederick's property. She had, however, never actually required the Gregorys to execute a mortgage as provided by the agreement of the 14th of April, 1859.

In March, 1872, William Gregory died insolvent, having by his will appointed his wife and the defendant John Gregory his executrix and executor; John Gregory, however, alone proved the will.

Shortly after William Gregory's death the plaintiff discovered for the first time that the advowson had been in June, 1859, purchased by and conveyed to Jonas and William Gregory on behalf of Mr. Bewsher, who by a memorandum in writing had agreed that they should hold the title-deeds as a security for the sum of 1,300*l.* therein stated to have been borrowed by him from William Gregory; but that in breach, as she insisted, of their duty as her solicitors, the Gregorys had neglected or omitted to procure a proper mortgage to be executed for her benefit. The plaintiff further discovered, as she alleged, that in 1868 the 1,300*l.* had been received by William Gregory and Jonas Gregory's executors, but without any authority from her; and also that no investment had ever been made to secure the 1,700*l.*

The plaintiff accordingly filed this bill, by her next friend, against the executors of Jonas and of William Gregory, praying (amongst other things) a declaration that their estates were jointly and severally

liable to repay to her the sums of 1,300*l.* and 1,700*l.*, with interest at five per cent. per annum, and also that, so far as necessary, the deed of the 29th of May, 1865, might be set aside, or declared to be only valid so far as the property comprised therein was held for the plaintiff's separate use.

Jonas Gregory's executors by their answer denied that they themselves had ever received any part of the 1,300*l.*, and relied upon the deed of the 29th of May, 1865, as having, with the plaintiff's full knowledge and acquiescence, given William Gregory authority to receive that sum on behalf of the plaintiff, and as having entirely exonerated Jonas Gregory's estate from all claims, if any. They also submitted that if the plaintiff ever had any claim against Jonas Gregory or his estate such claim had long ago been barred by delay and *laches*. They moreover denied that Jonas Gregory ever had any knowledge of, or was in any way concerned in, the transactions relating to the 1,700*l.*, or that he had ever personally concerned himself at all with the plaintiff's affairs, and contended that none of the transactions in question in the suit were partnership transactions in respect of which he incurred any liability.

It appeared that a Mr. Clark was a partner with the Gregorys during part of the time over which the transactions in question in the suit extended, but as he took no part in such transactions he was not made a party to the suit. Upon the cause originally coming on for hearing, a preliminary objection was raised that Mr. Clark was a necessary party. This objection was, however, overruled, as reported *supra*, p. 616.

The cause now came on for argument.

William Gregory's estate was altogether insolvent, but Jonas Gregory's executors had admitted assets sufficient to answer the plaintiff's claim, consequently her real contention was to throw the liability of repaying to her the two sums of 1,300*l.* and 1,700*l.* wholly upon Jonas Gregory's estate.

Mr. Cotton and *Mr. E. Outler* for the plaintiff.—There can be no question as to the liability of Jonas Gregory's estate as to the 1,300*l.*, inasmuch as he signed the

agreement of the 14th of April, 1859. And as to the 1,700*l.*, we submit that it was advanced to William Gregory for a client of his firm, and in the ordinary course of professional business. In such a case it is well settled that any member of a firm of solicitors is liable to make good any loss occasioned by the negligence or dishonesty of the partner by whom the money has been received—

The Earl of Dundonald v. Masterman,
38 Law J. Rep. (N.S.) Chanc. 350;
s. c. Law Rep. 7 Eq. 504;

St. Aubyn v. Smart, Law Rep. 3
Chanc. App. 646;

affirming your Honour's decision in Law
Rep. 5 Eq. 183;

Atkinson v. Mackreth, 35 Law J. Rep.
(N.S.) Chanc. 624; s. c. Law Rep.
2 Eq. 570.

[MALINS, V.C., mentioned]

Blair v. Bromley, 5 Hare 542; s. c.
16 Law J. Rep. (N.S.) Chanc. 105;
s. c. on app. 2 Ph. 354; s. c. 16
Law J. Rep. (N.S.) Chanc. 495.]

We submit therefore that Jonas Gregory's estate is also liable to make good the 1,700*l.*

Mr. Glasse and Mr. Waller, for Jonas Gregory's executors.—In order to render Jonas Gregory's estate liable, the *onus* is on the plaintiff to shew beyond doubt that the money was paid to William Gregory as a member of the firm, and for partnership purposes. We deny that any of the transactions in question were partnership transactions. At all events, we had nothing to do with the 1,700*l.* Even assuming that Jonas Gregory was originally liable for the 1,300*l.*, still we say that the effect of the deed of settlement of the 29th of May, 1865, was to release him and his estate from that sum, and that the plaintiff well understood that it threw the liability of the whole 3,000*l.* upon William Gregory alone. Moreover this is the plaintiff's first attempt to establish any liability against Jonas; on the ground of delay, therefore, her claim must fail. She was herself guilty of negligence in not requiring a mortgage as provided by the agreement of 1859.

[MALINS, V.C.—I am clearly of opinion that the estate of Jonas Gregory is liable for the 1,300*l.*]

As regards the 1,700*l.*, we submit that William Gregory was not acting within the scope of his partnership authority in receiving the money, for there is no conclusive evidence to shew that he received it otherwise than generally for the purpose of laying it out, in which case his partner is not liable for the loss, which is attributable to a breach of duty on the part of William Gregory alone—

Harman v. Johnson, 2 E. & B. 61;
s. c. 22 Law J. Rep. (N.S.) Q.B.
297;

Bourdillon v. Roche, 27 Law J. Rep.
(N.S.) Chanc. 681;

Coomer v. Bromley, 5 De Gex & S.
532.

Mr. Macnaghten, for William Gregory's executor, did not dispute that William Gregory had rendered himself liable for the whole 3,000*l.*, but asked for his costs on the ground that it was unnecessary to make William's executor a party to the suit, the estate being insolvent. Hemmover stated that there was already a suit instituted in another branch of the Court for the administration of William Gregory's estate.

Mr. Ilbert, for Captain Plumer.

Mr. Cotton in reply.—It cannot be disputed that Jonas Gregory was originally liable for the 1,300*l.*, under the agreement of 1859, under which he stood in the position of a trustee for the plaintiff. Both he and William undertook to execute a mortgage if she should require it. It is true she did not require it, but she would have done so if she had had independent advice. The statement in the deed of the 29th of May, 1865, that the 3,000*l.* was then in the hands of William Gregory, he knew to be untrue. The deed gave him no authority to receive the 3,000*l.*, for it was in fact a settlement only of what was assumed to be in his hands. It is impossible to suppose that the plaintiff intended that William Gregory should receive the money, and that his father's estate should be discharged. The real object of the deed was to place the money more completely under William's control than it would otherwise have been, and the circumstances under which it was executed are quite sufficient to invalidate it. Therefore the liability

of Jonas's estate as to the 1,300*l.* remains. With regard to the 1,700*l.*, I admit that there is no evidence that Captain Frederick wanted the money, but nevertheless William received the money on the representation that it was to be invested on the particular security of Captain Frederick's estate, and that was clearly within the scope of William's partnership authority, so as to render his partner liable for the loss, according to the principle laid down in

Harman v. Johnson (ubi supra)

and

The Earl of Dundonald v. Masterman (ubi supra).

Even if your Honour should only be in my favour as to one of the two sums, I submit that I am entitled to the whole costs of the suit.

His Honour reserved judgment.

MALINS, V.C. (on August 1st), after stating the facts, said—The original liability of Jonas Gregory for the 1,300*l.* is put beyond all doubt by the memorandum of agreement of the 14th of April, 1859, which he signed, and thus not only made himself the debtor of the plaintiff for the sum of 1,300*l.*, but became also a trustee for her. It being certain that the money has never been repaid, the only question as to this sum is whether any subsequent transactions have released his estate from that liability.

With regard to the 1,700*l.*, the transaction is altogether of a different character. I collect that William Gregory was a thoughtless and extravagant man, and it seems certain that he was always struggling with difficulties, which difficulties were probably unknown to his partner. He knew that the plaintiff had 1,700*l.* left, and this he obtained from her in the manner she states in her affidavit. It was not suggested, in the course of the argument, that Jonas Gregory knew anything of this transaction, and I am perfectly satisfied that he did not, and that the statement as to the proposed loan to Captain Frederick was a mere subterfuge of William Gregory to enable him to get the money from the plaintiff. It does not appear in evidence that there ever was any transaction with

a Captain Frederick whatever. It is certain that the money never got into the hands of the firm, but was immediately applied by William Gregory to his own purposes, and, no doubt, to relieve him from his embarrassments. The plaintiff, no doubt, believed that she was advancing the money, but she was so incautious as not even to take a promissory note, or any written acknowledgment of the money, and it remained wholly unsecured until 1864, when she took the bond of William Gregory only for it. The question is whether, under such circumstances, the money was lent to the firm, so as to make Jonas Gregory liable for it, or whether it was lent to William Gregory only. All subsequent transactions, as to both sums, took place between the plaintiff and William Gregory only. The father retired from business in August, 1862, and died in May, 1865. William Gregory continued to pay the interest on both sums up to November, 1871, though he had great difficulty in doing so during the latter part of his life, as his letters show. He died in March, 1872, utterly insolvent, and the deficiency as to his estate to pay the unquestionable debt which he owed to the plaintiff makes it necessary for her to endeavour to establish the liability of the father's estate, which is a solvent one, and, as I understand, sufficient to pay, if it is liable.

Assuming the liability of Jonas's estate, it was contended that that liability was discharged by a deed, or settlement, as it is called, executed on the 29th of May, 1865, that is, about the time of the death of the father. Now the circumstances with regard to that deed are very peculiar. The deed is set up by the answer of the executors of Jonas Gregory. [His Honour then read the deed, and continued]—That deed was executed, no doubt, to put the plaintiff off the scent, to make it appear that William had the money in his hands. The plaintiff details the circumstances as to the execution of this deed in her affidavit. [His Honour then read the plaintiff's account, to the effect above stated, of the circumstances under which she and her husband were induced to execute the deed, and proceeded]—I am of opinion that the con-

tents of this deed, and all the circumstances, shew the plaintiff was not aware what she was doing when she executed it, and that it is not in any way binding upon her. The liability, whatever it may be, is not therefore in any way affected by it.

With regard to the 1,300*l.*, I do not see a single circumstance to discharge Jonas Gregory from the liability to the plaintiff which he undertook by the memorandum of agreement of the 14th of April, 1859. It was clearly his duty to see that that money was repaid to the plaintiff; that duty he overlooked. His joint debtor continued to pay interest upon it down to November, 1871, and there is, therefore, no ground for the defence set up by the answer of Jonas Gregory's executors, that if the plaintiff ever had any claim against Jonas Gregory or his estate, such claim has long ago been barred by delay and laches. There must, therefore, be a declaration that the estate of Jonas Gregory is liable to repay this sum, with interest at five per cent., from the last payment of interest made by William Gregory in November, 1871.

The question as to the 1,700*l.* depends upon wholly different principles. It being clear that Jonas Gregory never received any part of this sum, and that he was wholly ignorant of the fact of his son having received it, he can only be liable for it on the ground that his partner's receipt for it was his receipt, or, in other words, that it was a partnership transaction. It is clear that one partner has no authority to bind the other partners by borrowing money, unless it is borrowed in the usual course of business, and for specific business purposes. These principles are clearly established, I think, by the two authorities which were cited, *Harman v. Johnson* (*ubi supra*) and *Bourdillon v. Roche* (*ubi supra*), cases which are frequently cited, and are very valuable authorities. [His Honour then referred to those cases at some length, and continued]—Upon these authorities, I think it clear that the mere statement that the money was to be lent to a client was not enough to bind the partner. If the firm had been employed to prepare securities for the plaintiff (because, in

that case, the firm would have had the business transactions, and it would have appeared in their books), a payment of money to one of the partners would have been a payment to both, because it would then have been received for the purpose of being invested on specific security, within the meaning of these decisions. I was much pressed by the plaintiff's counsel with the decision of Lord Justice James, when Vice-Chancellor, in *The Earl of Dundonald v. Masterman* (*ubi supra*), in which it was held that two partners were liable for the receipt of the third; but it was evident that the decision proceeded on the ground that a firm of solicitors, consisting of three partners, had undertaken the general arrangement of the affairs of Lord Dundonald, and that a payment to one was a payment to all, in the ordinary course of the business which they had undertaken. My decision in *St. Aubyn v. Smart* (*ubi supra*), affirmed on appeal by Lord Hatherley, which was also cited, proceeded on the same principle. The payment of the sum of 1,700*l.* to William Gregory was altogether out of the ordinary course of business, and his partner cannot, therefore, in my opinion, be liable for it. I have felt some doubt whether Jonas had not given authority to his son by the transaction as to the 1,300*l.*, but I think it would be going too far if I were to say that an authority by one partner to another to borrow one sum of money, is an unlimited authority to borrow to any extent. The unbounded condence of the plaintiff in William Gregory had led her to forego all prudence in the transaction of her business with him, and for that she must suffer. It is a case in which one of two innocent parties must suffer; that is, in which either the representatives of Jonas Gregory, he having been entirely innocent in the transaction, will have the loss thrown on them, or the loss must fall on another innocent party, this plaintiff. It is due to her negligence and want of prudence in not taking the ordinary course in business, and making some communication with Jonas Gregory, or enquiring, at all events, whether the money had gone into the partnership books. Under these circumstances it is impossible, in my opinion, that I can

throw the liability, as to the 1,700*l.*, upon Jonas Gregory. The bill, therefore, must be dismissed, so far as it seeks to recover the 1,700*l.* from the estate of Jonas Gregory. There will, therefore, be a decree that the defendants, the executors of Jonas Gregory, admitting assets, do repay to the plaintiff the sum of 1,800*l.*, with interest from a date which the parties will agree upon, the amount to be verified by affidavit; and then the bill will be dismissed as to the claim for the 1,700*l.* Then comes a question as to the costs. It is perfectly clear that the plaintiff must have the costs, so far as relates to the 1,300*l.*, against the estate of Jonas Gregory. With regard to the other part of the case, I suppose the costs can be distinguished. I think the justice of the case will be met by this, considering the way in which Jonas Gregory had trusted his son. The transaction as to the 1,300*l.* was carried on in a very unbusiness-like manner, I am bound to say, though by so experienced a man as Jonas Gregory. He ought to have been more cautious. His course of conduct on that occasion has led to the difficulty, although perfectly well-intentioned, I am satisfied. Therefore I think, with regard to that part of the case which relates to the 1,700*l.*, the bill should be dismissed without costs, as against the executors of Jonas Gregory.

Solicitors—Messrs. Radcliffe, Davies & Cator, for Capt. and Mrs. Plumer; Mr. W. Bohm and Mr. P. B. Matthews, for the defendants.

JESSEL, M.R. }
1874.
April 20. }

JERVIS v. WOLFERSTAN.

Trustees' Indemnity—Executor—Distribution of Residue with Notice of a Contingent Liability—Refunding Assets—Covenant to bequeath Share of Residue.

It is a general rule of equity that when a person accepts a trust at the request of another, and that other is a cestui que trust, the cestui que trust is liable personally to

indemnify the trustee against all losses accruing in the due execution of the trust.

Where the loss in respect of which such indemnity is sought occurs after the death of the cestui que trust the trustee is in the position of a creditor of the cestui que trust and entitled to recover as a creditor from legatees to whom his estate has been paid.

Distribution of the estate by an executor with notice of a contingent liability does not preclude him from recovering the estate from the legatees in case the contingent liability afterwards ripens into actual loss.

An executor who compels a legatee to refund can only require repayment of the capital and not of any intermediate income.

J. and P., at the request of a settlor, accepted transfers of shares in an unlimited company upon trust for a tenant for life and remaindermen. J. and P. were executors of the will of the settlor, and distributed the residue of his estate. Subsequently in the lifetime of the tenant for life large calls were made on the shares, and the remaindermen under the settlement disclaimed:—Held, that J. and P. as trustees were entitled to be indemnified against the liability out of the settlor's residuary estate, and to recover the capital which they had distributed among the residuary legatees.

The same testator had covenanted to leave by will or otherwise provide for his daughter B. one-third of the residuary estate; he bequeathed one-third to her, which was settled on her marriage and paid to the trustees of her marriage settlement:—Held, that the testator had satisfied his covenant; that the daughter B. took her share, not as a creditor, but as a residuary legatee, and that her trustees must refund the amount with the other residuary legatees.

Swynfen S. Jervis, by indenture dated the 1st of March, 1856, on the marriage of Mrs. Broughton, covenanted that he would bequeath by his will, or otherwise provide that whatever residue of his personal estate should remain at his decease, should be equally divided between his daughter Florence (Mrs. Broughton) and his two other children, Mrs. Brackenbury and W. N. Jervis.

By a deed of settlement of the 21st of August, 1866, Swyfen S. Jervis settled 625 shares in the Albert Insurance Company—an unlimited company, and supposed to be not only solvent but wealthy—on his wife, Catherine Jervis, for life, with remainders to his children and grandchildren; he appointed J. J. Jervis and P. O. Jervis trustees, and transferred the shares to them. On the same 21st of August, 1866, the settlor made his will, and thereby bequeathed his residuary personal estate to his two daughters, Mrs. Broughton and Mrs. Brackenbury, and his son, W. N. Jervis, and appointed J. J. Jervis and P. O. Jervis, his executors. S. S. Jervis, the testator, died on the 15th of January, 1867.

By an indenture dated the 22nd of April, 1867, Mrs. Brackenbury's share under the will was settled and assigned to trustees, one of whom was the said P. O. Jervis.

The executors of Mr. S. S. Jervis proved his will, advertised for creditors in the usual way, satisfied all his debts and liabilities, except the possible liability on the Albert shares. This company was then believed to be thoroughly solvent, and likely to continue so, and the shares were at a high price. Accordingly the executors divided the residue, which amounted to 2,649*l.* 12*s.* 6*d.*, paying one share, 883*l.* 4*s.* 2*d.*, to the trustees of Mrs. Broughton's settlement, and a similar share to the trustees of Mrs. Brackenbury's settlement. They retained in their hands the remaining one-third share for W. N. Jervis, who was then abroad.

After this, in September, 1869, the Albert Company was ordered to be wound up, and J. J. Jervis and P. O. Jervis were placed on the list of contributories in respect of the 625 shares vested in them, and calls to the amount of 6,875*l.* were made upon them.

It appeared that up to this time the *cestuis que trust* in remainder after the life estate of Mrs. Jervis under the deed of the 21st of August, 1866, had not been informed of the nature of the settlement, or, at any rate, had not been asked to accept or disclaim the gifts under it. Mrs. Jervis, the tenant for life, had received

some dividends under the deed. After the failure of the company, the *cestuis que trust* in remainder respectively disclaimed. The share of W. N. Jervis in the residuary estate, which had been retained by the trustees, was with his consent applied by them towards payment of the calls. Mrs. Jervis, the testator's widow, contributed, or offered to contribute, a proper proportion towards the liability; and this bill was filed by J. J. Jervis against Mr. and Mrs. Broughton, Mr. and Mrs. Brackenbury and the trustees of their respective settlements, and Mrs. Jervis, praying to be indemnified against the liability on the shares to the extent of the share of residue paid to the trustees of the settlements, and to obtain repayment of the shares.

Mr. Southgate and Mr. W. W. Cooper for the plaintiff.—Under the circumstances there is a resulting trust in favour of Swyfen S. Jervis, the testator; the plaintiff and his co-trustee are, in fact, trustees for him, and his estate is liable to indemnify them according to the ordinary rules—

Ex parte Chippendale; in re The German Mining Company, 4 De Gex, M. & G. 19; s. c. 22 Law J. Rep. (N.S.) Chanc. 926;

Balsh v. Hyham, 2 P. Wms. 453;

Phene v. Gillon, 5 Hare, 1; s. c. 15 Law J. Rep. (N.S.) Chanc. 65.

The plaintiff is a creditor of the testator, therefore, for the amount of the liability, and entitled to have her debt paid out of the residuary estate.

The fact that he was himself executor, and himself paid over the residuary estate, makes no difference, for at that time there was no debt existing, and all the creditors had notice of, was the possible and improbable liability on shares of a company considered solvent.

Prowse v. Spurgin, 37 Law J. Rep. (N.S.) Chanc. 251; s. c. Law Rep. 5 Eq. 99,

was also referred to.

Mr. Fry and Mr. Speed, for Mr. and Mrs. Broughton.—The executors clearly had notice of the liability when they paid away the residue, and therefore they cannot recover.

Besides, in this case, the payment was

made to Mr. and Mrs. Broughton's trustees as creditors of the testator under the covenant to bequeath a share of residue. If the executors made a mistake as to the amount of residue, it was money paid under a mistake of fact, and cannot be recovered—

Aiken v. Short, 1 Hurl. & N. 210; s. c. 25 Law J. Rep. (N.S.) Exch. 321.

We have been paid as creditors, and have an equal right with the official liquidator of the company; he could not make us refund, and the trustee cannot stand in any better position.

[THE MASTER OF THE ROLLS.—In

Hodges v. Waddington, 2 Ventr. 360, the rule is laid down that if a man pays a debt, there shall be a refunding to creditors in respect of debts of higher nature. If you can make out that you are creditors, you may bring yourselves within that rule; but are you entitled to anything except a share of residue after the debts are paid?]

The trustees, in fact, have themselves caused the difficulty by not communicating the settlement to the *cestuis que trust* and ascertaining whether they accepted or not the shares under it. If this had been ascertained, then the interest of the testator under the settlement might have been sold, while the shares were valuable, and the testator's estate, instead of being liable to this claim, would have been largely increased; their conduct, therefore, precludes them from recovering.

Mr. Bagshawe and Mr. Kekewich, for Mr. and Mrs. Brackenbury and the trustees of their settlement, cited

Grayburn v. Clarkson, 37 Law J. Rep. (N.S.) Chanc. 550; s. c. Law Rep. 3 Chanc. 605.

Mr. Stiffe Everitt, for Mrs. Jervis.

Mr. Southgate in reply.—The testator satisfied his covenant by bequeathing the share of residue—

In re Brookman's Trusts, 38 Law J. Rep. (N.S.) Chanc. 585; s. c. 39 ibid. 138; s. c. Law Rep. 5 Chanc. 182.

Mrs. Broughton's trustees are therefore simply residuary legatees and not creditors at all; the right of the official liqui-

dator to recover from them would be clear—

Davies v. Nicholson, 2 De Gex & J. 693; s. c. 27 Law J. Rep. (N.S.) Chanc. 719;

and the plaintiff has a right to stand in his shoes; in fact, the plaintiff as a trustee entitled to be indemnified is a creditor and entitled to have his debt satisfied out of the residue in whosoever hands it may be; and he has done nothing to forfeit this right.

THE MASTER OF THE ROLLS.—The case is one which is by no means common and which I hope will not become common. It is a case where the executors and trustees of a will now claim as creditors against the estate which they have themselves distributed. The case is one so peculiar that it is necessary to state it shortly.

By a deed of settlement of the 21st of August, 1866, a Mr. Swynfen Jervis, who was the owner of certain shares, numbering I think, 625, in the Albert Insurance Company, then a going concern, and supposed to have been not only solvent but wealthy, and in which the shares were fully paid up, made a settlement of these shares, supposed then to be of very great value, on his wife for life, with remainders among his children and grandchildren. The same settlor made his will on the 21st of August, 1866, and made the trustees of the settlement executors. He died in January, 1867, and the will was duly proved.

By an indenture of settlement made in his lifetime on the 31st of March, 1856, on the marriage of one of his daughters, now Mrs. Broughton, he covenanted that he "would bequeath by his will or otherwise provide that whatever residue of his personal estate should remain at his decease, should be equally divided between his said daughter Florence Jervis" (now Mrs. Broughton), "and his two children by his second marriage, namely, the defendant Blanch Brackenbury and Walter Neil Jervis." Then by another indenture of the 22nd of April, 1867, which was a settlement of Mrs. Brackenbury's share, her one third share of the residue which she took under Mr. Jervis's will was

settled and vested in her trustees. The executors of Mr. Jervis (the plaintiff is one of them) advertised for creditors in the usual way. They found that they had paid all their debts, that they had got rid of all their liabilities except this, that there was a possible liability on the Albert shares, because though it was a going concern, and believed to be solvent, it might fail. If it failed the failure might happen before the remaindermen had become entitled in possession, then they would have an opportunity of disclaiming and this would throw back the share as regards beneficial interest or liability on the testator's estate, and in that way there was a possible liability of the testator's estate to the trustees of that settlement, a remote, contingent, unexpected liability that existed, and it is not contended that the plaintiff was not aware that there was such a possibility. There being no other debt unpaid and no other liability, the executors divided the residue, which then amounted to 2,649*l.* 12*s.* 6*d.*, into three shares; they paid one share of 883*l.* 4*s.* 2*d.* to the trustees of Mrs. Broughton's settlement, and another share of equal amount to the trustees of Mrs. Brackenbury's settlement. Unfortunately the insurance company failed, and was wound up after all these payments had been made, and eventually the costs of the liquidation turned out to be exceedingly heavy, and very large calls, amounting to 6,875*l.*, were made upon these trustees and executors. Of course they were legally liable as trustees of the settlement of 1866, and they have had to pay this large sum of money.

The *cestuis que trust*, with the exception of the widow—who of course, having received the dividends during her life was unable to disclaim—naturally disclaimed, and the result therefore was that under our law there was a resulting trust for the testator's estate. Mrs. Jervis has paid what she could and nobody disputes that she has paid sufficient. The result therefore is that the testator's estate is liable for several thousands of pounds and liable to indemnify these trustees. I take it to be the general rule that where persons accept a trust at the request of another, and that other is a *cestui que trust*,

the *cestui que trust* is liable to indemnify the trustees personally for any loss accruing in the due execution of the trusts. Therefore I shall hold under that doctrine that the estate of the testator became liable to the trustees for this large sum of money.

That being so, the next question is, how are they to be recouped, if they are entitled to be recouped at all? The only sums remaining to recoup them are these two sums of 883*l.* 4*s.* 2*d.* paid to the trustees of the respective settlements. They were originally undoubtedly part of the testator's estate and part of the estate which was liable to recoup their executors, and the question which I have now to try is whether what has happened has entitled these defendants to retain these moneys and leave the executors to bear the loss personally.

Now the nature of the defence is this—It is first of all said as regards Mrs. Broughton and those claiming under her settlement, that they are not in possession as legatees at all, that it is not a case in which an attempt is made by a creditor to make a residuary legatee refund, but that it is the case of one creditor attempting to make another creditor refund. The first question which I have to examine is whether that is a true state of the case as regards the law, and I do not think that it is. The covenant by Mr. Swynfen Jervis was simply that he would bequeath by will or otherwise provide that this share of residue should go to Mrs. Broughton. He did bequeath it by will, and he therefore fulfilled his covenant. The effect of the bequest by the will was to make the lady a residuary legatee and nothing else, and consequently whether she settled it or did not settle it, it was the residuary legatee receiving a share of the residue, and if as residuary legatee she was liable to refund, the liability in my opinion remains. That makes the case of Mrs. Broughton identical with Mrs. Brackenbury.

The next question is, are they liable to refund at all? I take it that no proposition is better settled than that residuary legatees are liable to refund at the suit of an unpaid creditor, and I have already held that the plaintiff is an unpaid creditor.

The only proposition that remains to be examined is this, it is said that in addition to being a creditor the plaintiff and his co-creditor were also the executors of the debtor, and that though creditors can obtain an order to refund against residuary legatees, executors cannot, if the executors have paid over the assets with notice of the debt. Now that is undoubtedly good law, but it does not by any means follow that the creditor, as such, has lost his right to recover as creditor, because he could not recover in another character, assuming he could not recover in that character. It may be quite true that if the suit was brought in the character of executor only it would be barred for that reason. I will examine in a moment whether it is so barred, but still I do not think that it is at all conclusive on the question as to the creditor's right to recover, the ground being that he has done something which would debar him in another character from recovering, he not suing in that other character.

But is it true that the executor would be barred in a case like this? I cannot find any authority for that. I have looked through many cases, and I have asked for the assistance of the bar, and I cannot find the rule stated in wider terms than those which I have stated that an executor cannot recover a payment made with notice of a debt. Now the plaintiff certainly had not notice of a debt for the debt did not exist. The utmost notice that he had was notice of a possible liability, a remote, unlikely liability, but a possible one, and the question therefore remains whether the notice of a possible, remote, contingent liability of this kind would prevent the executor recovering back the assets if he had paid them away when that becomes a debt which was formerly this contingent remote liability. I am not willing to stretch the rule beyond what its terms require, because it appears to me that great inconvenience would arise from so straining or stretching the rule. If it were true that an executor was disabled from recovering, merely because he had notice of such a possible liability, the result would be to throw the great bulk of the estates of testators who

had any property into this Court, a result certainly not desirable, because it would then be sufficient for an executor to allege as an excuse for not paying any of the legatees, that at some remote period his testator had been a lessee of property, though the property might be of the greatest possible value, though it had been assigned many years before, and there was a good covenant of indemnity by a solvent purchaser. That is a very common case indeed. But not only would it be a sufficient answer against paying the residuary legatee, it would be a sufficient answer against paying anybody anything, the mere fact that he had heard (for that is notice) that the testator had formerly been a lessee, would give him any delay he might wish, because he might be prosecuting enquiries as to whether the testator had ever been a lessee of any property whatever of which he was formerly possessed, and it shews at once the extreme inconvenience of notice of such a kind of remote, contingent liability being sufficient to make the executor guilty of negligence, for that is what it is, in distributing the assets—wilful negligence, such as to deprive him of any remedy, if he were afterwards made personally liable at the suit of the person entitled to prosecute that liability. I think the mere statement of such a matter shews how dangerous it would be to extend the doctrine to that length, and I am not prepared so to extend it; on the contrary I would rather encourage executors to distribute the assets as soon as possible instead of making them liable to such a responsibility if they did not take such superfluous and unusual precautions. I think, therefore, that it would not have been sufficient to prevent the plaintiff, even as executor, from recovering this amount if he had been compelled by a third person to pay it. That being so I am of opinion that the plaintiff is entitled to recover.

There now remains a very important question, first, what he is entitled to recover? I take it that he is entitled to recover what he has paid. Mr. Bagshawe put it to me that that would involve some hardship; but, on the other hand, everybody taking a residue must know that he

takes it subject to the testator's liabilities, and takes the risk of its afterwards turning out that there are undiscovered liabilities. That has always been the law. Everybody taking a share of residue must be held to take it with knowledge of that liability, therefore I think there is no hardship in that. On the other hand it was thought to be a hardship that a man may not spend the income, and this doctrine is now established that if an executor recovers back assets he cannot recover any of the income, but he must take only the capital. Following that doctrine, I shall direct the trustees of Mrs. Brackenbury's settlement to pay 883*l.* 4*s.* 2*d.* into Court, and the trustees of Mrs. Broughton's settlement to pay the like sum into Court, a day to be fixed for that purpose.

Now, as to the costs, I cannot help seeing that this is a case of very great hardship on all sides. I do not at all blame the trustees of these settlements for bringing this case into Court. Points of law of great nicety, and by no means free from difficulty, have had to be discussed, and I think that they were not wrong in not making the payments without the case being decided. So far, therefore, from mulcting them in costs, I think they must have their costs. Therefore when the sums are brought into Court I think that the costs of all parties, as between solicitor and client, should be paid out of the fund, and that the residue should be paid to the plaintiff and his co-executor, Mr. Philip Octavius Jervis.

Solicitors—Messrs. Stokes, Saunders & Stokes, for plaintiff; Messrs. Tucker & Lake; Messrs. Few & Co.; and Mr. J. H. Johnson, for defendants.

JESSEL, M.R.

1874.

June 12.

STRONG v. BIRD.

Release of Debt—Declaration of Intention—Appointment of Debtor Executor.

*A. borrowed 1,100*l.* from his step-mother, upon an agreement that the debt should be paid by deductions of 100*l.* from*

each quarterly payment which she made him for her board. After two deductions had been made she declared she would make no more, and thenceforward continued to pay the quarterly sums in full. She appointed him sole executor of her will which contained no disposition of her residuary estate:—Held, that, although in order to have an effectual release in equity of a debt, there must be an actual legal release or transfer of the property, that in this case the debt was satisfied on two grounds—First, because the appointment of the debtor as executor operated as a release at law, and all claim in equity to recover the debt was prevented by the intention of the testatrix to release it. Secondly, because the testatrix by making the full quarterly payments had actually completed the gift of the instalments she was entitled to retain.

This was a suit for the administration of the estate of Frances Bird, the testatrix in the cause. The question argued was, whether she had in her lifetime released the defendant from a debt. The testatrix was the step-mother of the defendant, and lived with him under an agreement according to which she paid him 850*l.* a year by four quarterly instalments as her share of the household expenses. In the beginning of 1866 the defendant borrowed of the testatrix 1,100*l.* and it was agreed that the loan should be paid off by deductions of 100*l.* from each quarter's payment for board. In pursuance of this agreement she deducted 100*l.* from the quarterly payment in June, 1866, and 100*l.* from the quarterly payment in October, 1866. At Christmas, 1866, according to the evidence of defendant and his wife, she refused to make any further deductions and expressly forgave the debt. From that time till her death, which occurred in December, 1870, she paid the quarterly payments without any deduction. The evidence of the defendant and his wife was corroborated by memoranda in the handwriting of the testatrix.

The testatrix by her will appointed the defendant executor, and made no disposition of her residuary estate.

The question of his liability now came on to be argued on a summons taken out

by him to vary the Chief Clerk's certificate which had found him liable for the 900*l*.

Mr. Southgate and Mr. G. Miller, for the defendant. — The circumstances shewed an effectual release in equity—

Flower v. Marten, 2 Myl. & Cr. 459.

Mr. Chitty and Mr. Jolliffe, for the plaintiff. — To perfect the gift there should have been an effectual release or transfer of the property valid at law as well as in equity; such an act or declaration as might be pleaded as a release by way of accord or satisfaction at law—

Peace v. Hains, 11 Hare, 151;

Taylor v. Manners, 35 Law J. Rep. (N.S.) Chanc. 128; s. c. Law Rep. 1 Chanc. 48.

These cases shew that a simple declaration of intention to give is not sufficient and that equity follows the law.

Yeomans v. Williams, 35 Beav. 130; s. c. 35 Law J. Rep. (N.S.) Chanc. 283; s. c. Law Rep. 1 Eq. 184,

was decided on the ground that the executor made a representation on which the debtor altered his position, and in

Taylor v. Manners (*ubi supra*),

there was an agreement for value which of course equity will enforce. There is nothing here but a simple declaration of intention without any other equity. The appointment of an executor does not operate as a release in equity—

Ingle v. Richards, 28 Beav. 366;

Cross v. Sprigg, 6 Hare, 552; s. c. 18 Law J. Rep. (N.S.) Chanc. 204; on appeal, 2 Hall & Tw. 233; 2 Mac. & G. 113; s. c. 19 Law J. Rep. (N.S.) Chanc. 528,

was also referred to.

Mr. Macheson (*Mr. Mander* with him), and *Mr. A. Thompson*, for other parties.

THE MASTER OF THE ROLLS.—Notwithstanding all the technical arguments which have been raised in this case I have no doubt that I can do justice. The first point is what are the facts? It has been admitted that this is as fair and honest a case as was ever presented to the Court. This gentleman swears that he borrowed 1,100*l*. in three sums from a lady who stood to him in a very peculiar relation.

She was his step-mother, and she evidently entertained towards him the feelings of a mother. She lent him the 1,100*l*. and the agreement come to seems to have been of this nature. At this time he was maintaining her, although I should rather say that she lived in his house, but being a lady of fortune she did not want him to maintain her for nothing. He seems to have maintained her and she to have allowed him 850*l*. a year, payable by four quarterly instalments, for such maintenance. He says that the agreement was that the loan should be paid off by a deduction of 100*l*. from each quarter's payment for board. In pursuance of the arrangement she deducted 100*l*. in June, 1866, and also in October, 1866, after which time, he says, "she refused to make any further deductions and expressly forgave me the debt." Now if it stood there alone, I think the rule of law would prevent my acting upon that evidence, but it does not stand alone. His wife makes an affidavit in corroboration of his evidence.

In corroboration of the statements of the defendant and his wife, the cheque ends of the cheques drawn by the testatrix for those two quarterly payments are produced, and upon those cheque ends in her own handwriting it is stated that he has only been paid 112*l*. 10*s*., she having deducted 100*l*.

Now it appears that she lived four years after this, and that she paid sixteen quarters' board at the rate of 212*l*. 10*s*. a quarter. Upon those facts I think this is clear, that whether Mrs. Bird did or not make a gift effectual in law, she intended to do so. I cannot read the conversation, of which evidence has been given, as meaning anything more than this—"I will not take the instalment of 100*l*., and I will never take another instalment." It is also to be observed that the defendant thanked her at the time, and that he so understood her words is plain from the observation, "That she forgave me the debt." It being admitted that these are persons of honour whose word is to be trusted, and persons of integrity and position who know the meaning of the words they use, I think that no other interpretation can be given to the words used than that Mrs.

Bird intended to give the money which of course she had the power of giving to her stepson.

The question is, did the law allow her to give it without more than what she actually did? First of all it is said, and said quite accurately, that the mere saying, by a creditor to a debtor, "I forgive you the debt," will not operate as a release at law. It is what the law calls a *nudum pactum*—a promise made without an actual consideration passing. It is not a release, because it is not under seal; therefore the mere circumstance of saying, "I will forgive you," will not do; but there are two modes in which the validity of the transaction can be supported. First of all, we must consider what the law requires. The law requires nothing more than this—that, in a case where the thing which is the subject of donation is transferable or releasable at law, that the legal transfer or release shall take place; that is, that the gift is not perfect until what has been generally called a change of the property at law has taken place. Allowing that rule to operate to its full extent, what occurred was this. The donor, or the alleged donor, had made her will, and by that will had appointed Mr. Bird, the alleged donee, executor. After her death he proved the will, and the legal effect of that was to release the debt in law; and therefore the condition which is required, namely, that the release shall be perfect at law, was complied with by the testatrix making him executor. It is not necessary that the legal change shall knowingly be made by the donor with a view to carry out the gift. It may be made for another purpose; but if the gift is clear, and there is to be no recall of the gift and no intention to recall it, so that the person who executes the legal instrument does not intend to invest the person taking upon himself the legal ownership with any other character, there is no reason why the legal instrument should not have its legal effect. When a testator makes the man executor, and thereby releases the debt at law, he is no longer liable at law. It is said that he would be liable in this Court, and so he would, unless he could shew some reason

for not being made liable. Then what does he shew here? Why, he proves, to the satisfaction of the Court, a continuing intention to give; and it appears that, having shewn the continuing intention to give, and having shewn a legal act, which transferred the ownership or released the obligation—for it is the same thing—the transaction is perfected, and he does not want the aid of a Court of Equity to carry it out or to make it complete, because it is complete already, and there is no equity against him to take the property away from him.

On that ground I shall hold that this gentleman had a perfect title to the 900*l*. But there is another ground, which, I think, is equally clear, namely, the testatrix living for more than nine quarters after this period.

Now, what were her legal rights? By the bargain that was made, her legal right was to retain 100*l*. every quarter out of the quarterly amount payable for board. It was not a question of set-off, but it was a legal debt. She, therefore, when the quarter expired, owed this gentleman 112*l*. 10*s*., and no more; and if he had brought an action for board, she could, by paying the 112*l*. 10*s*. into Court, without any plea of set-off, have succeeded in the action. His legal right was to obtain from her, at the end of each quarter, 112*l*. 10*s*. At the end of each quarter she pays him another 100*l*., which she does not owe him; and when she has made nine of those payments, she has paid him 900*l*. It is not any case of incomplete gift, but it is a complete payment, by her paying the 900*l*. by instalments of 100*l*. each, which she intended to give him, and which she has given at each period, as they became due, by actual payments; and I think that that would put him in a position to say that, having been paid, I have a right to retain, because the testatrix intended me to retain; and the gift is perfectly established in that way also.

On both grounds, therefore, I think that this gentleman is entitled to recover, and I shall allow the summons accordingly.

I may mention that the same evidence was not before the Chief Clerk that has

been before me, or he might have arrived at the same conclusion as I have done had he had the same materials.

The costs of all parties will be costs in the cause, and will come out of the estate.

Solicitors—Messrs. Chapple & Welch, for plaintiff; Messrs. Mason & Withall, for defendant; Mr. Farrar and Mr. C. J. Mander, for other parties.

JESSEL, M.R. }
1874. } ASTLEY v. THE EARL OF
May 1. } ESSEX.

Forfeiture—Name and Arms Clause—Remainderman—Ignorance of Clause—3 & 4 Will. 4. c. 27. ss. 3 and 4—Statute of Limitations.

Section 4 of 3 & 4 Will. 4. c. 27, extends to forfeitures which operate to accelerate an estate under a conditional limitation as well as to forfeitures, of which the heir-at-law only can take advantage.

A devisee under a conditional limitation is not protected from forfeiture by ignorance of the condition.

An estate was settled on tenant for life and remaindermen in tail, with a name and arms clause providing that in case any person should fail to comply with it for twelve calendar months after becoming entitled in possession the estate should go over as if he were dead. T. G. C. entered into possession as tenant in tail, and did not comply with the condition; he remained in possession for more than twenty years after he had forfeited the estate:—Held, that he did not acquire a title by adverse possession, but that under 3 & 4 Will. 4. c. 27. s. 4, the right of the remaindermen to enter commenced on his death.

At the death of T. G. C. the next remainderman was in India and was ignorant of the clause until after the twelve months expired:—Held, that his ignorance did not prevent the forfeiture operating as to his interest.

Robert Thompson, by will dated the 30th of December, 1781, devised his real estate to Elizabeth Corbett, wife of Thos.

NEW SERIES, 43.—CHANC.

Corbett, for life, remainder to the use of William Corbett for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of William Corbett, successively in tail male, with remainder to other persons for life, remainder to their sons in tail in like manner, with a name and arms clause, which was in the following terms—

“Provided also, and the said testator thereby declared his will and meaning further to be, that all and every person and persons who should for the time being be under and by virtue of that his will entitled to the possession of his real estates for their own benefit after the decease of his said niece, Elizabeth Corbett, should, when and so soon as he or they should so become entitled in possession, and when and so soon as he or they should have attained the age of twenty-one years, take and use the surname and arms of Thompson, and from thenceforth at all times use such surname and arms, and use his and their best endeavours to obtain an Act of Parliament or other lawful and sufficient license or authority for enabling and entitling him so to do. And in case any such person or persons should neglect or fail to take and use such surname and arms, or to obtain a proper and sufficient license and authority for that purpose for the space of twelve calendar months next after the time when he or they should so become entitled in possession to such estates or next after the time when he or they should attain the age of twenty-one years, whichever of such times should last happen, or if he or they should at any time thereafter fail to use such surname or arms, then, and in every such case, the estate and interest of the person so failing of and in his said estates and the aforesaid powers consequential thereto should cease, determine and be absolutely void to all intents and purposes whatsoever, and the testator's said estates should immediately thereupon go over and belong in possession to the person who should be next in remainder under that his will, and be then *in esse* in like manner as if the person so failing or neglecting was naturally dead, anything thereinbefore contained to the contrary notwithstanding. And the said testator further gave and

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devised all his copyhold estates whatsoever and wheresoever, and which said copyhold estates he had surrendered to the uses of his will, to the same uses and for the same intents and purposes and subject to the same charges, powers, provisos and conditions as were thereinbefore contained, specified and declared concerning his freehold estates in the respective counties in which such copyhold estates were situate (except as to the limitations to his trustees for the purpose of preserving contingent remainders), or as near thereto as the nature thereof would admit of."

The testator died in 1788.

In April, 1818, the estate tail created by R. Thompson's will was duly barred as to the freeholds, and by an indenture, dated the 9th of April, 1818, and executed by Wm. Corbett and T. G. Corbett, his eldest son, and Elizabeth Corbett, the freeholds were assured after the death of Elizabeth Corbett and W. T. Corbett to the use of such person as the said T. G. Corbett should by deed appoint remainder to T. G. Corbett in tail male. And W. Corbett and T. G. Corbett covenanted to surrender the copyholds to the same uses.

No surrender of the copyholds in accordance with the covenant was ever made. Elizabeth Corbett died in 1825. William Corbett then assumed the name and arms of Thompson, and became William Thompson Corbett. He died in 1825, leaving five sons, the said T. G. Corbett, his eldest son, R. Corbett, who died an infant unmarried, Andrew Corbett and two others.

T. G. Corbett on his father's death entered into possession of the freeholds and copyholds.

By deed poll dated the 18th of November, 1837, T. G. Corbett purported to appoint the hereditaments to himself in fee in execution of the power contained in the indenture of the 9th of April, 1818.

On the 2nd of June, 1846, T. G. Corbett was admitted to the copyholds as tenant in fee, and made his will, dated the 27th of July, 1861, devising all his real estate to Lord Essex and others and their heirs upon certain trusts, and died on the 26th of July, 1868, never having had any male issue.

On the 18th of May, 1869, the trustees of his will were admitted to the copyholds.

This suit was instituted for the administration of the estate of T. G. Corbett, by a person interested under his will. After the institution of the suit, a sale was effected, under the order of the Court, of a piece of the copyhold land, as being subject to the trusts of T. G. Corbett's will. On examination of the title, it appeared that the estate tail in the copyholds, under the will of R. Thompson, had never been barred, as they had never been surrendered to the uses of the deed of 1818.

It appeared that R. Corbett, the second son of W. T. Corbett, had died an infant unmarried, and that Andrew Corbett, the third son, had died on the 9th of May, 1864, having had issue seven sons — W. A. Corbett, F. B. Corbett, N. W. Corbett, W. R. Corbett, A. G. Corbett, E. C. Corbett, and E. K. Corbett.

W. A. Corbett had attained twenty-two without having taken the name and arms of Thompson. He had been abroad since his father's death, and was ignorant of the name and arms clause in the will of A. Thompson. Neither of his three next brothers had taken the name and arms of Thompson, or barred their estates tail within the time provided by the clause.

A. G. Corbett, the fifth son of Andrew Corbett, attained his age of twenty-one on the 16th of April, 1873, and by a disentailing surrender dated the 9th of April, 1874, barred his estate tail in the copyholds.

Several contentions were raised as to the title to the copyholds.

1. That T. G. Corbett, having committed a forfeiture and remained in possession for more than twenty years afterwards, had acquired a customary fee simple by adverse possession, under the statute 3 & 4 Will. 4. c. 27. s. 3, so that the title to the purchase-money was now vested in the trustees of his will.

2. That the forfeiture clause did not apply to T. G. Corbett, or any other tenant in tail, and that accordingly W. A. Corbett was rightfully entitled, as successor to T. G. Corbett, under the limitation.

3. That the forfeiture clause did apply to tenants in tail, but that it was not obligatory on the remainderman, under section 4 of the statute 3 & 4 Will. 4. c. 27, to take advantage of the forfeiture until after the death of T. G. Corbett, on the 25th of July, 1868; that A. G. Corbett was entitled to take advantage of it at any time before the expiration of twelve months after his coming of age, and that, as he had executed a disentailing deed within that time, he was absolutely entitled.

It was agreed by all parties that the question should be decided on a summons taken out by the plaintiff to pay the purchase-money into Court, and the matter now came on for argument.

The first point argued was the question whether, assuming the forfeiture clause applied to tenants in tail, T. G. Corbett had obtained a title under the Statute of Limitations.

Mr. Southgate and *Mr. Cookson*, for the plaintiff, contended that T. G. Corbett forfeited the property, and then, under section 3 of 3 & 4 Will. 4. c. 27, obtained a title, by twenty years' adverse possession, after the forfeiture incurred.

Mr. Badcock, for W. A. Corbett, contended that section 3 of the Act was qualified by section 4, which was to be read in the widest sense, and that accordingly, notwithstanding the forfeiture (if the clause did apply to him), the right of the remainderman to enter was to be deemed to have first accrued at the time when, by the death of T. G. Corbett, the estate would have become an estate in possession, had no forfeiture occurred. He referred to *Sugden's Vendor and Purchaser*, 14 ed. p. 480.

THE MASTER OF THE ROLLS.—I cannot hold the Statute of Limitations to have the effect contended for. I think it must be held that the remainderman has a right at the termination of the tenancy for life to enter; and that the true way of reading the statute is that the words forfeiture and breach of condition are to be read in their largest sense, and to apply, whether the forfeiture gives a right to an estate under a conditional limitation, or whether it is a true for-

feiture at law, and the gift over can only be taken advantage of by the heir or other person entitled in case of a forfeiture. I think, therefore, the true view of this case is that, whether the clause of forfeiture applies to T. G. Corbett or not—which I am not going to decide at present—the Statute of Limitations cannot apply. If it did not apply to T. G. Corbett, then, of course, he did not forfeit the estate, and on his death, as he did not bar the entail and died without issue, of course the next remainderman would be entitled to possession, whoever the next remainderman was. If it did apply to T. G. Corbett, then I hold the meaning of the 4th section is that, inasmuch as the title of the remainderman accrued by forfeiture or breach of condition, that those words include every case of forfeiture or breach of condition, whether the effect of the forfeiture was to accelerate another estate, under—as it is sometimes called—a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the old common-law rule. I hold that this section was intended to apply to both those cases, and, consequently, the original right, if I may call it so, of the remainderman to enter on the expiration of the previous estate in the natural way, upon the death of the tenant for life, is not taken away by the tenant for life committing a forfeiture. As I said during the argument, to hold otherwise would have a very strange result. For instance, I put the case of a clause of forfeiture and conditional limitation by reason of the tenant for life not residing for six months every year at the mansion house—a point which is exceedingly difficult to ascertain—and there are very few things more difficult to ascertain, because residence has been decided not to mean that a man must actually sleep there every night; then if the man breaks the condition in any one year and lives twenty years afterwards, if I were to hold that the 4th section did not apply, he would acquire a fee simple, very much, I think, to the astonishment of the remainderman. It appears to me that that would be too absurd. I must, therefore, read

the 4th section literally, and hold it to apply to the conditional limitation as well as to other cases of forfeiture. I think, therefore, whoever has a title, the devisee of T. G. Corbett has not.

Now, the question remains to be argued whether this clause does apply to a tenant in tail or not. Upon that I should like to hear argument. I have heard it argued by the purchaser once. Mr. Badcock, you say it does not apply?

Mr. Badcock, for W. A. Corbett.—In the first place the special terms of the clause shew that it is only intended to apply to tenants for life. And secondly, clauses of this description are held not to apply to tenants in tail. See

Corbett's Case, 1 Rep. 83 b, and

Jarman on Wills, 3rd ed. vol. 2. p. 18,

and cases there cited.

And even if this contention be incorrect and the clause does apply to tenants in tail it would not affect my client, W. A. Corbett, until he had notice of the condition—

Doe v. Beaucherk, 11 East, 657.

Porter v. Fry, 1 Vent. 199;

In re Hodges' Legacy, 42 Law J. Rep. (N.S.) Chanc. 452; s. c. Law Rep. 16 Eq. 92;

Re Catt's Trust, 2 Hem. & M. 46; s. c. 33 Law J. Rep. (N.S.) Chanc. 495,

were also referred to.

Mr. Blakesley, for A. G. Corbett, Mr. Borrett, for the purchaser.

Mr. Cadman Jones, for the trustees of T. G. Corbett's will.

THE MASTER OF THE ROLLS.—I have no doubt upon either point. First of all with regard to the point of construction. I admit that it is a case fairly arguable. [After reading and commenting upon the clause the Master of the Rolls proceeded.] There is an imperfect expression in the mode of devolution, that is of the operation of that which is merely to give effect to the previous clearly expressed clause, cutting down all the previous clauses, but is this imperfect description of the mode of devolution to enable me to say that the first description of the person is

to be confined to the tenant for life, and the second description, namely, the ceaser of the estate, is to be confined to the estate tail? I think that that would violate the ordinary principles of construction which are that you are not to cut down clear words except by clear words, and the true view of this clause as to the last part of it is that it is an imperfect and incomplete description of the mode in which the estate will then devolve, and nothing more. I hold, therefore, that these words do apply to a tenant in tail, and, consequently, as I have already held, the remainderman was entitled in 1868; but as he was then twenty-one he would certainly forfeit unless the fact of his being ignorant of the will itself and of the condition will protect him.

Now, as to that, I think the case of *Porter v. Fry* (*ubi supra*) is a clear and distinct authority. In that case there was a devise to the tenant in tail upon condition that if the lady married without consent the estates should go over to the lessor of the plaintiff. She did marry without consent, but she had no express notice of the devise, and it was contended for her that as she did not know of the devise—and did not know, therefore, of the condition—that she was entitled to say that she was not liable to the condition until she knew of it. However, the Judges gave judgment in favour of the lessor of the plaintiff on this ground, that that was the testator's will, that he had made no such exception. They said if the person liable to the condition had been heir-at-law and so could have entered under another title, believing himself to be in, under his common law title, he was not to be ousted of that title without notice of the will. But where it was a stranger, that is a person not heir at law, that stranger could only take the benefit of the devise under the will by complying with its terms, and if he did not know of it, like the case of any other devisee or legatee who did not know of the devise or the legacy, it was a great misfortune, but as the case of want of knowledge had not been excepted by the testator himself, they could not make a will for him or make a new case of exception. When you come to look at

this will, you have a very good illustration of this, because the testator himself exempts persons not entitled to possession, he exempts persons who are infants, and he has made no other exemptions, and upon the principle of that case, which I see was followed very recently in the case of *Re Hodge's Trusts* (*ubi supra*) where the person was in India—carrying out the same principle that a person who takes by gift under a will cannot plead want of knowledge of the contents of the will as an excuse for not complying with its provisions—on that principle it appears to me that Mr. Badcock's client is not exempted from the operation of the clause, and consequently the money representing the estate which has been sold will belong to Mr. Blakesley's client, and I will make an order accordingly.

Solicitors—Messrs. Frere & Co., for plaintiff;
Messrs. R. M. & F. Lowe, for defendant;
Messrs. White, Borrett & Co., for the purchaser;
Messrs. Bouverie & Deedes, for W. A. & A. G. Corbett.

MALINS, V.C. }
1874. } DE SERRE v. CLARKE.
July 20, 27. }

Appointment—Reference back to Instrument creating Power—Husband and Wife—French Law—Community of Goods—Duties of Trustees—Costs.

A testator bequeathed his residuary estate to trustees, in trust for A. for life, and after her decease to pay the capital to such of the children of A. as might be living at her decease, in such shares as she should appoint, and, in default of appointment, to such children equally.

A. had four children, all of whom survived her, and one of whom, a daughter, C., became domiciled in France, and married a Frenchman, by whom she had one child.

After his death A., in exercise of her power, appointed one-fourth of the trust funds to C., "for her separate use," absolutely, and then died.

Section 1,401 of the Code Napoleon provides that all property belonging to the husband and wife at the time of their marriage, or coming to them by succession or donation during the marriage, shall fall into the

"community of goods," and vest in them in equal moieties, "if the donor have not expressed himself to the contrary." C.'s daughter therefore, according to the law of France, claimed to be entitled to a moiety of the appointed fund, contending that her mother had an interest or property in the fund at the time of her marriage.

Upon bill filed by C. to compel the trustees to pay the whole of the appointed fund to herself,—Held, that C. was entitled to the whole fund, on the ground, first, that her right to it accrued at, and not before the date of the appointment, when, in consequence of her husband's death, there was no "community of goods;" and, secondly, that even assuming she had a property in the fund at the date of her marriage, the donor had, by appointing the fund to her "for her separate use," expressed an intention that the law of community should not attach to it.

In re Vizard's Trusts (35 Law J. Rep. (N.S.) Chanc. 804; s. c. Law Rep. 1 Chanc. App. 588) reluctantly followed.

As the trustees ought to have paid the plaintiff at least the one moiety of the appointed fund to which she was in any case entitled, and might have paid the other moiety into Court, under the Trustee Relief Acts, they were only allowed their costs of the suit as between party and party.

Further consideration.

John Carson by his will, dated the 21st of March, 1835, devised all his real and personal estate to trustees, upon trust to pay certain legacies; and as to the residue of the estate, he directed his trustees to pay the income thereof to his daughter, Agnes Turner, during her life, for her separate use, and after her decease to pay the capital of such residue unto and among such of the children of his said daughter, Agnes Turner, as might be living at her decease, in such shares and in such manner as she, notwithstanding coverture, should by deed or will appoint, and, in default of such appointment, unto and equally between such children of the said Agnes Turner respectively.

The testator died in 1836, possessed of property to a very large amount. His daughter, Mrs. Turner, had four children, one of whom was the plaintiff, Caroline Sophia de Serre, who, in 1851, married a

Frenchman, and had by him one child, a daughter.

Monsieur de Serre died in 1857, and by a deed, dated the 18th of March, 1870, Mrs. Turner, in exercise of the power given to her by her father's will, appointed a sum of 6,500*l.*, being one-fourth of his residuary estate, to her daughter, the plaintiff, Madame de Serre, for her separate use absolutely, in case she survived her mother, Mrs. Turner.

Mrs. Turner, the tenant for life, died in 1871, whereupon Madame de Serre applied to the trustees of the will for payment of the 6,500*l.* appointed to her by her mother, but they refused to pay the same to her, on the ground that the plaintiff had, by her marriage, acquired a French domicile; and that, according to the French law, the reversionary interest to which she was, at the time of her marriage, entitled under her grandfather's will, fell into the "community of goods," and therefore vested, as to one moiety only, in Madame de Serre, and, as to the other moiety, in her daughter.

The mother then filed this bill, to compel the trustees to pay over to her the 6,500*l.* The trustees relied on the 1,401st section of the Code Napoleon, which, so far as is material, is as follows—

"Community (on marriage) is composed actively—first, of all the moveable property which the married parties possessed at the day of the celebration of the marriage, together with all moveable property which falls to them during the marriage, by title of succession, or even of donation, if the donor have not expressed himself to the contrary; second, of all the fruits, revenues, interests and arrears, of what nature soever they may be, fallen due or received during the marriage, and arising from property which belonged to the married persons at the time of the celebration, or from such as has fallen to them during the marriage by any title whatsoever" (1).

(1) The section in the original is as follows:—

"La communauté se compose activement, 1°. De tout le mobilier que les époux possédaient au jour de la célébration du mariage, ensemble de tout le mobilier qui leur échoit pendant le mariage à titre de succession ou même de donation, si le donateur n'a exprimé le contraire; 2°. De tous les fruits,

Mr. Glasse and Mr. Maonaghten, for the plaintiff, Madame de Serre.—Madame de Serre's title to the fund was a new interest acquired, for the first time, at the date of the appointment, that is, after her husband's death, and therefore the French law does not apply.

In re Vizard's Trusts, 35 Law J. Rep.

(N.S.) Chanc. 804; s. c. Ibid. 460;

s. c. Law Rep. 1 Chanc. App. 588;

s. c. Ibid. 1 Eq. 667,

is on all fours with this case. It has long ago been settled that where a person takes by the execution of a power, he takes under the power, and not from the date of the instrument creating the power;

The Duke of Marlborough v. Lord Godolphin, 2 Ves. sen. 61.

Lee v. Olding, 2 Jurist (N.S.) 850;

s. c. 25 Law J. Rep. (N.S.) Chanc. 580,

is another authority in our favour, and is referred to without disapprobation in

Sugden on Powers, 8th edit. p. 78.

Moreover, even assuming that Madame de Serre had any property in the fund at the date of the marriage, yet the appointor having appointed it to her for her separate use, has expressed an intention, within the meaning of the 1,401st section, that the fund shall not fall into the community of goods.

[MALINS, V.C., mentioned

Hole v. Escott, 4 M. & Cr. 187; s. c.

2 K. 444; s. c. 6 Law J. Rep.

(N.S.) Chanc. 355; s. c. 8 Ibid. 83.]

Mr. J. Pearson (Mr. Ince with him)

for the daughter of Madame de Serre.—We submit that Madame de Serre had, at the time of her marriage, a vested interest in this fund, subject to be divested in the event of her death in her mother's lifetime—

Higden v. Williamson, 3 P. Wms. 132;

1 *Fearne on Contingent Remainders*, 226–229 (Sect. 9).

Re Frowd's Settlement, 10 Law Times, N.S. 367; s. c. 4 N.R. 54,

revenus, intérêts, et arrérages, de quelque nature, qu'ils soient, echus ou perçus pendant le mariage et provenant des biens qui appartenaient aux époux lors de la célébration, ou de ceux qui leur sont echus pendant le mariage, à quelque titre que ce soit."

is a direct authority in our favour, though we admit it cannot stand with

In re Vizard's Trusts (ubi supra).

But in the latter case, when before the Court of Appeal, Lord Justice Knight Bruce does not appear to have altogether agreed with Lord Justice Turner.

Madame de Serre's interest at the time of her marriage was also a species of property which is recognised by the French law, and is termed "espérance," that is, *spes possessionis*, which is clearly property within the meaning of the Code Napoleon: 14 Duranton, 124.

The interest she acquired under the appointment was no new interest, for she took under it the same share that she would have taken under her grandfather's will, in default of appointment.

Willoughby v. Middleton, 2 J. & H. 344; s. c. 31 Law J. Rep. (N.S.) Chanc. 683,

is also an authority that the fund should be considered as having been her property at the date of her marriage.

The appointment to her "separate use" cannot have reference to her first marriage, for she was at that time a widow; the words could only take effect if she married again.

We therefore submit that her interest in the fund at the time of her marriage was property within the meaning of the French law, and that the mother and daughter take in equal moieties.

Mr. Higgins and *Mr. W. W. Karlake*, for the trustees of the will, asked for their costs as between solicitor and client.

Mr. Macnaghten, in reply.

MALINS, V.C., said the case raised a point of very considerable nicety and importance as between the French law and English law. The plaintiff, the testator's granddaughter, in 1851 married a Frenchman. The husband died in 1857, and in 1870 the appointment of 6,500*l.* to Madame de Serre was executed by her mother. The question was whether the 6,500*l.* so appointed belonged to Madame de Serre absolutely, or to her and her daughter in equal moieties. The question arose on the 1,401st section of the Code Napoleon, which was as follows—[His Honour then read the section, and con-

tinued]—Now at the date of the marriage it was perfectly clear that Madame de Serre had, under the will of her grandfather, an interest in his property. She had, therefore, at that time "property," according to the decision in *Higden v. Williamson (ubi supra)*. There it was a contingent interest belonging to a bankrupt, and the question was whether it passed to his assignees or not; it was held that, inasmuch as it was a kind of interest or property, which the bankrupt might have released, it did pass to his assignees.

So, in this case, Madame de Serre's share being contingent on her surviving her mother, it was property vested in her at the time of her marriage, and it was clear that if nothing more had been done, or if no appointment had been made, that hope or expectation which she then had would have come under the "community of goods," according to the Code Napoleon; and, it being an interest at her marriage, her daughter would be entitled to the share which, by the community, vested in the father. But the father died in 1857, and by the deed of appointment, executed in March, 1870, after reciting the will of the grandfather, Madame de Serre's mother appointed the 6,500*l.* to her, for her separate use, if she survived her mother. The question was whether Madame de Serre derived that sum under her grandfather's will, or whether she acquired it under the deed of March, 1870, because, if it was derived under the will, it was bound by the community, whereas, if it was acquired under the deed, it then vested in her for the first time, and not during the coverture. Did it then vest at the date of the deed, or at the date of the marriage? Now he was not at liberty to do otherwise than follow the decisions.

In *Lee v. Olding (ubi supra)*, a most important case, decided in 1856, there was an exclusive power of appointment of certain trust funds vested in a father in favour of his children, with a limitation, in default of appointment, to the children equally. There were two children, one of whom, a son, became bankrupt, and therefore, whatever he would have taken in default of appointment, would

have passed to his assignees; but the son having obtained his certificate, the father, two days afterwards, made an appointment of the whole fund in his favour. The question was whether his assignees took the moiety which he would have taken in default of appointment, and it was decided by Vice-Chancellor Stuart that he took the whole fund, as against his assignees, the right to the property being acquired, not under the instrument creating the power of appointment but by the deed executing the power. If that case was law then Madame de Serre took under the appointment, and from the date of the appointment, that is, thirteen years after her husband's death. Was then the decision in *Lee v. Olding* (*ubi supra*) law? The very same question arose in *In re Vizard's Trusts* (*ubi supra*), in which he himself was counsel, and argued that *Lee v. Olding* (*ubi supra*) was not law. There Vice-Chancellor Stuart followed his own decision in *Lee v. Olding* (*ubi supra*), and, upon the case coming before the Court of Appeal—although there was apparently a conflict of opinion, Lord Justice Turner agreeing with Vice-Chancellor Stuart, and Lord Justice Knight Bruce seeming to differ—the decision of Vice-Chancellor Stuart was affirmed. In that case the mother appointed to her children exactly what they would have taken in default of appointment; the appointment did not alter their positions in the slightest degree. Before the date of the appointment one of the sons had executed an assignment for the benefit of his creditors, and the question arose whether the creditors took his share, or whether he took it himself absolutely. It was decided by the Court of Appeal that he took under the appointment, and not as in default of appointment, and that consequently his creditors took no interest. Mr. Pearson had said that in that case there was a power to go beyond the persons to whom the appointment was actually made, but he was of opinion that that made no difference. Was he, then, at liberty, under these circumstances, the decision of Vice-Chancellor Stuart in that case having been affirmed by the Court of Appeal, to say that, this lady having this fund appointed

to her thirteen years after her husband's death, what was appointed to her vested in her husband? In the absence of any contract, the law of France gave half to the husband and half to the wife, whereas the law of England gave the whole to the husband. He was of opinion that Madame de Serre took under the deed of appointment. Much was to be said in favour of *Re Frowd's Trusts* (*ubi supra*), and against *Lee v. Olding* (*ubi supra*), and if he were at liberty to decide for himself, he should decide that the money vested in the husband. But *Re Frowd's Trusts* (*ubi supra*) was decided before *In re Vizard's Trusts* (*ubi supra*), and was at variance with *Lee v. Olding* (*ubi supra*), the decision in which was directly in the teeth of it. In *Re Frowd's Trusts* (*ubi supra*) a marriage settlement contained a covenant by the husband and wife for the settlement of all property then vested in the wife. At the time of the marriage the wife was entitled, in default of appointment, to the funds settled by her father's marriage settlement. The funds were afterwards appointed to the wife absolutely, for her separate use, and it was decided by Vice-Chancellor Wood that they were subject to the covenant. He was bound to say his own judgment would concur with that, but he would be obliged in such a case now to decide that such a covenant did not bind the property, and that whatever the wife had at the date of the marriage was displaced by the appointment. In *The Duke of Marlborough v. Lord Godolphin* (*ubi supra*) it was decided that shares appointed by will to children who died in the appointor's lifetime did not vest in their representatives, but lapsed; but the question there before the Court became immaterial here, because the point did not arise, this not being a testamentary appointment. *Willoughby v. Middleton* (*ubi supra*) had not much application to this case.

This then being, as he understood, the English law, what was the French law? The opinions of distinguished French advocates had been read to him, but he agreed with the opinion of the learned advocate who advised the plaintiff rather than with the opinions of the others.

Another point was that the fund had been appointed to Madame de Serre "for her separate use." What was the effect of that? It was true that the words had reference rather to a future marriage. He understood that by the French law community attached to all the property coming to the husband and wife during the coverture, "if the donor have not expressed himself to the contrary." He was of opinion that the words "for her separate use" must not be disregarded. It was a declaration on the part of the donor (assuming that the plaintiff had a property in the fund at the date of her marriage), that the one, and not both, should have the fund.

On the whole, therefore, he was of opinion—first, on the ground that the right to the fund accrued under the appointment of 1870, when there was neither community nor coverture; and, secondly, on the ground that the fund was appointed to the plaintiff for her separate use—that the fund belonged to her absolutely, and there must be a declaration accordingly. The only question remaining was as to costs. In any view of the case the plaintiff was entitled to a moiety of the fund. The course, therefore, open to the trustees was simple, for they might with safety have paid one moiety to her, and have paid the other moiety into Court under the Trustee Relief Acts. As they had not chosen to adopt this course, he should only give them their costs as between party and party. The daughter must have her costs as between solicitor and client.

Solicitors—Messrs. Pilgrim & Phillips, for plaintiff: Messrs. Petgram & Hodgkinson and Messrs. Clarke, Woodcock & Ryland, for defendants.

LORDS JUSTICES. } WILLIAMS v. THE AYLESBURY
 1874. } AND BUCKINGHAM RAIL-
 August 5. } WAY COMPANY.

Lands Clauses Consolidation Act, 1845
 (8 & 9 Vict. c. 18), sec. 69—*Land purchased by Railway Company from limited Owner—Application of Purchase Money—Permanent Improvements—Rebuilding of Parsonage House.*

NEW SERIES, 43.—CHANC.

A railway company took part of the glebe land belonging to a rectory. The patron of the living and the bishop agreed with the rector that the purchase money, when paid by the company, should be applied in paying part of the expense of rebuilding the rectory house, which was in a ruinous condition, the remainder of the money required being borrowed from Queen Anne's Bounty. The company neglected for some years to pay the money, and in order to complete the rebuilding the rector advanced a sum equal to the purchase money himself. The company having paid the purchase money, the rector, the patron and the bishop, petitioned that it might be paid to the rector to recoup his advance:—Held, that the Court had no power under section 69 of the Lands Clauses Act to direct such an application of the money.

This was a petition in the above suit and under the Lands Clauses Act, 1845.

The above company, under their parliamentary powers, required to take a portion of the glebe lands belonging to the rectory of Waddesdon.

The compensation to be paid by the company was assessed at 700*l*. Great delay took place in the payment of the money, and in November, 1871, the above suit was instituted by the rector against the company to compel them to pay. The bill also asked for an injunction to restrain the company from continuing in possession of the land until the money was paid, and for a declaration that the plaintiff was entitled to a lien on the land for the 700*l*. and interest, and for a sale (if necessary) to enforce the lien.

The parsonage house being in a ruinous condition, it was determined to rebuild it. Part of the money necessary for this purpose was borrowed by the rector from the Commissioners of Queen Anne's Bounty, and the patron of the living and the bishop gave their consent that the 700*l*. should, when paid by the company, be applied in making up the rest of the sum required for the rebuilding. Meanwhile the rector advanced the 700*l*. himself, and the rebuilding was completed. The 700*l*. having been at length paid by the company to the rector, the petition was presented by the rector, the patron, and the bishop

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asking that the 700*l.* might be retained by the rector in repayment of the 700*l.* which he had advanced for the rebuilding.

The Master of the Rolls was desirous of making the order asked for if he could, but he doubted whether the Court had power under section 69 of the Lands Clauses Act to sanction this application of the money, and the petition was therefore by his desire brought before the Court of Appeal.

Mr. Townsend, for the petitioner.—An order such as we ask was made in

Ex parte The Incumbent of Whitfield,

1 J. & H. 610 ; s. c. 30 Law J.

Rep. (n.s.) Chanc. 816 ;

the only difference being that the building was not completed at the time when the petition was presented. The delay in the present case is the fault of the company.

[*MELLISH*, L.J.—I think it was a stretching of the words of section 69 when the Court allowed money to be laid out in buildings. But if a limited owner has chosen to lay out his own money in that way, what power has the Court to order him to be recouped ?]

In

In re Leigh's Estate, 40 Law J. Rep.

(n.s.) Chanc. 687 ; s. c. Law Rep.

6 Chanc. 887,

where the Court refused to allow a tenant for life to be recouped money which he had already laid out, the remaindermen objected. In the present case the only persons who can represent future interests join in the petition. In

Ex parte The Rector of Claypole, 42

Law J. Rep. (n.s.) Chanc. 776 ;

s. c. Law Rep. 16 Eq. 574,

the purchase money of glebe land taken by a railway company was allowed to be expended in additions to the parsonage house.

Mr. B. B. Swan, for the company.

JANES, L.J.—It is utterly impossible to comply with this petition. We have no more power to order this money to be applied in this way than to order it to be paid to any other person in the world. The 69th section says that the money may be applied in the purchase of other land, to be conveyed and settled upon the like

uses as the land in respect of which the money was paid. A construction has been put on these words as allowing the money to be laid out in new buildings upon the settled estate, considering them as a permanent improvement to the estate. The present application shews the danger of stretching the words of an Act of Parliament. Each time the words are stretched this is used as a precedent for stretching them still further. The decisions, however, do not authorise us to do what is now asked. I am sorry for this gentleman, for he appears to have been misled in the matter. But we have no more power to do what he asks than we should have had to order the land which the company have taken to be sold in order to raise funds for rebuilding the parsonage house. The Act does not authorise it.

[*MELLISH*, L.J.—I am of the same opinion. I, too, am sorry for the position in which the rector is placed. But it is utterly impossible to say that the proposed application of the money would be a purchase of other lands to be settled to the same uses. We cannot, because all parties interested consent, make an order which the Act does not authorise.

The application was refused, and the money was ordered to be invested and the interest paid to the rector.

Solicitors—Messrs. Evans, Foster & Rutter, agents for Mr. J. Newton, Leighton Buzzard, for petitioner; Messrs. White & Buckston, for the company.

JESSEL, M.R. }

1874.

May 4.

JONES v. LLOYD.

Demurrer—Partnership—Lunatic Partner—Suit for Dissolution by Next Friend.

A partner who has become incurably insane may obtain a decree for dissolution of the partnership on this ground, and although he has not been found lunatic by inquisition, may institute a suit for dissolution by his next friend, alleging that the lunatic is incurably insane, and that the

dissolution is for the benefit of the lunatic, the Court will entertain the suit, in order to protect the property of the lunatic.

Bill was filed by the plaintiff (described as a person of unsound mind, not so found) by his next friend, stating that the plaintiff and defendant had entered into partnership for fourteen years, determinable by notice at the end of seven; that the plaintiff had since become incurably insane; that since he had become insane the defendant had given notice to determine the partnership, and also had attempted to withdraw the notice; and that dissolution would be for the benefit of the lunatic:—Held, on demurrer, first, that the notice to dissolve having been given to the insane partner could not be withdrawn.

Secondly, that, independently of this, on the allegations that the plaintiff was incurably insane, and that it was for his benefit that the partnership should be dissolved, the Court would entertain the suit, as it was necessary that the property of the lunatic should be protected; but quære, whether a final decree could be made without an application in lunacy.

By articles dated the 15th of April, 1867, the plaintiff and defendant agreed to enter into partnership as chain and nail manufacturers, for fourteen years, from the 31st of March, 1867, "subject to the provisions thereafter contained for determining the said partnership."

The articles, according to the construction put upon them by the Master of the Rolls, provided that the partnership might be determined at the end of the first seven years by either partner previously giving to the other notice to determine on the 31st of March, 1874.

On the 1st of April, 1874, this bill was filed by J. Jones (described as a person of unsound mind, not so found), by his next friend, praying for a dissolution of the partnership, as from the 31st of March, 1874, an account and receiver. The bill alleged that about three years before the plaintiff, "owing to softening of the brain, became and has ever since continued incapable of attending to business, and is now in fact of unsound mind."

That "on the 17th of September, 1873, the defendant gave notice to the plaintiff

and his family of his intention to dissolve the partnership upon the 31st of March, 1874, when the first seven years thereof expired."

That on the 28th of March, 1874, the defendant served on the plaintiff a notice in writing that he withdrew his former notice.

That it was expedient and for the benefit of the plaintiff that the partnership should be dissolved.

The defendant put in a general demurrer to the bill for want of equity.

Mr. Fischer and *Mr. Maidlow*, for the demurrer.—The plaintiff relies on two grounds—first, that the defendant has given notice to dissolve; the answer to this is, that the notice was prospective, and before the time fixed for dissolution. Before the partnership was actually dissolved by it, it could be and was withdrawn.

The second ground is the insanity of the plaintiff. As to this, in the first place, insanity is not a ground for dissolution by either partner, unless the insanity is incurable, and there is no allegation that the plaintiff is "incurably" insane.

If there were such insanity the right to dissolve for incapacity belongs to the sane partner only.

And if dissolution were obtained at the instance of the sane partner, it could only be dissolution from the date of decree, not from the 31st of March, as prayed.

But in fact there can be no dissolution at the instance of the lunatic partner, if the sane partner wishes to continue—

Jones v. Noy, 2 Myl. & K. 125; s. c.

3 Law J. Rep. (N.S.) Chanc. 14;

Saye v. Bennet, 1 Cox, 107;

Waters v. Taylor, 2 Ves. & B. 299.

At all events, a suit cannot be instituted by a next friend.

Mr. Southgate referred to an unreported case of

Fisher v. Melles, M.R. 1870, F. 3, before Lord Romilly (1).

(1) The original bill in this suit was filed in January, 1870, as a suit by "J. O. Fisher, a person of weak mind, by William Jones, his father and next friend, plaintiff," against W. Melles and three others, defendants," alleging that the plaintiff had

In that case there were charges of fraud, and then the Court might interfere to protect the lunatic. But no such case is made out here, and there are grave objections to permitting such a suit to be instituted.

in 1856 entered into partnership with the defendant W. Melles, for fourteen years, from the 24th of June, 1856; that the plaintiff's intellect had been impaired by softening of the brain, and he had become incapable of attending to business; that while so incapable, the defendant, W. Melles, exercising undue influence, had induced him to enter into a new agreement with the other defendants, very much to their advantage; and prayed for an injunction to restrain such defendants from meddling with the assets, for a declaration that the new agreement was void, and that the partnership of Fisher & Melles might be dissolved and wound up.

On the 14th of March, 1870, Lord Romilly, M.R., made the following order:

"His Lordship being of opinion that no case was established against the defendants of undue influence or fraud against the plaintiff, and that the cost of so much of the bill as charges undue influence or fraud, should ultimately be paid to the defendants by the next friend of the plaintiff; His Lordship doth order that the motion do stand over, to enable an application to be made to the Lords Justices of Appeal, to establish the fact that the plaintiff is a person of such unsound mind as to be incapable of taking care of himself or his property, and any of the parties to be at liberty to apply as they may be advised, but notwithstanding this order, the plaintiff be at liberty, within three weeks from this date, to amend the prayer of his bill by additions thereto, in such manner as he shall think fit, without prejudice to any question in the cause."

A petition in lunacy was presented, and the plaintiff was found lunatic by inquisition, and the next friend appointed his committee, and by supplemental order appointed to conduct the suit in that capacity, the title of the suit having been altered by the addition, "And between the said J. C. Fisher, a person of unsound mind, by W. Jones, the committee of the estate, v. —," the following decree was made on the 30th of June, 1870:

"His Lordship doth order that so much of the plaintiff's bill as charges undue influence and fraud against the defendant be dismissed, with costs to be taxed by the taxing master, and paid by W. Jones, the committee of the plaintiff, to the defendants; and doth declare that, at the time of entering into the agreement dated the 13th of June, 1869, in the bill mentioned, the plaintiff was not in a fit state of mind to enter into such agreement, and that the same is void." The decree then directed the accounts of the partnership of Fisher & Melles to be taken, the estate sold, and the partnership wound up.

The position of a lunatic as plaintiff is very different from that of a lunatic as defendant. If the lunatic is defendant, the guardian *ad litem* of the lunatic is appointed by the Court upon an affidavit of the petitioner, and is under the control of the Court; not so the next friend of plaintiff.

This distinction was taken and insisted on in

Halfhide v. Robinson, ante, p. 398; s. c. Law Rep. 9 Chanc. 373.

In

Beall v. Smith, 43 Law J. Rep. (N.S.) Chanc. 245; s. c. Law Rep. 9 Chanc. 85,

the Vice-Chancellor doubted whether the order could be made, and said it was only to be supported on the ground of the special circumstances of the case (see p. 93). The objections to the decree in

Beall v. Smith (*ubi supra*), are applicable to the relief here sought. In

Light v. Light, 25 Beav. 248, the Master of the Rolls no doubt made a decree for protection of the property, but he gave directions to apply in lunacy, and that is the course that ought to have been taken here, for it is clear that no final relief could be given without the appointment of a committee in lunacy, and no case for protection of property is made out.

Mr. Southgate and *Mr. Byrne*, for the plaintiff, were not called upon.

THE MASTER OF THE ROLLS, after reading and commenting on the clause of the partnership articles as to dissolution and the notice to dissolve, said that the notice was a valid notice, and operated as a dissolution; that, under these circumstances, the notice to withdraw could have no effect, as, if it operated at all, it would operate as a new agreement for the continuing of the partnership, and the position of the lunatic partner, who could not assent to such an agreement, could not be affected by the notice.

[The Master of the Rolls then said that, while he agreed with the defendant's arguments, that to support the said equity there must be an allegation of permanent insanity, and that the dissolu-

tion was for the benefit of the plaintiff, the bill sufficiently alleged both that the plaintiff was incurably insane, and that it was for his benefit that the partnership should be dissolved, and then proceeded as follows]:—

Well, then, it was said, that being so, it by no means follows that the Court will dissolve a partnership at the instance of a person of unsound mind, not so found by inquisition, at the request of a next friend, for really he is the person asking it and not the lunatic. To that proposition I also give my cordial assent. I think no Court would dissolve a partnership unless it saw it was necessary for the benefit of the lunatic. If it saw it would be for his benefit that the partnership should be continued as being well managed and the property well taken care of, the Court would not interfere; but I find in this bill an allegation, in the 14th paragraph, "that it is expedient, for the benefit of the plaintiff, that the said partnership should be dissolved and the said accounts taken thereof by and under the direction of the Court." And I find that followed by a prayer that the profits of the partnership, that is, the assets, "may be decreed to be paid to or secured for the benefit of the plaintiff, the plaintiff being ready and willing and hereby offering to pay what, if anything, shall be found due to the defendant; that all the property, stock-in-trade and effects of the said partnership may be got in and disposed of under the direction of the Court; and then that a proper person may be appointed to receive and collect the debts, moneys, stock-in-trade, and effects owing and belonging to the said partnership; that all proper directions may be given for effectuating the purposes aforesaid." So that I find an allegation that it is for the benefit of the plaintiff, and I find a prayer for what I will call an interim security of the partnership property. I mean the appointment of a receiver, and so on. Can I say, therefore, on general demurrer, which admits all these facts, that it is not to be dissolved at the instance of the plaintiff? I cannot say so, unless it is true that the insane partner has no equity, which was the proposition

boldly maintained by either one or both of the counsel for the demurring defendant.

Well, now, that is a proposition of law which it is necessary to examine, and at the same time I will state another proposition which they put forward, and which can be examined conveniently at the same time. It was said that, even assuming there was such an equity, the equity can only be asserted by the committee in lunacy, and not by a bill filed by a next friend. I do not think either of those propositions well founded. I think there is an equity on the part of the lunatic, and I think the equity may be asserted by the next friend. I do not say that it is not desirable that there should be a committee appointed, and I do not say if this cause comes to a hearing, I myself, if I am then the Judge to hear it, or the Court which may hear it, may not think it desirable that it should not be finally adjudicated upon until some application has been made to the Lords Justices for an adjudication in lunacy, and for the appointment of a committee. All that is matter for subsequent consideration. What I have now to decide is, whether the bill itself is maintainable, and whether any interim order for the protection of the property of the lunatic, or his share of the partnership property, can or cannot be obtained.

On the first point, I think that the old decision of Lord Kenyon is, as adopted and recognised by Lord Eldon and Vice-Chancellor Wood in subsequent cases, quite conclusive. What he said in *Sayer v. Bennett* (2) was this: "I will venture to lay down, as a general rule, that, where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade" (that is what I meant—active partners), "the insanity of one of them, by which he is rendered incapable to contribute that skill and industry on his part, is a good ground for putting an end to the partnership, not by the authority of either of the partners, but by application to a Court of justice, and this for the sake of the partner who is so rendered incapable, as well as of the

(2) This passage is taken from the report of the case in Montague's Digest of the Law of Partnership, vol. i. note c.

other, for it would be a great hardship upon a person so disordered if his property might be continued in a business, which he could not control or inspect, and might be subject to the imprudence of another. If this then were the case of one of the partners being insane at the present moment, I should not have a particle of doubt to decree the dissolution of the partnership." Now that means this, as clearly as possible, that there is an equity in the insane partner. The bargain he made was that certain property, called partnership property, should be under the control of himself and another, not that it should be under the sole control of the other. The bargain he made was that he and another should take an active part in carrying on the business, in supervising the arrangements necessary for carrying it on, and that the partnership property and the partnership, goodwill, assets and profits should not be risked merely by the other without his consent. That was his bargain. By the act of God that bargain has become incapable of performance, and he is not able to exercise that supervision over the conduct of the business and the care of the property for which he bargained. Then, what I understand Lord Kenyon to mean is, that that has so altered the complexion of matters, has so entirely changed the nature of the contract, that he is no longer bound, and that, even on the part of the lunatic, you may apply to the Court of Equity, in a proper case, for a dissolution on the ground of that entire change having taken place in the relations between the parties, and that the equity is not confined to the sane partner, but is clearly extendible and extended to the case of the lunatic partner. Well, now, I find the whole doctrine, the whole judgment of Lord Kenyon emphatically approved by Lord Eldon in *Waters v. Taylor* (*ubi supra*), and equally approved of by Vice-Chancellor Wood in the anonymous case in 2 Kay and Johnson (3). Therefore I take it to be settled law, and when I say I take it to be settled law, I am using only

the very words that were used by the Vice-Chancellor, that he considered that those cases settled the law. Therefore I take it to be established law that the insane partner has a right to come into this Court, of course in a proper case, to have the partnership dissolved.

That then being his right, can it be exercised? that is, can a suit be instituted by the lunatic not so found by inquisition by his next friend? I have no doubt it can. There is a distinct authority on the subject, and it seems to me so distinct that I have no occasion really to refer to the reasoning, because I think the cases of *Light v. Light* (*ubi supra*) and *Beall v. Smith* (*ubi supra*) are distinct authorities, but independently of the unreported case to which allusion has been made of *Fisher v. Melles* (*ubi supra*) where I know the point was discussed, and independently of distinct authority let us look at the reason of the thing. If this were not the law anybody might at his will and pleasure commit waste on a lunatic's property or do damage or serious injury and annoyance to him or his property without there being any remedy whatever. In the first place the Lords Justices or the Lord Chancellor are not always sitting for applications in lunacy. In the next place, if they were, everybody knows that it takes a considerable time to make a man a lunatic, and if a man is a lunatic not so found by inquisition, and his family hesitate no doubt about making him a lunatic or hope for his recovery, and take care of him in the meantime without applying for a Commission in Lunacy, is it to be tolerated that any person can injure him or his property without there being any power in any Court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that no effort of his can be made, and no member of his family can file a bill in his name as a next friend to prevent that injury? Is it to be tolerated that a man may make away with the share of a lunatic in a partnership business, or take away a share of a trust property in which he is interested, without this Court being able to extend its protection to him by grant-

ing an injunction at the suit of the lunatic by a next friend because he is not so found by inquisition? I take it, those propositions when stated really furnish a complete answer to the suggestion that he cannot maintain such a suit. Of course they do not answer the question as to how far he may carry it, but that he can maintain such a suit for the purpose of protection, for the purpose of obtaining, as in this case, a receiver, I should think there can be no doubt whatever. But how stands it on authority? In the case of *Light v. Light* (*ubi supra*) the exact point came before my predecessor, and he decided in the case of a trust such a bill could be filed by a lunatic not so found on inquisition by his next friend. I find in the books of practice the proposition is laid down in the widest sense, in fact *Daniel's Chancery Practice* was referred to on that occasion. But the question came before the Lords Justices recently in the case of *Beall v. Smith* (*ubi supra*) which was cited to me by the demurring defendant's counsel, and what do they say? Lord Justice James says this—"The law of the Court of Chancery undoubtedly is, that in certain cases where there is a person of unsound mind not so found by inquisition, and therefore incapable of invoking the protection of the Court, that protection may, and if and so far as may be necessary and proper be invoked on his behalf by any person as his next friend, but every person so constituting himself officiously the guardian, committee and protector of a person of unsound mind, does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question." Well here I find an allegation which is to be taken as true on this demurrer that the bill is for the benefit of the lunatic, and, therefore, the next friend has so far discharged himself from that *onus*. Then he goes on, "The Court of Chancery is not the *curator* either of the person or the estate of a person *non compos mentis* whom it does not and cannot make its ward; it is not by reason of the incompetency that the Court of Chancery entertains the proceedings. The Court

can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind. If there be a trust property in which the person is beneficially interested, the Court may, no doubt, deal with it in such a manner as it may deem just, and it will, if necessary, ascertain the nature and extent of his interest, and will authorise, and in a proper case compel the trustee to deal with the lunatic's interest in the trust property for his benefit. That arises from its inherent absolute jurisdiction over trusts and trust funds. So in case of partnership it may make the necessary orders with respect to the partnership and its assets, notwithstanding the incompetency of a partner, but that again is a consequence of this ordinary jurisdiction in partnership matters which is not ousted or paralysed by such incompetency. Now no one can deny, therefore, I should think, after that judgment, that in partnership matters in which the Court has a primary jurisdiction that jurisdiction is not ousted or destroyed by either party becoming a lunatic. I mean by "party" plaintiff or defendant, and it is impossible to doubt, at least I should think so, that if one partner wasting or misapplying the assets, the other partner though a lunatic, not so found by inquisition, could by his next friend prevent such misapplication. So in the same way, if it is, as Lord Kenyon puts it, an undoubted hardship on the lunatic that in a proper case his property shall be left at the mercy of a single sane partner, that the whole mode of conducting the business shall be left to his own sole discretion, and that that hardship was remediable in a Court of Equity prior to the Lunacy Regulation Act, the same remedy must still remain and the lunatic must have an undoubted right to say—This is a case in which it will be for my benefit that the partnership be dissolved (as he does say by this bill), and therefore I am entitled to some protection for the assets even before the decree for final dissolution, and he is entitled to submit that case to the judgment of the Court, and for that purpose at all events to make the necessary interlocutory

application. I do not say, it is not necessary for me to say at the present, whether he will or will not obtain a final decree without application to the jurisdiction in lunacy, all I say is that in my opinion and judgment he can maintain this bill, and this being a general demurrer for want of equity it must be overruled and with costs.

For though I am not at all indisposed to encourage demurrers, I must decide according to the ordinary rule; it requires an exceptional case to depart from it.

Solicitors—Mr. E. Byrne, for plaintiff; Messrs. Church, Sons & Clarke, agents for Mr. Griffin, Birmingham, for defendant.

BACON, V.C. }
1874. } *Re VIAN'T'S SETTLEMENT.*
May 23. }

Construction — Settlement — After-acquired Property.

A lady was entitled under a marriage settlement to the whole of a fund for her life. The fund in default of children was limited to the husband. There being no children the lady on her husband's death became entitled to one moiety of his residue beneficially. She was also his administratrix, and on her second marriage a settlement was made by which she and her intended husband covenanted to settle all property to which she or he in her right should become entitled during the coverture under the former settlement. The life interest was expressly settled. At the date of the second marriage the fund in question was the only fund outstanding under the first settlement:—Held, that the covenant operated on her moiety.

Upon the marriage of Mr. and Mrs. Hawkins in 1857 certain property, including a policy effected on the life of Mr. Hawkins, was settled upon trust to pay the income during their joint lives to the wife, then Sarah Albina Eldridge, and in case of her surviving her husband and there being no children of the marriage (which events both happened), on trust for Mr. Hawkins, his executors, administrators and assigns. He died intestate

in 1859, and in January, 1860, letters of administration were granted to his widow. The proceeds of the policy were invested in the purchase of 2,084*l.* 11*s.* 9*d.* consols in the names of the trustees of the settlement of 1857.

Mrs. Hawkins, the widow, married John Viant in August, 1866. Shortly before the marriage a settlement was executed by them, dated the 6th of August, 1866. The settlement, after reciting that Mrs. Hawkins was entitled to certain mortgages and a life interest in the sum of 2,084*l.* 11*s.* 9*d.* consols, and that upon the treaty for the intended marriage it was agreed that she should assign the mortgages and the annual income to be derived from the "said consols and all other sums and sum of money which she should become entitled to during her intended coverture it was declared that J. Tizard and A. L. Cooper, the trustees of that settlement, should stand possessed of the mortgage debts and securities and certain sums of stock (not mentioning the sum of 2,084*l.* 11*s.* 9*d.*), and the annual income to be derived from the said sum of 2,084*l.* 11*s.* 9*d.* 3*l.* per cent. consols, and all other sum and sums of money to which the said Sarah A. Hawkins might become entitled as thereafter declared to sell and invest and to hold the trust fund and income thereof, "as well as of the said sum of 2,084*l.* 11*s.* 9*d.*," upon trust for the wife for life, then for the husband for life or till he should do some act, or some event should occur, whereby or in consequence whereof any part of the annual income, if payable to himself, became vested in some other person or persons, and afterwards in trust for the children of the marriage as therein mentioned, and in default of children on the trust therein mentioned. The deed contained a covenant by the intended husband and wife, "that if the said S. A. Hawkins or the said J. Viant in her right shall at any time or times during the coverture between them, the said S. A. Hawkins and J. Viant, become entitled to any sum or sums of money and personal estate whatsoever under the provisions of a certain deed of settlement (describing the settlement of 1857), then

the said S. A. Hawkins and J. Viant shall and will immediately upon her, his or their becoming possessed of or entitled to the same personal estate as far as she, he or they lawfully or equitably can or may at the costs of such newly acquired personal estate by all proper acts, deeds, assignments and assurances in the law, assign, settle and assure the same personal estate upon and for the several trusts, intents and purposes, and with, under and subject to the powers, provisos, declarations and agreements hereinbefore of and concerning the personal estate and property of her, the said S. A. Hawkins, hereby assigned and settled in manner aforesaid, any law to the contrary notwithstanding."

Mrs. Viant died in September, 1873, and on the 17th of December, 1873, John Viant assigned to R. N. Howard all his interest in the money he was entitled to in right of his wife under the said policy on the life of A. J. Hawkins, deceased. The consols representing the policy moneys were sold, and ultimately the half of the proceeds which Mrs. Viant was entitled to as widow of her husband, was paid into Court and was now represented by a sum of 970*l.* 15*s.* 9*d.* consols.

A petition was now presented by R. N. Howard and J. Viant, asking for payment of the money to Mr. Howard.

Mr. Kay and Mr. Cookson, for the petition, argued that the property was not acquired during the coverture, and if it could be said to be, it was not acquired under the settlement of 1857, but came by operation of law. The express settlement of the life interest shewed an intention to exclude Mrs. Viant's interest in the remainder. They referred to

Re Pedder's Trusts, 40 Law J. Rep. (N.S.) Chanc. 77; s. c. Law Rep. 10 Eq. 585;

Re Browne's Will, 38 Law J. Rep. (N.S.) Chanc. 316; s. c. Law Rep. 7 Eq. 231;

Archer v. Kelly, 1 Dr. & S. 300; s. c. 29 Law J. Rep. (N.S.) Chanc. 911;

Re Edwards, ante, 265; s. c. Law Rep. 9 Chanc. 97;

Re Olinton's Trusts, 41 Law J. Rep. (N.S.) Chanc. 191; s. c. Law Rep. 13 Eq. 295;

NEW SERIES, 43.—CHANC.

Mr. Colt, representing the children of Mr. and Mrs. Viant, contended that the right to this fund did come to Mr. Viant during coverture, that was to say at the moment of marriage. The wife at the time of marriage was beneficially entitled to the moiety within the meaning of the covenant. A strong argument that the covenant was intended to operate on this fund was that if it did not there would be nothing for it to operate upon, and the Court would give some effect to it if it could. He relied upon—

Graftley v. Humpage, 1 Beav. 46; s. c. 8 Law J. Rep. (N.S.) Chanc. 98.

Mr. Owen, for the trustees.

Mr. Cookson replied, and cited in addition—

Blythe v. Grenville, 13 Sim. 190; s. c. 12 Law J. Rep. (N.S.) Chanc. 82;

Alleyne v. Hussey, 22 W. R. 203;

Rose v. Cornish, 16 Law Times N.S. 786.

BACON, V.C., said—The only question is as to the legal operation of the settlement of 1866, a question which depends on the language of the covenant. The words are no doubt words of futurity, but they speak from a period of time before the marriage took place. From the moment when the marriage was celebrated in church the covenant came into operation. Whatever took place after the date of the deed was a futurity within the meaning of this settlement. At the moment before the marriage took place the right of the intended wife was to have a life interest in the particular fund mentioned, and she was entitled moreover, her former husband having died intestate, and there having been no children of that marriage, to the possession of one-half of the fund as her own. Upon her marriage that right became the right of her husband, and at the moment the priest's benediction was pronounced on the marriage the husband did become entitled during the coverture to that which was hers before, and that however the words of futurity may be construed; and however much the cases may be considered, I cannot see that the words of

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futurity have any material bearing on the question before me.

With respect to the second point that has been argued upon the construction of the deed of 1857, I consider I should be doing some violence to language to hold that it was not under the provisions of that settlement that she became entitled in the events that have happened to the moiety of the capital, subject to her own life interest.

By the second settlement in 1866, it was provided that if there should be no children of the second marriage, that property, in which a life interest was provided for the wife, was, in the event of her surviving her husband, to be hers, and she had power to dispose of it by will. This was the sort of provision which upon the occasion of the second marriage was contracted for: this was the provision that was made before any covenant began to come into operation. Had no such provision been made, upon the marriage being celebrated, the husband's marital right would at once have prevailed, and he could have done whatever it is open to a husband to do with regard to getting into possession property to which his wife is entitled, subject to her own life interest in it. Then the covenant steps in and says, that the right shall not be the husband's, at least so I read the covenant, and I think that I do so without doing violence to the words. In the case of *In re Pedder's Trusts (ubi supra)*, the question was a different one in this respect. The property consisted of a vested remainder in land expectant on the death of a tenant for life who outlived the coverture, and Lord Justice James, then Vice-Chancellor, observed, "This is not property with regard to which it can be averred that the husband or the wife did become seized or possessed of or entitled to it 'during the coverture.' [His Honour here read the terms of the covenant, and said]—In this case" during the coverture, that is to say immediately on the marriage being solemnised, "the husband did become entitled to the sum of money under the provisions of the deed, and by the settlement he covenanted that whatever he should so become entitled to in his wife's right should be settled."

I am of opinion, therefore, that the argument which has been addressed to me on behalf of the assignee of the husband fails. The attempted assignment was a direct violation by the husband of his covenant.

The claim of the petitioners must be disallowed; and there must be an order that the fund be paid over to the trustees of the settlement of 1866, but the case is unquestionably one of some nicety, and the authorities suggest doubts upon the question.

My view is that upon the marriage being solemnised the husband did become entitled to this reversionary interest, which, but for the settlement, he might have sold or have done what he liked with but that the covenant operated on the fund and brought it within the scope of the settlement.

The costs of all parties will come out of the fund.

Solicitors—Messrs. Combe & Wainwright, agents for Mr. Howard, Weymouth, for petitioner; Messrs. Pattison, Wigg & Co., agents for Mr. George, Weymouth, for the respondents claiming the fund.

MALINS, V.C.

1874.

March 13, 14,
16, 17, 18, 19
and 21.

HAYMAN v. THE GOVERNING BODY OF RUGBY SCHOOL.

Public Schools Act, 1868 (31 & 32 Vict. c. 118)—*Governing Body*—*Head Master*—*Power of Governing Body to dismiss*—*Demurrer*.

The governing body of a school constituted under the Public Schools Act, 1868, has, under the 13th section of that Act, absolute power to dismiss the Head Master of the school "at their pleasure," that is, without assigning any reason, and so long as this power is fairly and honestly exercised the Court of Chancery cannot interfere.

They may do so, moreover, although the Head Master received his appointment from a prior governing body in existence before the passing of the Act, whose powers of dis-

missal were subject to restrictions as to time and place of exercise.

Semble. If the Governing Body gives reasons for the dismissal, the Court will look at the sufficiency of those reasons.

The authorities considered.

Demurrer.

The plaintiff in this suit was the Rev. Henry Hayman, D.D., lately the Head Master of Rugby School, and the defendants were the Governing Body of that school and the Right Rev. the Bishop of Exeter. The plaintiff by his bill prayed that it might be declared that a certain resolution of the Governing Body passed on the 19th of December, 1873, removing him from his office of Head Master, and a notice to vacate his office and deliver up possession of the school-house and appurtenances, dated the 14th of January, 1874, and issued in pursuance of the resolution, were respectively invalid and not binding on the plaintiff, and ought not to be enforced; that the defendants, the Governing Body, might be restrained by injunction from removing or dismissing the plaintiff from his said office of Head Master, and from electing any person to succeed him in his said office, and from instituting or prosecuting any action at law, or other proceedings for ejecting the plaintiff from the school-house, lands, buildings and premises occupied by him in virtue of his said office, or from otherwise enforcing or carrying into effect the said resolutions and notice, or either of them; and that the defendants, or some of them, might pay the costs of the suit.

The bill began by stating that the plaintiff was appointed to the office of Head Master of Rugby School on the 20th of November, 1869, to succeed the defendant, the Bishop of Exeter (then Dr. Temple), on his elevation to the Episcopal Bench. Dr. Temple had been Head Master since the year 1858, and both he and the plaintiff received their appointments under the Act 17 Geo. 3. c. 71. Under that Act, the school-house, almshouses, lands and property then belonging to the school and charity were vested in certain persons named in the said Act as trustees of the charity, upon the trusts and for the purposes in

the Act and the schedule thereto mentioned. And the Act conferred on the said trustees power to sell and grant leases of portions of the said trust property, and contained directions for the application of the money to arise from such sale, and of the rents and profits of the unsold portions of the property; and it was thereby enacted, amongst other things, that the said trustees should at all times thereafter be styled and called by the name and title of "The Trustees of the Rugby Charity, founded by Lawrence Sheriff of London, grocer."

The schedule to this Act contained the rules then in force for the government of the school and charity, which, after directing that the Rev. Stanley Burrough, M.A., the then present schoolmaster, should be continued so long as he should behave well, provided as follows—"Second. That all the masters of the grammar school who shall succeed the said Stanley Burrough, the present master, the usher or ushers, and the writing masters who shall succeed those first to be nominated, as hereinbefore mentioned, shall be chosen within three calendar months next after any vacancy shall happen by the trustees, or the major part of them present at a meeting to be held for that purpose, and be removable at the will and pleasure of the trustees, or a major part of them present at their meeting on the first Tuesday in the month of August."

Fourth. That the trustees should meet quarterly at certain specified times in the school, and hear the boys examined, and should "at their annual meeting in August make such rules and orders for the better regulation of the said school, and the masters and ushers thereof as the said trustees, or the major part of them present at such meeting, should think proper."

By a subsequent Act of Parliament (54 Geo. 3. c. 131), the month of July was substituted for that of August, the latter month having been found inconvenient for holding meetings in.

By the Public Schools Act, 1868 (31 & 32 Vict. c. 118), which applied, amongst others, to Rugby School, it was enacted that "existing Governing Body" should

in the case of Rugby mean "the trustees," and power was given (section 5) to the then existing Governing Body of each of the schools to which the Act applied to make within a certain time a statute for establishing the constitution of the Governing Body in each school as might be deemed expedient, but after the time therein limited all powers of making statutes were to pass to special commissioners named in the Act. The Act then empowered the new Governing Body to make statutes with respect to the several matters in the Act mentioned relating to the management and regulation of the school, and after conferring various other powers upon the Governing Body, it enacted, in section 13, that the Head Master of every school to which the said Act applied should be appointed by, and hold his office *at the pleasure of the new Governing Body*, and that all other masters should be appointed by and hold their offices at the pleasure of the Head Master; and it was enacted (section 28) that, subject to any alterations made by that Act, or by any scheme or statute made in pursuance thereof, all powers vested in the then existing Governing Body of a school to which the Act applied, in relation to such school or the government thereof, should continue in force, and might be exercised by such Governing Body until a new Governing Body should be appointed, and after the appointment of a new Governing Body by the new Governing Body in the same manner in which they might have been exercised if that Act had not passed.

This Act made no provision as to the times or place at which the "pleasure" of the Governing Body was to be expressed. No scheme for establishing the new Governing Body, nor any alteration in the constitution of the existing Governing Body of the school was made until May, 1871, when a statute for the purpose was made by the special commissioners mentioned in the Act of 1868, which statute was approved by Her Majesty in Council in August, 1871, and in December, 1871, the new Governing Body was fully constituted.

Dr. Hayman's appointment was made by the trustees of the school, who were

then the Governing Body. These trustees were Mr. W. S. Dugdale, Mr. Wise, M.P.; the Duke of Marlborough, the Earl of Warwick, Earl Howe, Lord Charles Bertie Percy, Lord Leigh, Sir C. B. Adderley, M.P.; Mr. Newdegate, M.P.; Mr. Davenport, M.P.; the Rev. C. W. Holbech, and Colonel North, M.P. And all these gentlemen, except Mr. Dugdale and Earl Howe, were present when Dr. Hayman's appointment was made.

The bill in paragraph 11 stated as follows: "There were several other candidates for the office besides the plaintiff and they also sent in testimonials to the trustees, and the trustees, after considering all the testimonials and the claims of all the candidates, came to the conclusion that the plaintiff was the fittest person to be Head Master of the school, and appointed him accordingly. Amongst the rival candidates were some who had been educated at, or were otherwise connected with, Rugby, and whose claims were favoured by Dr. Temple, and by the assistant masters hereinafter named, then working under him at Rugby, and by the Rev. G. G. Bradley, D.D., who had himself formerly been an assistant master at the school, but was then Head Master of Marlborough College; and it appears from the circumstances hereinafter stated to have been the opinion of Dr. Temple, Dr. Bradley and the assistant masters, that the trustees were bound to select from among the candidates some candidate who had been educated at, or was otherwise intimately connected with, Rugby School, or, at all events, some candidate other than the plaintiff. The plaintiff was not educated at, and had no connection with, Rugby School, and Dr. Temple, Dr. Bradley and the assistant masters were accordingly much piqued and annoyed at the choice which the trustees had made, and being much prejudiced against the plaintiff on religious and political or other grounds, they deliberately formed the scheme and design of procuring by every means in their power the annulment of the said appointment, or otherwise of so harassing and thwarting the plaintiff in relation to the school and to themselves, and so disparaging him in the eyes of the public

as to make his position as Head Master intolerable, and so, if possible, compel him to resign. A part of such scheme and design was to procure, if possible, some resolution or resolutions of the Governing Body censuring or reflecting on the conduct of the plaintiff, and by publishing the same in the public newspapers, to prejudice the parents of pupils and intending pupils, and the boys themselves, and the public generally, against the plaintiff, so as to make it difficult, if not impossible, for him to maintain the numbers and discipline of the school. Immediately upon the plaintiff's appointment, Dr. Temple, and Dr. Bradley and the said assistant masters proceeded to execute their said design, and from that time to the present have not ceased in their endeavours to carry the same into effect, and in fact the acts and proceedings hereinafter mentioned on the part of Dr. Temple and Dr. Bradley, and of the Governing Body, after they became members thereof, so far as such acts and proceedings were hostile to the plaintiff, were done or procured to be done in furtherance of the same settled plan and design, viz., either to procure the dismissal of the plaintiff, or to force him to resign the Head Mastership."

The bill, which was of considerable length, consisting of 137 paragraphs and ninety-one pages, then set forth the various matters upon which the plaintiff relied in support of his case. In view of the judgment of the Vice-Chancellor, however, it is not necessary to give at length these allegations, but the following statement of the substance of the plaintiff's case will be sufficient for the purpose of this report.

After the paragraph above set out, the bill proceeded to shew the manner in which the alleged scheme was prosecuted, first, by objections on the part of the assistant masters and the Bishop of Exeter, to the candidature of the plaintiff, and the use he made of his testimonials; and two long letters upon the subject were set out, one of which was written to the plaintiff ten days after his appointment by twenty out of the twenty-one assistant masters, and the other of which was written ten days later

by the Bishop of Exeter to the trustees, together with other correspondence and occurrences relating to this part of the case, which terminated with a resolution of the trustees passed on the 20th of December, 1869, whereby they agreed that the plaintiff had acted with perfect good faith in the use he had made of his testimonials. The bill then related the action taken by the assistant masters with reference to the dismissal by the plaintiff of two of the House Tutors, and set out the correspondence between the plaintiff and the trustees thereon, and certain resolutions passed by the trustees approving of the plaintiff's conduct. The bill then stated the constitution, on December, 1871, of the new Governing Body. That body consisted of the Bishop of Worcester (the Chairman), elected by the old trustees of the Rugby Charity; Lord Leigh, as Lord-Lieutenant of the county of Warwick; Dr. Bradley, elected by the University of Oxford; Dr. Bateson, elected by the University of Cambridge; Dr. Temple (Bishop of Exeter), by the University of London; Professor H. J. S. Smith, by the Royal Society; Mr. Rickards, by the Lord Chancellor; Mr. Lingen, by the Head Master and Assistant Masters of the School; and the Marquis of Hertford, Lord Warwick, Sir C. Adderley, and Mr. Newdegate, by the old trustees, making, with the Bishop of Worcester, the five members whom the old trustees had the power to nominate. The bill then charged in paragraph 41 as follows—

"41. Although Dr. Temple and Dr. Bradley had been active partisans of the assistant masters in their differences with the plaintiff, and had, in fact, prejudged the whole case against the plaintiff, and were determined beforehand to drive him from the school, yet they allowed themselves to be elected members of the new Governing Body, and thus to become judges of matters in and respecting which they and the assistant masters, whose cause they had taken up, and whom they, in fact, represented, had a strong personal interest and bias, which made them wholly unfit to form an impartial judgment on such matters, or on any question between the assistant masters and the plaintiff. Dr. Temple had been Head Master of the

school for several years, and was the brother-in-law of one of the assistant masters. Dr. Bradley had been an assistant master of the school for many years, and was likewise closely connected by marriage with one of the assistant masters. Both Dr. Temple and Dr. Bradley were, from their personal experience and from their connection with the assistant masters, intimately acquainted with the affairs of the school both past and present, and they were, in fact, looked to by their colleagues on the Governing Body, and trusted implicitly by them as the proper and trustworthy sources of information on all matters connected with the school. Dr. Temple abused the power and influence over his colleagues which his long experience and ample means of knowledge gave him, to further the aforesaid scheme and design of himself and the assistant masters, and made incorrect representations to his colleagues as to several matters of fact, and more particularly as to what were the established customs and usages of the school, and represented as part of such established customs and usages several matters which were not part thereof, but were, in fact, innovations introduced by Dr. Temple himself; and the acts and proceedings of the new Governing Body, so far as they were hostile to the plaintiff, and especially the resolutions hereinafter complained of, were, in fact, caused and brought about, in whole or in part, by such abuse of power and influence and such incorrect representations as aforesaid."

The bill then stated the action taken by ten of the assistant masters with reference to the plaintiff's appointment of one of the house masters, a resolution of the Governing Body declining to interfere, but refraining from expressing any approval of the exercise of the Head Master's discretion in that particular instance, and a protest, signed by Dr. Temple, Dr. Bradley, and three others of the Governing Body, against this non-interference by the Governing Body.

The bill then stated certain differences which arose between the plaintiff and Mr. Scott, a foundation master and one of the house tutors, and paragraph 88 contained an allegation that the Governing Body,

under the influence of Dr. Temple and Dr. Bradley, who had determined to undo the appointment of the plaintiff as Head Master, and to force on his resignation or dismissal, had in fact been persuaded, and had resolved beforehand to get rid of the plaintiff, whatever he might write to Mr. Scott, and whatever explanation or statement he might make to the Governing Body.

The differences between the plaintiff and Mr. Scott ultimately led to a resolution of the Governing Body, passed on the 25th of February, 1873, whereby they expressed their opinion that it was desirable the plaintiff should retire; and the bill, in paragraph 95, charged that the Governing Body were persuaded to adopt this resolution, "under the improper and undue influence of the Bishop of Exeter, and yielding to his persistent efforts to carry into effect the aforesaid scheme and design."

The last part of the plaintiff's case related to his dismissal of Messrs. Sidgwick and Smith, two of the assistant masters who were not in fact the lowest in point of seniority, and the remonstrances of some of the assistant masters upon this score; and set out the correspondence thereon, including a letter written to the plaintiff on October 30th, 1873, by the Bishop of Worcester, the chairman of the Governing Body, expressing their opinion that such dismissal was a departure from the customs of the school.

Upon this branch of the case, the bill charged, in paragraph 114, that, although as early as February, 1872, the Governing Body were aware that the plaintiff repudiated any voluntary engagement of Dr. Temple which interfered with the authority of the Head Master, they, nevertheless, "acting under the hostile and improper influence aforesaid," accepted the unsupported and incorrect statement of Dr. Temple, that a scheme by which the last appointed master should always be the one to retire upon any reduction in the number of masters, was one of the customs of the school; and in directing the letter of the 30th of October, 1873, to be written to the plaintiff, and in passing the resolution of the 19th of November hereafter

mentioned, the Governing Body "improperly, and in derogation of the trust reposed in them, abdicated their proper functions and duties as governors and trustees of the school, and surrendered their judgment to Dr. Temple and Dr. Bradley, and allowed them to be at once witnesses of vital facts in dispute between the assistant masters and the plaintiff, and judges of the plaintiff's conduct, although both Dr. Temple and Dr. Bradley had from the beginning been advocates and partisans of the plaintiff's opponents in the school, and had pledged themselves to condemn, and had, in fact, condemned the plaintiff, and recorded an adverse judgment against him before they became members of the Governing Body."

The remaining statements of the bill were shortly as follows—The Governing Body met on the 19th of November, 1873, and after hearing the plaintiff and considering his statements and the correspondence, passed a resolution that in their opinion the plaintiff, in giving notice of dismissal to Messrs. Sidgwick and Smith, "had not acted in accordance with the undertaking given by him on the 16th of April, 1872, to observe the usages and customs of the school" (apparently referring to a letter of Dr. Hayman's of that date, in which he said that he concurred with the Governing Body in the wish that the system which had hitherto prevailed should be maintained as far as possible, and that he had no intention of any such changes as they seemed to point to); and, further, that the Governing Body felt that they must "require Dr. Hayman to place his resignation in their hands on or before Wednesday the 23rd of December, to take effect at Easter next."

Against this decision the plaintiff protested, and requested to have an opportunity of adducing further evidence. The Governing Body, however, declined, and urged Dr. Hayman to resign. Further correspondence ensued; and as Dr. Hayman did not resign, the Governing Body finally, on the 19th of December, 1873, passed the following resolution—

"That upon a review of the administration of the school from the period when

the Governing Body came into office to the present time, they are of opinion that Dr. Hayman is not a fit and proper person to hold the position of Head Master of Rugby School, and that it is essential for the interests of the school that he should cease to hold such office; that, in exercise of the powers vested in the Governing Body by 'the Public Schools Act, 1868,' Dr. Hayman be removed from his office of Head Master, and that such removal take effect on the 7th day of April next; that the clerk be instructed to communicate the above resolutions to Dr. Hayman, and to give him formal notice to vacate his office of Head Master of Rugby School on the 7th day of April next."

And in paragraphs 135 and 136 the bill summed up the plaintiff's case as follows—

"135. Under the circumstances herein appearing, the resolutions and proceedings of the Governing Body herein complained of were passed and adopted, not in the due exercise and execution of the powers and trusts reposed in them, nor out of a due, or any regard for the true interests and benefit of the school and the public, but out of a predetermined hostility, and motives of resentment and party spirit on the part of Dr. Temple, and Dr. Bradley and the assistant masters, whom they represented, and out of the exercise by Dr. Temple, by the means aforesaid, of an undue influence over the other members of the Governing Body, and the undue and culpable submission on the part of the other members of the Governing Body to such undue influence, and out of an undue bias and prejudice on the part of the Governing Body in favour of the assistant masters, and against the plaintiff, resulting in a great measure from misrepresentations of the plaintiff's acts and motives by the defendant, Dr. Temple, and an entire want of fairness and impartiality on their part in adjudicating on the charges made by Dr. Temple and the assistant masters against the plaintiff, and, in fact, out of motives, which, according to the rules of equity, were improper and corrupt. Under these circumstances, the plaintiff submits that the said resolutions and proceedings

are as against the plaintiff invalid, and ought not to be enforced.

"136. The plaintiff also submits that the said resolutions of the 19th of December, 1873, are invalid on this further ground, that, inasmuch as he was elected to the office of Head Master under the provision of the statute 17th Geo. 3. c. 71, as modified by the statute 54th Geo. 3. c. 131, he can be dismissed only in accordance with the terms of those statutes at an annual meeting of the trustees, held pursuant thereto."

To this bill the defendants, the Governing Body, and the defendant, the Bishop of Exeter, filed separate demurrers for want of equity. These demurrers, and a motion on behalf of the plaintiff for an injunction in the terms of the prayer of the bill, now came on together for argument, and the demurrer of the Governing Body was argued first.

Mr. Cotton, Mr. Davey, Mr. Bowen (of the Common Law Bar), and *Mr. Ilbert*, for the defendants, the Governing Body, in support of the demurrer.—There are two points upon which the plaintiff appears to rest his case. First, that the resolutions whereby he was dismissed were not duly passed; secondly, that they were invalid, as procured by improper influences. The ground of the first point is that, under the 17 Geo. 3. c. 71 and the 54 Geo. 3. c. 131, the plaintiff was only removable by the trustees at a meeting held in Rugby in the month of July. This, however, is a fallacy; for when they removed Dr. Hayman, the Governing Body were not acting under those regulations, but under the powers conferred upon them by the 15th section of the Public Schools Act, 1868, which contained no regulations as to time or place of meeting, or mode of procedure, but simply enacted that the Head Master of any school to which it applied should "be appointed by and hold his office at the pleasure of the new Governing Body." It is true that Dr. Hayman had been appointed by the old Governing Body; but by the Public Schools Act of 1864, 27 & 28 Vict. c. 92, it was enacted that "every person" appointed to an office in any one of the schools named in the schedule" of that Act—and Rugby was one of them—must

take that office "subject to such provisions and regulations as might hereafter be enacted." Dr. Hayman held his office, therefore, subject to any alteration by Act of Parliament; and the new Governing Body having by Act of Parliament the power to dismiss him at their pleasure, the old restrictions as to time and place were gone, though the old regulations, where not inconsistent with subsequent enactments, might still remain in force until the new ones were framed.

Upon the second and larger question it was said that the Governing Body were acting as judges in deciding upon the plaintiff's case; and that Dr. Temple and Dr. Bradley had sat as judges when, by reason of the strong part they had taken against him, they were in fact disqualified to do so, and that, therefore, the resolution dismissing the plaintiff was bad. This involved a second fallacy—namely, that of attributing to the Governing Body the functions of judges. But even if they were judges, there was no charge in the bill that they had attempted to further personal—i.e., pecuniary—interest, so as to bring them within the rule prohibiting a judge from so doing. They had, however, no interest but the interest of the school, and they were not judges at all. The Head Master was removable at the "pleasure" of the Governing Body, and no judge had the power to decide a cause according to his "pleasure." He must act according to the principles of the law, and his pleasure has nothing to do with it. Dr. Hayman had exercised the power to dismiss the assistant masters, and the Governing Body did not question his right to do so, though they did not consider he was acting judiciously and in accordance with the usages of the school; but if he had been acting as a judge, he could not have done this as he did "at his pleasure;" and what is true of Dr. Hayman and the assistant masters is true of the Governing Body and Dr. Hayman. The Governing Body, then, did not sit as judges, nor were they trustees; they were simply managers and controllers of the school; and in administering the school as they thought fit, they are not subject to the control of this or any other Court, unless it can be shewn that the resolutions

they arrived at were null and void as tainted by fraud or corruption, and of this there is no charge in the bill.

[MALINS, V.C.—Your argument is that Dr. Hayman held his post at the pleasure of the trustees, and that they can therefore dismiss him with or without reason.]

Exactly. They are not judges nor trustees, except accidentally in one sense of the word. The only question is whether they have exercised their powers in a manner which in law is valid. This Court could not interfere unless the circumstances were such as would, upon mandamus, support a plea of *non est factum*, and entitle a Court of common law to say "Dr. Hayman is still Head Master;" and to justify that, the conduct of the Governing Body must amount to fraud or corruption. For instance, if they removed a Head Master in order to gain a vote in a hotly-contested election, or (to put an impossible case) if they removed him to put in his place some one who would give them a share of the revenues of the school. Those would be causes tainted by corruption and unconnected with the management of the school, entitling this Court or a Court of law to interfere. The case of

The Queen v. The Governors of Darlington School, 14 Law J. Rep. (N.S.) Q.B. 67; s. c. Law Rep. 6 Q.B. 682,

is in point, though it goes much further than we require, for there the master could only be dismissed by the trustees in the exercise of a "sound discretion;" and yet although it was found that the facts upon which the discretion had been exercised proved to be wrong, and their judgment to be incorrect, the Court of Queen's Bench, followed by the Exchequer Chamber, held that as they had come to an honest conclusion the Court could not interfere. It was further held that the master could not even be heard in explanation, while here Dr. Hayman has had the fullest opportunities. The only charges of improper motives are pleaders' colouring to facts which do not bear them out; and general charges not duly supported by facts pleaded will not support a bill on demurrer—

Munday v. Knight, 3 Hare 497;

Gilbert v. Lewis, 1 De Gex, J. & S.

NEW SERIES, 43.—CHANC.

38; s. c. 32 Law J. Rep. (N.S.) Chanc. 347;

Grenville-Murray v. The Earl of Clarendon, 39 Law J. Rep. (N.S.) Chanc. 221; s. c. Law Rep. 9 Eq. 11.

The chief substance of the plaintiff's case is that a scheme and design was formed against him from the first, and deliberately carried through by Dr. Temple and Dr. Bradley. This scheme or design, however, never really existed, but was mere pleaders' colouring, the facts shewing that those gentlemen were only using their knowledge and influence for the good and in the best interests of the school which Dr. Hayman, as Head Master, who had to deal with masters as well as boys, had shewed himself unfitted to govern. Could it be said that because Dr. Temple and Dr. Bradley had more knowledge of what was needed in a great school, and took a greater interest in the welfare of the school than anyone else, that they were, therefore, disqualified from exercising their knowledge for the advantage of the school?

To deal with the cases which will probably be relied on for the plaintiff. In

Dummer v. The Corporation of Chippenham, 14 Ves. 245,

where the Governing Body, who were the trustees of the school, had dismissed the Head Master, Lord Eldon overruled the demurrer because they had dismissed him on corrupt grounds, i.e. on account of a vote he had given, and his Lordship said in such a case the defendants must put in an answer. In

Willis v. Childe, 13 Beav. 117; s. c. 20 Law J. Rep. (N.S.) Chanc. 113,

the Court interfered because the defendants were acting as trustees. Here the Governing Body were not acting as trustees but as managers of the school, nor could it be said that they were acting as judges, for they were not bound to give any judgment at all, nor even to exercise a sound discretion. The Governing Body were only doing what they thought best for the school. There is in all the facts alleged no trace of any improper motive. The Court has no jurisdiction in the matter, and the demurrer must therefore be allowed,

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Mr. Glasse, for the plaintiff, in support of the bill.—In whatever capacity the Governing Body sat, whether as judges, as managers, or as trustees, their judgment in the case of *Dr. Hayman* was *ultra vires*, and should be set aside. They were, however, strictly trustees, and as such their action is liable to be enquired into by this Court. It was said that the Governing Body were not responsible to the Court unless—and the exception was an important one—there were some corruption, in which case it was admitted the Court could interfere. The term corruption could not be narrowed down to the mere motives for obtaining votes or a pecuniary benefit; it meant a tainted action, and the action of *Dr. Temple* and *Dr. Bradley* in regard to the plaintiff was tainted throughout by *animus* and undue bias; the other members of the Governing Body only allowed themselves to be influenced wrongly, and if *Dr. Temple* and *Dr. Bradley* had been absent from the first nothing of this sort could have arisen. We contend that the presence of these two gentlemen leavened the whole mass; and if it can be shewn that they should not have acted on the Governing Body, and they or even one of them can be got rid of, then the resolution cannot stand. Now, what is legal discretion? Its definition dates from centuries back, and has been continually cited by authority. In

Rooke's Case, Coke's Rep. Hil. 40 Eliz. 5 Rep. 99 b,
it was said—

"Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for, as one saith, *talis discretio discretionem confundit*."

The Darlington School Case (*ubi supra*),
has been cited, and, assuming it to be good law, though it is not so (having been disapproved in

Dean v. Bennett, 40 Law J. Rep. (N.S.)
Chanc. 452; s. c. Law Rep. 6
Chanc. 489),
within the law there laid down, there is in

this case such malice as would inevitably result in a verdict of guilty in an action for conspiracy. In the same volume is a case in point,

The Queen v. The Justices of Hertfordshire, 6 Q.B. Rep. 753,
which shews that if any one magistrate or Judge was disqualified the decision of all is absolutely void; and so it was also held in

The Queen v. The Justices of Suffolk,
18 Q.B. Rep. 416.
[MALINS, V.C.—In these cases there was a pecuniary interest on the part of the magistrate.]

An infinitesimal one; but is a pecuniary interest, however small, to entitle a person to relief, while vastly greater interests in the Judge or trustees, such as those possessed by *Dr. Temple*, are not? There are other authorities in our favour, *ex gr.*—

Doe v. Haddon, 3 Dougl. 310; and
The Queen v. Rand, 35 Law J. Rep.
(N.S.) M.C. 157; s. c. 7 B. & S.
297; s. c. Law Rep. 1 Q.B. 230,

which, while laying down that mere possibility of bias will not suffice, left it as clear that real bias will. If we can shew that *Dr. Temple* and *Dr. Bradley* acted with this bias, we must succeed.

The learned counsel then dealt with the facts of the case in order to shew that this bias really existed; and in referring to the 135th paragraph of the bill, he maintained that while the words "under the circumstances aforesaid" had no further effect than to import the facts previously pleaded, it was sufficient if the allegations either now or at the hearing proved to be legitimate deductions from those facts; and contended that it was impossible in the face of this, and of the 137th paragraph of the bill which sought discovery from *Dr. Temple*, to allow the demurrer.

But the Governing Body who had purported to dismiss the plaintiff were in fact trustees, at all events as having vested in them the property of the charity, and as such their conduct was liable to be reviewed by a Court of equity.

The effect of the Acts of George III, with their schedules, was the constitution of a charity, with a set of rules and regu-

lations, positively enacted, and which could not be varied except upon application to the Court of Chancery, under which the lands, buildings and property of the charity were vested in trustees, who were trustees in that strict sense of the word which rendered their actions liable to be enquired into by the Court of Chancery, and who, moreover, although they could remove the Head Master "at their pleasure," could not do so under improper influence, nor properly, except at a particular time and in a manner pointed out in the Act, *i.e.*, at their annual meeting in July. Having, however, in case of emergency, the power of applying to the Court, this restriction as to time was obviously inserted for the protection of the Head Master, and to prevent him from being turned out except at such a time before the school vacation as should give him an opportunity of removing without unnecessary inconvenience from what was, in fact, his home. Coming to the Public Schools Act of 1868, it was found that by the 28th section it was expressly enacted that, subject to any alterations by the Act or any scheme in pursuance thereof, all powers vested by Act of Parliament or otherwise in the existing Governing Body in relation to that school or the government thereof should continue in force until a new Governing Body was appointed, and afterwards, "in the same manner in which they might have been exercised if that Act had not been passed." This re-embodied the provisions of the Acts of George 3. and kept in force the old rules and regulations thereunder, and at all events until the new Governing Body was appointed. Moreover, section 13 of the Act, which enacts that the Head Master of every school under the Act "shall" be appointed by and hold his office "at the pleasure" of the new Governing Body, applied only to a Head Master appointed after the operation of the Act, and did not apply at all to the plaintiff. Under the Act of 1868, therefore, the new Governing Body had no power at all to dismiss the plaintiff, except in so far as the mantle of the old trustees had fallen upon them, and then only at the annual meeting in July. This was not

in any way altered by the operation of the Act of 1864; and by the Public Schools Act, 1872, and by the scheme in pursuance thereof agreed to between the new Governing Body and the old trustees the schoolhouse and property of the charity were actually invested in the defendants, the Governing Body, as trustees.

Again, the causes which immediately led to the dismissal of the plaintiff were, according to the resolution of the 19th of November, 1873, the dismissal of Mr. Sidgwick and Mr. Smith, to one of whom notice had been given by the plaintiff as the only unmarried classical master, and to the other as the junior classical master. That and no other was the reason for the resolution censuring Dr. Hayman, and the subsequent resolution dismissing him was by reference confined as to its reasons to the same cause. This brought the case within

Willis v. Ohlde (ubi supra), where trustees were restrained from enforcing a dismissal because no sufficient explanations of the charges and opportunity of defending himself had been given to the master. In

The Queen v. The Justices of Suffolk (ubi supra), the proceedings were held to be invalid because a rated inhabitant had sat upon the bench, and the *ratio decidendi* was not the infinitesimal pecuniary interest, but that his presence there was unseemly and wrong, and the cases of

The King v. The Bishop of London and In re Beloved Wilkes's Charity, 3 Mac. & G. 440; s. c. 20 Law J. Rep. (n.s.) Chanc. 588,

shewed that though trustees armed with discretionary powers might not be bound to shew their reasons, their discretion must be exercised with an absence of indirect motive, with honesty of intention, and with a fair consideration of the subject.

The Fremington School Case, 11 Jurist, 421; s. c. 10 Jurist, 512, was another authority in his favour. Lastly, the Court ought not to lose sight of the manner in which the plaintiff had been treated. The resolutions were in fact come to in pursuance, not only of a

foregone conclusion, but of a preformed determination on the part of some of those who had sat as judges, and from motives, which were, according to the rules of equity, improper and corrupt, and under such circumstances the resolutions could not stand, and the demurrer must be allowed.

Mr. John Pearson (with Mr. Glasse), in support of the bill.—There are three questions for the Court to decide upon this demurrer. First, what are the relations between the Governing Body and the Head Master? Second, what is the jurisdiction of the Court in such a case? Third, should the Court here exercise its jurisdiction, if any, and in what way? The contention of the other side is, that the Governing Body are not judges, not trustees, but are controllers or managers of the school. They are, it is admitted, to act conscientiously, and are not to act in a manner politically or pecuniarily corrupt; but, subject to these exceptions, they are to have a most unlimited power and authority; they are to be able to discharge a Head Master at a moment's notice, without reason, at their mere caprice, and without any appeal to any jurisdiction, to any authority, in this country. The counsel on the other side did not go on to define what position the Head Master was to hold; if they had they would at once have seen the fallacy of their own arguments. For this autocratic Governing Body enormous and uncontrollable powers were claimed—powers unknown to the law and such as no Act of Parliament could be found to have created. In the Act under which they were claimed would not be found a single syllable which gave the Governing Body immunity from the action of the law and from the Courts of Equity. But in fact the attempted withdrawal of the Governing Body from the action of the Court, was an act of mere imagination on the part of the other side, in order to sustain an arbitrary and illegal resolution. The Act was not passed for the purpose of creating the Governing Body, but for the purpose of "improving" the management of the Schools. The history of this school shewed that it was a charity, and, as such, those who ruled it were trus-

tees, subject to the jurisdiction of the Court. The character of the rulers as a Governing Body could not be altered by Act of Parliament, and, more, it was not attempted by the Act to do any such thing. If the new Governing Body were not the actual trustees by law, yet they, having the whole disposal of the property, were so *de facto*, and would be answerable to the Court—

Daugars v. Rivaz, 28 Beav. 233; s. c.

29 Law J. Rep. (N.S.) Chanc. 685.

The nominal trustees of Rugby were mere shadows, for they were in everything overruled by the Governing Body, who were therefore the real trustees. The notice to the plaintiff to quit the school-house and the threat of an action of ejectment were admissions that the property was vested in the Governing Body as trustees. If not, what was the relation of the Head Master? He must be either *cestui que trust* or servant, and it could not have been the object of the Act of 1868 to degrade the Head Masters of our noblest public schools to the position of mere servants of the Governing Body. In

The Attorney-General v. Magdalen

College, 10 Beav. 402; s. c. 16 Law

J. Rep. (N.S.) Chanc. 391,

the Court would not interfere because there was a Visitor; and if the Legislature had intended Governing Bodies to have the position and functions of Visitors it would have done so by express enactment, and, not having done this, shewed that they were to be trustees. The distinction as exemplified in

Whiston v. The Dean and Chapter

of Rochester, 7 Hare, 532; s. c. 18

Law J. Rep. (N.S.) Chanc. 473,

was that where there is no hold upon any part of the common fund held for the charity, there the relation may be that of a mere officer or servant, and the relation of *cestui que trust* is not established; but it was otherwise in the plaintiff's case, who had a hold upon the revenues of the charity. Even if under the scheme, in pursuance of the Act of 1872, the school-house, lands and property had not been vested in the Governing Body as trustees, yet, as they had sole control of the revenues, that alone created the relation of trustee and *cestui que trust*, though the *corpus*

might be vested in other persons interposed in the character of bare trustees. The powers of the Governing Body were then to be held in trust and honestly exercised; therefore, if they were "maliciously" (and he only meant to use the word in its legal sense, as with *mala mente*) exercised, such use of them was bad, and the plaintiff was entitled to an answer in order that he might see whether this was the case.

The learned counsel then commented upon the plaintiff's case, and on coming to the final part of it contended that although the resolution of the Governing Body dismissing the plaintiff purported to be founded upon a review of his whole administration, the real reason was, in fact, narrowed down to the dismissal of Messrs. Sidgwick & Smith, in alleged breach of the customs and usages of the school, which was then the only matter in difference. The case of

The Queen v. Darlington School (ubi supra)

shewed that any such customs or bye-laws were illegal and they would also be absurd, for though a master might be in point of seniority the lowest, his duties might be the highest and most important, and yet it was contended that the most important master must be dismissed first if his appointment is the latest. The highest mathematical master might be forced to give way to the lowest! Appealed to by the plaintiff, the Governing Body, on December the 19th, 1873, decline "to alter the resolution they came to on the 19th of November," and resolve to dismiss him. Was it not, therefore, plain that when they refused to alter the decision embodied in their resolution of the 19th of November, they had in that resolution given their real reason for dismissing the plaintiff? There had been, however, no departure at all from any custom, and certainly from none binding on the plaintiff, and thus the defendants encountered the serious legal difficulty of having given a reason for their decision, which reason was bad. There were numerous cases which shewed that, where persons had absolute powers of dismissal, and in exercising them gave their reasons, the Court would investigate

those reasons, and if they were bad annul the decision. Such were

The Queen v. The Bailiffs of Ipswich,
2 *Ld. Raym.* 1,232, 1,240;

The King v. The Bishop of London
(*ubi supra*);

In re Beloved Wilkes's Charity (ubi supra).

It was said that the Governing Body were not judges, and they were not in the sense that they did not wear judicial costume; but the power to dismiss was a judicial power, and when exercising it they were exercising a judicial function, and were to act on principles of justice and fair play. Similar principles were laid down with reference to jurors in 4 *Bacon's Abridg. Tit. E.* 561, where it was said that they should be "*omni exceptione majores*" i.e. free from partiality or consanguinity. "So also if he has declared his opinion touching the matter" . . . "or has done any act by which it appears that he cannot be impartial." Was not Dr. Temple within this? Thus, assuming as he had a right to do on demurrer, that all the statements in the bill are true, the principles adopted by courts of law and equity to preserve untainted the administration of justice have been violated by Dr. Temple and Dr. Bradley, the plaintiff was entitled to have an answer to his bill, and the demurrer must be dismissed.

Mr. H. A. Giffard and *Mr. Morgan Howard* (of the Common Law bar) followed on the same side, and cited—

Archbold's Practice in the Crown Office, 301;

and

Mallalieu v. Hodgson, 16 *Q.B. Rep.* 689; s. c. 20 *Law J. Rep.* (N.S.) *Q.B.* 339.

Mr. Cotton, in reply.—The Governing Body, when exercising the power given to them by the act of removing the Head Master, were not acting as trustees, nor in any sense as a judicial body. They were a body entrusted by the Legislature with an absolute power and liberty of appointing and dismissing a Head Master at pleasure. He did not mean to say that they were at liberty to act unfairly, but they were a body answerable only to their own consciences and not amenable to having the reasons for an exercise of

their power investigated by a Court of law. These considerations threw out all the arguments founded upon the cases of *The Queen v. The Justices of Hertfordshire* (*ubi supra*),

and

The Queen v. The Justices of Suffolk (*ubi supra*);

which only amounted to this—that if there was a Court constituted it was to be properly constituted, which it would not be if one of the Judges had a pecuniary interest, or, as in

The Queen v. Rand (*ubi supra*)

was actuated by malice. In fact, the whole of the argument of the plaintiffs counsel upon these points turned upon the fallacy of assuming that the Governing Body in dismissing Dr. Hayman were exercising a judicial function. That was not so. As well might it be said that the plaintiff was exercising a judicial function in dismissing Mr. Sidgwick. A Judge determined the question before him upon the evidence only, and not upon considerations whether a man was rich or poor, married or single, as Dr. Hayman claimed the right to do. This marked the distinction between the capacities in which both the plaintiff and the Governing Body acted and that in which a Judge acted, and threw out also another illustration, that of jurors who ought to be *omni exceptione majores*. A jury must decide as between man and man on the evidence, and not according to their prepossessions. If they decided at their pleasure, it would vitiate their verdict, whilst, so to decide, is the very thing the Act of Parliament says the Governing Body are to do, and the same argument applied to the case of arbitrators who were actually judges chosen by the parties themselves, and, moreover, disposed of all that had been said about the presence of Dr. Temple and Dr. Bradley leavening the mass. The decision of the Governing Body must be assumed to be the decision of the whole body, and there was no allegation that the body as a whole were influenced by pecuniary motives or the desire to favour kindred, nor by malice, except in the sense of a *mala mens*, whatever the distinction might be, but only by partiality, hostility, and prejudice, and

that they allowed themselves to be influenced by Dr. Temple and Dr. Bradley. But this Court had no right to interfere with the resolution, unless it could find upon the pleadings, statements of fact well pleaded which would render the resolutions void. If the Governing Body came to their decision uninfluenced by pecuniary interests or motives external to the administration of the school, the Court had no right whatever to interfere. But if the Governing Body sought to promote political or theological views, to procure pecuniary benefits to themselves, or acted from motives of kindred, the case was different. In short, while they had the power of dismissing the Head Master “at their pleasure” (subject only to their exercising such pleasure as Englishmen and gentlemen) they must do so in the administration of the school and not with ulterior objects; and it was not for this Court to say whether it was better that the Head Master should go or that the under masters should go, or to enter into the question who was right or who was wrong, and what should be done or whether anything should be done. Of that the Governing Body were the sole judges; and if they said,—“We cannot weigh the matter in nice scales, and possibly the evidence may not support our view, but from what we have seen something must be done; and sorry as we are for the necessity, we have no right to consider the interests of Dr. Hayman. Parliament has thrown upon us a duty which we are bound to exercise—namely, that of doing what we consider is the best thing for the true interests of the school.” If they said that, and it was what they did say, they were fully and entirely justified. The Court had no jurisdiction, and the demurrer must be allowed.

Cur. adv. vult.

MALINS, V.C. (on March 21st), said—This is a suit instituted by the Rev. Dr. Hayman, the present Head Master of Rugby School, against the Governing Body of that school and the Right Rev. the Bishop of Exeter. The case is one of great importance. It has occupied a large portion of the time of the Court,

and it has been most ably argued during six days of the present and past weeks. I should have taken longer time to prepare my judgment, but, considering that it might be desired by the parties to the cause to take the opinion of the Court of Appeal, I have thought it right not to defer the delivery of my judgment, as the Courts rise on Thursday next for the Easter Vacation. The facts of the case are these: His Honour then commenced stating the facts of the case, and after referring to the Act 17 Geo. 3. c. 71 mentioned above, and to the alteration of the time for the meeting of the trustees from August to July, resumed—It is, therefore, clear that if the rights of Dr. Hayman depended upon the 17th Geo. 3. only, he was liable to be removed “at the will and pleasure of the trustees,” but that such will and pleasure could only be expressed at the annual meeting to be held in the month of July. But the Public Schools Act of 1868 (31 and 32 Vict. c. 118) was then in force, and that Act provided, by the 13th section, that the Head Master of every school to which the Act applied should be appointed by and hold his office at the pleasure of the new Governing Body, and that all other masters should be appointed by and hold their offices at the pleasure of the Head Master; and by the 28th section, it provided that, subject to any alterations made by the Act, all powers vested in the existing Governing Body of a school to which the Act applied should continue in force and be exercised by such Governing Body until a new Governing Body was appointed, and after their appointment by the new Governing Body as if the Act had not been passed.

This Act, it will be observed, makes no provision as to the time or place at which such “pleasure” of the Governing Body is to be expressed. But the Public Schools Act of 1864 (27 & 28 Vict. c. 92), had contained the following provisions. That Act, after reciting that a commission had been issued in 1861 to enquire into certain matters, had enacted that, “every person appointed after the passing of this Act to any office in the Governing Body of any of the colleges or schools, shall take and hold that office, subject to such provi-

sions and regulations as may hereafter be enacted respecting the same.” Then it provides that the Governing Body shall mean and include the Head Master. That, therefore, made Dr. Hayman’s appointment subject to any provision which Parliament might afterwards make.

Now the first point relied upon on behalf of the plaintiff was that he is not liable to be dismissed by the new Governing Body at all, but that the power to dismiss him is vested in and must be exercised by the old trustees, and that as they could only exercise it at the annual meeting in July, the resolution of the 19th of December last was necessarily invalid. I am, however, of opinion that the plaintiff became subject to the new Governing Body upon their coming into existence, and that this objection to the resolution of dismissal cannot, therefore, be sustained. The plaintiff himself always treated the new Governing Body as having entire authority over him from the day it came into existence, and to this body his subsequent communications were addressed.

It is, in my opinion, clear that the plaintiff and all the head masters of the great public schools to which the Act of 1868 applies are subject to the control of the new Governing Body of each school, and that they hold their office at the pleasure merely of the new Governing Body, and are consequently liable to be dismissed without notice and without any reason being assigned.

The probable intention of the Legislature was to avoid such contests as have so frequently occurred in this Court and the Court of Queen’s Bench as to the power of trustees to remove the masters of schools. The apparent harshness of the power is mitigated by the appointment of men of high position, honour, and integrity as members of the Governing Body, by whom it is assumed that such power, arbitrary as it is in terms, would not be harshly, unjustly, or inconsiderately exercised. Assuming this to be the true construction of the Act, it was then contended, on behalf of the plaintiff, that this Court will control the proceedings of such bodies as this whenever it is satisfied that their powers have

been exercised corruptly, unjustly or for the purpose of effecting some collateral object, and that the circumstances of this case shew that the power of the Governing Body has been so improperly and unjustly exercised, and its exercise so improperly brought about, that it is the bounden duty of the Court to interfere and treat the resolution for the dismissal of the plaintiff as invalid, and to restrain them from carrying it into effect.

I think the clear result of the numerous authorities cited on both sides in the argument of this case is that all arbitrary powers, such as the power of dismissal at their pleasure, which is given to this Governing Body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they will always be presumed to have been until the contrary is shewn, and that the burden of shewing the contrary lies upon those who object to the manner in which the power has been exercised. No reasons need be given, but if they are given the Court will look at their sufficiency.

Upon this subject numerous authorities were cited, and I will briefly advert to most of them. The first in point of date was *The Queen v. The Bailiffs of Ipswich* (*ubi supra*), which was a case in which the corporation dismissed Mr. Serjeant Whitaker from being their recorder. It was contended upon his behalf that his office was a freehold. I only read the following passage from the Report for the purpose of shewing the opinion expressed by that great lawyer, Lord Chief Justice Holt, in disposing of the substance of the case, — "The Solicitor-General opposed granting a peremptory mandamus because the recorder was an officer *ad libitum* of the corporation, and cited *The King v. Campion* (1). But that objection was contrary to the return whereby he appeared to be confirmed for life. And Holt said, that if he had been an officer *ad libitum* the corporation ought to have returned that, and relied upon it, and it would have been a good return; but they could not take advantage of that when they had returned a cause, if the

cause were not sufficient; for it appeared that they had not gone upon their power and determined their will, but put him out for a misdemeanour." It is plain, therefore, that Lord Chief Justice Holt considered that if they had merely returned that he held office at their pleasure, and that they had exercised their pleasure by dismissing him, the matter could have been no further enquired into, but as they had dismissed him for a misdemeanour, it was competent for the Court to enquire into the sufficiency of the reasons that induced them to dismiss him.

In *Doe v. Haddon* (*ubi supra*), one of the Governing Body was proved to have said that he would rather spend 500*l.* than not turn the master of the school out, and he had also threatened the constable with the loss of his office if he did not concur in his dismissal. That again was such a corrupt motive in one of the Governing Body as to vitiate the whole proceedings.

In *Dummer v. The Corporation of Chippenham* (*ubi supra*), the master was dismissed by the Governing Body, who were part of the corporation there, on the alleged ground of bodily disease and infirmity of age, but the bill alleged that the resolution was really in consequence of a scheme to remove him because of his having voted at the last election in a manner opposed to the opinions of the corporation. To that bill a demurrer was put in, but Lord Eldon considered that there was such an allegation of corrupt motive there in exercising the power, that he overruled the demurrer, and required the Governing Body to put in an answer.

The next case in order of date, of importance, is, *In re Fremington School* (*ubi supra*), which was so much considered by the learned Vice-Chancellor Knight Bruce. That, it will be remembered, was a case in which the Governing Body had a power of dismissal "for neglect or misbehaviour or any other just cause." Various charges, I think eighteen in number, were brought against the master of the school, founded principally upon gross immorality of conduct. When the matter came before the Vice-Chancellor Knight Bruce, in June, 1847, in a very long and elaborate

(1) 1 Sid. 14.

judgment he came to the conclusion that, inasmuch as three out of the Governing Body had in writing expressed their belief in his guilt before they went into the enquiry, that was such a disqualification for expressing any opinion that he granted an injunction restraining the resolution being carried into effect (that report is to be found in 10 Jur. p. 512), but he left the Governing Body, the trustees, at liberty to reconsider the matter. Notices were sent to all the other trustees, but the result was that the same three trustees who had expressed their opinion of the guilt of the master again acted in considering the subject, and were assisted by one other trustee only; and one of the trustees, the clergyman of the parish, Mr. Hardy, was so adverse to the master, Mr. Ward, that it might well have been considered that he was actually disqualified to sit in judgment upon him. But they having done so, and having come to the conclusion that he was guilty of the gross charges made against him—cases of gross personal misconduct—the same learned Judge, reconsidering the matter after the resolution, in the next year came to the conclusion that he could not interfere, and the dismissal took effect. I only refer to one or two expressions in his judgment. He said (2)—“Then comes the consideration whether it was competent to these gentlemen (inasmuch as neither of their colleagues could or would sit with them) to hold a sitting for this purpose, considering all that had taken place, considering that Mr. Hardy,” that is, the clergyman of the parish, “one of them, had expressed an opinion of the guilt of Mr. Ward before he had heard either him or any witnesses for him upon the subject, and especially considering that Mr. Orde, Mr. Surtees and Mr. Wyvill, after hearing Mr. Ward came to a conclusion of his guilt, and who moreover previously, and without hearing Mr. Ward and the examination of his witnesses, had come to a conclusion of the same kind.” Then he says—“Undoubtedly it placed them in a position of considerable difficulty. If Mr. Ward was unfit to remain in the school,

if he was a mischievous and pernicious instructor of youth, and their colleagues would not sit with them, what were they to do? I think, therefore, that the jurisdiction or tribunal, if I may use such a phrase, was properly constituted. We come next to consider the charges which were brought before this domestic and private judicature thus constituted. Now the charges are eighteen in number, and it is impossible to see their number, their nature and their variety, without feeling very great regret for more reasons than one.” Then at page 424 he says, “I have nothing to do with motives. I impute none but good motives, but so is the fact. The fourth charge is, that you did commit,” a very great impropriety which I need not particularly name. “Now with reference to this particular charge I must make a general observation; for which I ought to apologise, as it is almost, if not entirely a repetition of what I said upon the former occasion, namely, in June last, that I do not consider that the office of the Court is to decide whether the electors ought or ought not to have believed or disbelieved certain evidence. It is not for this Court to be satisfied, it is for the electors to be satisfied, and if upon legitimate materials, which might possibly have satisfied a reasonable man desirous of doing justice, they came to a certain conclusion in point of fact, my opinion remains that it is not the office of the Court to interfere with it.” Then for the third time he expressed his regret that he was obliged to come to the conclusion to leave the matter to be carried into effect according to the resolution of the Governing Body.

I shall mention next a very important case—*The Queen v. The Governors of Darlington School* (*ubi supra*), in which the Governing Body, incorporated by Queen Elizabeth, had a power of dismissal for any just cause. It was held by the Court of Queen's Bench and by the Court of Exchequer Chamber, affirming their judgment, that by the terms of the charter the governors might in their discretion remove a master without summons or hearing, and although no charge against him had been exhibited or made. The judgment of the Court of Queen's Bench

(2) 11 Jur. 424.

was delivered by Lord Denman (3). Lord Denman there says: "They—that is, the Governing Body—are bound to remove any master whom, according to their sound discretion, they think unfit and improper for the office; and as that discretion may possibly be well exercised for defects of various kinds not amounting to misconduct; so there may be misconduct incapable of proof by witnesses, but fully known to the governors themselves, on which they could not abstain from exercising their power of removing the master without the abandonment of their duty." Then he stated that a bye-law had been passed, and they held that to be invalid. Then Lord Denman further says: "But they might be reasonably satisfied of the truth of the charges without possessing any means of proving them by evidence; and even if they had no charge before them, they might still in the exercise of their discretion remove him from reasonable cause. The prosecutor"—the prosecutor of course here was the schoolmaster—"has denied the charges and the trial, but he does not deny the exercise of discretion, which might have been disproved, in fact, as by shewing that malicious feelings against the master were indulged by the governors, or that they had some interest to serve in promoting of another to his place. The allegation of removal in the exercise of discretion is an independent allegation, which the prosecutor does not deny, though it is accompanied with reasons which on the trial he disproved. But the power of the governors so to remove justifies their so doing, and it is not to be restricted by any opinion which we may form of the reasons on which they may have been induced to exert it."

That came on appeal before the Court of Exchequer Chamber, and the judgment of that tribunal was delivered by Lord Chief Justice Tindal, and I will refer to one or two passages of his judgment also. He says (4): "Looking to the terms of the letters patent of Queen Elizabeth, we think the office in question is in its original creation determinable at the sound discretion of the governors

whenever such discretion is expressed; and that it is in all its legal qualities and consequences not a freehold, but an office *ad libitum* only; the governors would be guilty of misconduct, might perhaps render themselves liable to a criminal prosecution, if they exercised their discretion of removal in an oppressive manner, or from any corrupt or indirect motive; but we see nothing that is to restrain them from exercising such discretionary power whenever they honestly think it proper so to do . . ." Then he says, "And there seems nothing unreasonable in the founders giving such authority to the governors. For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of a charge before a jury or otherwise of actual proof. A general want of reputation in the neighbourhood, the very suspicion that he has been guilty of the offences stated against him in the return, the common belief of the truth of such charges amongst the neighbours, might ruin the well-being of the school, if the master was continued in it, although the charge itself might be untrue, and at all events, the proof of the facts themselves insufficient before a jury. Many other grounds of removal, fully sufficient in the exercise of a sound discretion, might be suggested."

Then, in the case of *Willis v. Childe* (*ubi supra*) before Lord Langdale, there was a power to remove, "upon such grounds as the trustees shall in their discretion, in a due exercise and execution of the powers of the trust reposed in them, deem just." Having that power, charges were made against the master. It was necessary to have two meetings, and two meetings were convened, but the result was that no sufficient investigation took place, and at pages 130 and 131, Lord Langdale states the grounds of his coming to the conclusion that the discretion of the trustees was to be controlled by this Court. This is a specially important case, because in the very same transaction the trustees having treated the master as their tenant at will, had given him notice to quit the school and school-house, and had brought an action of eject-

(3) 6 Q.B. Rep. 695.

(4) 6 Q.B. Rep. 715.

ment against him, which action was successful, and had been decided before the judgment was given. The judgment of the Court of Exchequer upon the ejectment will be found reported. But when that matter came before this Court, Lord Langdale said (5), "The plaintiff alleges that the power of the trustees has been corruptly exercised, or at least, that there has been an undue exercise of their discretion. A great many affidavits have been filed; they contain much inconsistent evidence, and it seems to me that some at least of the trustees manifested an eager desire to find occasion to remove the plaintiff. If, upon a fair investigation of the facts, and after just means of explanation and defence had been afforded, it had appeared that the employment of the plaintiff had become prejudicial to the school, the trustees would have been fully justified in removing him. Upon the merits, I find it very difficult to form any conclusive opinion upon the truth or falsehood of many of the allegations which are stated; but after reading the affidavits, I observe that some differences having arisen between the master and the usher, the trustees not troubling themselves to promote any means of conciliation or adjustment, seem to have been disposed to impute the principal fault to the plaintiff, and instead of instituting an enquiry in his presence, which might have afforded him the means of explanation and defence, they, without his knowledge, commenced proceedings against him, by referring the matter to the school committee to consider the case. The committee proceeded to investigate the case in his absence, and without his knowledge, and reported against him. The report was not communicated to him, but the trustees met, and, as they say, considered the report, and in his absence, and without hearing him, they confirmed the report, and resolved to remove him, and stated the grounds and reasons for his removal." That Lord Langdale restrained the trustees from acting upon, and as far as appears by the report, the plaintiff remained in his office.

(5) 13 Beav. 130, 131.

To this class of cases belongs the case of *Dean v. Bennett* (*ubi supra*) before Lord Hatherley. I need not go further into that case than to state that it was the case of a dissenting Protestant congregation which had the summary power of dismissing their minister at two meetings. A meeting was called, charges were made against the minister, which were not investigated, and the subsequent meeting for the confirmation of the first resolution was called, and the proceedings at the first were unknown to those who voted at the second. Lord Hatherley, under those circumstances, considered that though there was a summary power which might have been exercised without assigning any reasons, inasmuch as it was apparent their proceedings had been unjust, he must restrain the trustees from acting upon it. It was in that case he expressed, not disapprobation, but some doubt as to *The Queen v. The Darlington School* (*ubi supra*), to which I have already referred.

The case of *Re Beloved Wilkes' Charity* (*ubi supra*), before Lord Truro, was a case in which trustees had a power of selecting a boy from two particular parishes to be educated at the expense of the charity as a clergyman of the Church of England. In default of their finding a fit candidate within those two parishes, they were at liberty to go to any other parish; they had gone out of the two parishes to select a candidate, and a farmer, who was an inhabitant of one of the parishes, filed a bill to restrain them from carrying out the charity in favour of the boy who did not belong to one of the two favoured parishes. Lord Truro, in a very remarkable judgment, and I only refer to this part of it, says—"The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases. If, however, as stated by Lord Ellenborough in *The King v. The Archbishop of Canterbury* (6), trustees think fit to state a reason, and the reason

(6) 15 East 117.

is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision; but if without entering into details they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered, and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion. It seems, therefore, to me, that having in the present case to look to the motives of the trustees as developed in the affidavits, no ground exists for imputing bad motives."

Daugars v. Rivaz (ubi supra) is the case with regard to a French Protestant congregation. I need not say more than that in that case the same principles were acted upon. The next case is the case of *The King v. The Bishop of London (ubi supra)*, which was a case where no minister could preach without the sanction of the diocesan. In that case the bishop of London having refused his sanction to a particular candidate, an application was made to the Court of Queen's Bench for a mandamus to compel him to institute. I read it only for the expressions of Lord Ellenborough (7) that no person should be allowed to preach "unless he be first approved and thereunto licensed by the archbishop or bishop. Suppose he should return *non idoneus* generally, can we compel him to state all the particulars from whence he draws his conclusion? Is there any instance of a mandamus to the ordinary to admit a candidate to holy orders, or to specify the reasons why he refused? If indeed it had appeared that the bishop had exercised his jurisdiction partially or erroneously; if he had assigned a reason for his refusal to license which had no application, and was manifestly bad, the Court would interfere; but the difficulty that I feel is that the bishop, as it now appears, stands only upon his objection to the fitness of this party, of which the statute meant that the bishop should be the judge."

That came afterwards before the Court

and is reported (8). That is an application against the Bishop and Archbishop of Canterbury, and there it is only necessary to say that Lord Ellenborough again in delivering a more elaborate judgment of the Court says (9)—"But in the instance of the lecturer the term 'approbation' in the statute 13 & 14 Ca. c. 2 is quite another thing; what scales have we to weigh the conscience of the bishop? and how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's license on account of many matters which cannot be conveniently stated to a Court of justice? May he not disapprove for matters within his own personal observation and knowledge; for the habits of life and conversation of the person which might be known to him from residing in the same university or society with him? from his conduct in life down perhaps to the very time when the bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided? What authority has he to compel the attendance of witnesses before him? The word of the statute is "approve," and he must exercise that approbation according to his conscience upon such means of information as he can obtain, and every thing that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably, induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a Court of law may, I am of opinion, be fitly taken into his consideration."

I need hardly say that pecuniary interest in the Governing Body would be conclusive. That was decided in a case which was cited in the argument, viz., *The Queen v. The Justices of Hertfordshire (ubi supra)*, where one of the justices who decided the question had a very insignificant pecuniary interest, amounting only to 8*l.* or 9*l.*, but that was considered by Lord

(7) 13 East 422.

(8) 15 East 117.

(9) 15 East 146.

Campbell in the Court of Queen's Bench as fatal to his exercising any judgment, and the finding to which he was a party was quashed. The same thing will be found in *The Queen v. The Justices of Suffolk* (*ubi supra*). But although pecuniary interest will disqualify, circumstances which may be calculated to produce bias will not do so; and, therefore, in *The Queen v. Rand* (*ubi supra*), where those acting were trustees of a property which would be affected by the decision (it was a rating question), but being only trustees and having no pecuniary interest, it was there decided that though that might produce bias, it was not a disqualification, and Mr. Justice Blackburn, in giving the judgment of the Court, said—"Whenever there is a real likelihood that the Judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act, and we are not to be understood to say that where there is a real bias of this sort this Court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly *bona fide*, and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest, and we think that *The Queen v. The Dean of Rochester* (10) is an authority that circumstances from which a suspicion of favour may arise do not produce the same effect as a pecuniary interest, and as the decision of that case was on demurrer to a plea and might have been taken into error, the authority is one on which we ought to act," therefore there was a bias there, but no interest.

Upon these authorities, then, and upon every principle, it is clear that if the governing body was properly constituted, and they fairly and honestly exercised their power of dismissing the plaintiff, their decision is not liable to be controlled by this Court.

But the contention on the part of the plaintiff is that, looking at the events which occurred upon his appointment to the head

mastership in 1869 and the subsequent transactions, the governing body was not so constituted as to be capable of coming to a just and impartial decision, and that its decision was, in fact, unjust and partial. The objection of the plaintiff to the decision of the governing body is founded on the fact of the Bishop of Exeter and Dr. Bradley being two of the members of that body. No objection is or could with any reason be taken to the other distinguished members of the body, and their decision is impugned solely on the ground that it was produced by the undue and improper influence of the bishop and Dr. Bradley. In order to decide the painful questions between the parties, it is necessary to consider the facts stated by the bill the occurring of which is admitted by the demurrer. And here I must repeat the regret which I expressed more than once in the course of the arguments, that the case should have to be decided upon demurrer; because I cannot help thinking that many of the statements of the bill might have been materially qualified if the evidence of both parties had been given. The course of proceeding adopted has, no doubt, the advantage, relied upon by Mr. Cotton, of preventing a painful conflict of evidence if affidavits had been read and there had been cross-examination upon them. To come to the allegations of the bill.

His Honour then resumed his statement of the plaintiff's case, which he stated in detail and minutely analysed, and after he had done so, continued—"Under all these circumstances, the plaintiff contends that the resolution was invalid, and the bill asks for a declaration accordingly. The real question in the case is whether this resolution is valid, and it must be so if it is the result of the fair and honest opinion of the governing body. Subject to the question of the construction of the Act which I have already disposed of, it is admitted by the plaintiff that no objection can be taken to any member of the body except the Bishop of Exeter and Dr. Bradley. Can I attribute any improper motive to them? Their character and position render that all but impossible. If they took the course they did upon an honest conviction that it was right, and

(10) 17 Q.B. Rep. 1; s. c. 20 Law J. Rep. (N.S.) Q.B. 467.

that it was not for the good of the school that Dr. Hayman should remain there, can I say that as members of the Governing Body they were not entitled to act upon that conviction? A man's scholarship may be perfect, his character admirable, and yet for the want of the power to control subordinates and govern boys, may be such as to render him wholly unfit for a schoolmaster. I do not attribute this unfitness to Dr. Hayman; on the contrary, I believe he would have succeeded in the management of this school if he had had a fair chance, but that he has not had. Still, the Governing Body is entitled to act on its own opinion, uncontrolled by this Court, if those opinions are fairly and honestly entertained; and I am unable judicially to come to the conclusion that they were not. It is to my mind plain that a state of things existed at Rugby in December last which made it imperative for the Governing Body to do something, or the school must have gone to destruction; whether it was proper to remove the under masters or head master was for them, not I think for this Court, to determine. With them the Legislature has left the decision of that question, and so it must be left by the Court, unless it can see that the decision has been arrived at for some corrupt, improper, or collateral object. I am unable to see that any such objects have actuated the able and distinguished body of men who were parties to the resolution of the 19th of December last. If it had not been for the unfortunate part taken by the Bishop of Exeter in 1869, I am satisfied that the decision would not have been questioned by Dr. Hayman in this or any other Court. The bill, however, contains charges of a very serious character, and it is in paragraphs 11, 41, 88, 114, and 135 that the most serious charges are to be found.

[The Vice-Chancellor then went again through these paragraphs, which are those already fully stated above, containing the charges as to the scheme and design of Dr. Temple and Dr. Bradley, and their having prejudged the case against the plaintiff, and having abused their influence over their colleagues so as to induce them to abrogate their functions and condemn the plaintiff, and that in so doing they acted with undue

bias from motives which, according to the rules of equity, were improper and corrupt.] His Honour then continued—Any allegations of personal interest I must disregard. Bias they may have had. The bill is admirably drawn, and there is scarcely a line to which exception can be taken; but I regret that anything should have been inserted suggesting the influence of family connexion. Then as to the allegation that a body of twelve such men should have been over-ruled and so over-persuaded by two of their number, Dr. Temple and Dr. Bradley, as to render it impossible for them to come to a just conclusion—that I must treat as the mere allegation of the pleader. Although the allegations in the 135th paragraph are strong, they can hardly be regarded as allegations of any fraudulent conduct, and they amount only to strong charges of unfitness; and the cases referred to by Mr. Cotton are applicable. Those cases, such as *Munday v. Knight* (*ubi supra*) and *Gilbert v. Lewis* (*ubi supra*) shew that general charges, such as of fraud, where not sustained by facts, will not protect a bill on demurrer, any more than will a general allegation that the defendant holds property in trust for the plaintiff, as was held in *Grenville Murray v. Earl of Clarendon* (*ubi supra*). Upon the whole, I am sorry to be obliged to come to the conclusion that the bill does not shew a case for the interference of the Court, and the demurrer must, therefore, be allowed, but not with costs. I am extremely sorry for the grievous hardship of Dr. Hayman's case, but I am satisfied that a prolongation of the painful disputes, which would be the result of over-ruling the demurrer here, would be of no benefit to him. I believe that events have made his retention of his office impossible. I therefore allow the demurrer, but I do so without costs.

Mr. Pearson.—Your Honour will give us leave to amend the bill?

Mr. Davey.—I must oppose that, for the plaintiff has had ample time to consider his case and to prepare his bill.

MALINS, V.C.—I feel very much indisposed to grant the application, I am so satisfied that this dispute will never end in any good to you. As I pointed out in the course of the argument, if the Court

should ultimately over-rule the decision of the 19th of December last, if it is the settled conviction of the governing body, and I cannot presume that such a body of men would have acted as they did unless they had a settled conviction, that it is not for the benefit of the school that Dr. Hayman should remain there, they might meet again and come to another resolution. It is impossible for this Court, when Parliament has put it so absolutely in the power of the Governing Body, to interfere. I repeat, according to the construction of the Act of Parliament, my opinion is that every head master of a public school, that is of the great public schools, for I believe every one of them is subject to this Act, that every head master is as much at the mercy of the Governing Body as a coachman is at the mercy of his master, and can be dismissed with or without reason. They are not obliged to give any reason whatever, and the Court must presume that they exercise their discretion properly, unless the contrary can be distinctly shewn. Therefore, in the interest of Dr. Hayman himself, if you will take my advice you will let the matter rest. Of course no man is ever satisfied with a judgment that is against him, at least it very seldom happens so, but I am sure I have had the greatest possible regard to the interest of Dr. Hayman in the consideration I have given to this case, and I should gladly have given him relief if I thought I could have done so effectively. But I am so satisfied that in the existing state of things, whether by the amendment of this bill or any other course, he cannot attain any good, that I am very reluctant to let the matter, so far as I am concerned, go any further. Therefore I will consider that you do not ask me for leave to amend.

It was then arranged that the demurrer of the defendant, the Bishop of Exeter, should be set down pro forma, and that both demurrers should be allowed, but without costs.

Solicitors—Messrs. Bower & Cotton, for the plaintiff; Messrs. Iliffe, Russell and Iliffe, for the defendants.

[IN THE HOUSE OF LORDS.]

1874. }
March 24. } COOK v. FOWLER.
May 15. }

Security for Money—Rate of Interest—Damages—Implied Contract—3 & 4 Will. 4. c. 42. s. 28.

Where a person borrows money for a certain period, with interest at a certain rate down to the day named, a contract for payment of interest at that rate after the day named is not to be implied. The principal and interest, if not then paid, become a debt, and any allowance for its detention or non-payment made by any tribunal before which the payment may be sought, is in the nature of damages, not of interest.

Although the rate of interest agreed on for the time certain is usually adopted as the proper measure of the damages for the subsequent delay, the tribunal may look at all the circumstances of the case, and award such a rate of interest as shall appear fair and reasonable.

Where the holder of a warrant of attorney to enter judgment for a fixed sum on a day named, with interest at the rate of 5l. per cent. per month and costs, did not enter up judgment, and did not, the maker of the instrument having died, make any definite claim against his debtor's estate for the space of four years and upwards, —Held, that the tribunal (one of the Vice-Chancellors) before whom the claim at last came, was justified in awarding by way of damages such a rate of interest as the holder of the warrant of attorney would have been entitled to, according to the ordinary rule of the Court of Chancery, had he entered up judgment on the day named in the defeasance to the warrant of attorney, namely, at the rate of four per cent.

This was an appeal from a decree of Stuart, V.C. The appellant was the holder of a warrant of attorney made by a Mr. Beavan, deceased, and the respondents were the two executors of Mr. Beavan's will, and also one of the creditors of his estate. The warrant of attorney was dated the 2nd of May, 1864, and authorised the persons there named to enter up judgment against him, William

Beavan, for 2,000*l.* The following was the defeasance, endorsed, "The within warrant of attorney is given to secure the payment of the sum of 1,330*l.*, with interest thereon at and after the rate of 5*l.* per centum per month, on the 2nd day of June next, judgment to be entered up forthwith; and in case of default in payment of the said sum of 1,330*l.* and interest thereon on the day aforesaid, execution or executions, or other process, may then issue for the said sum of 1,330*l.* and interest, together with costs of entering up judgment, registering same, and writ and writs of execution or executions, sheriff's poundage, officers' fees and all other incidental expenses whatsoever."

No judgment was entered up upon the warrant of attorney. Three weeks after its date, William Beavan died, namely, on the 25th of May, 1864, having by will appointed the respondents his executors, and devised and bequeathed to them all his property upon trust to convert, and after payment of his debts, &c., to pay certain legacies. The testator's property was involved, and in June, 1864, one of the creditors filed a bill for the administration of the estate by the Court of Chancery. Notice of the bill and decree made thereon was served on the appellant, but he did not come in and prove his debt, and in March, 1867, the respondents were obliged to file a bill against him for redemption of certain property he held by mortgage from the testator. In that suit a compromise was come to, by which it was agreed that the equity of redemption of the properties comprised in his mortgage securities should be released to the appellant, he crediting the estate with certain sums, and that the appellant should by affidavit verify the account between him and the testator. Thereupon the appellant filed his affidavit, and in the schedule thereto he entered his claim for interest on the 1,330*l.*, after the rate of 5*l.* per centum per month, not only from the 2nd of May, 1864, to the 2nd of June in that year, being the period mentioned in the warrant of attorney, but also at the same rate from the 2nd of June, 1864, to the 27th of November, 1868,

when the affidavit was filed. The Chief Clerk certified for that amount. But one of the respondents, Fowler, who was a creditor of the estate, and had obtained liberty to attend the proceedings, took out a summons to vary the certificate by allowing the appellant interest on the 1,330*l.* from the 2nd of June, 1864, after the rate of 4*l.* per cent. per annum, instead of after the rate of 5*l.* per cent. per month. On that summons, which was adjourned into Court, Stuart, V.C., made the order now appealed from, and allowed interest at 4*l.* per cent. per annum only. The result was found to be, that the appellant was indebted to the testator's estate in the sum of 103*l.* 15*s.* 1*d.*, instead of being a creditor for the amount of 1,955*l.* 14*s.* 9*d.*

Mr. E. K. Karlake (with him *Mr. F. H. Daly*), for the appellant.—Where a security for money payable at a day named stipulates for the payment of interest at that day after a certain rate, payment of interest at that rate after that day is implied should the principal remain unpaid. The interest is payable because of an implied contract, whether it is called interest or by any other name. There are no cases reported in which the Court has given a different rate of interest than that named in the deed, and although there may be no cases in which the Court has given an enormous rate of interest, this is because of the usury laws, which up to a certain period forbade such a rate from being named in the deed of security. Since those laws were repealed there can be no such thing as an unconscionable rate of interest, it may be extraordinary, but where is that to begin, at six per cent. or anything higher than five per cent.? If the rate in this instrument had been fixed at six per cent., would the Court have reduced it to four or five per cent.?

The statute of 3 & 4 Will. 4. c. 42, only applies where no rate of interest is mentioned, so, too, with regard to the rule in equity. Where a rate to a certain day is stipulated for, a contract for interest subsequent to that day at that rate is implied, whether the instrument be a debenture, as in

Price v. The Great Western Railway

Company, 16 Mee. & W. 244; s. c. 16 Law J. Rep. (N.S.) Exch. 87,

or a mortgage, as in

King v. Sarah Greenhill, 8 Sc. N.S. 869; s. c. 15 Law J. Rep. (N.S.) C.P. 333.

If the money is not paid at the day named, it is reasonable to infer that the parties intended interest to be paid subsequently to that day, per Parke, B., in *Price v. The Great Western Railway Company* (*ubi supra*).

Any words by which the intention of the parties can appear are sufficient to make a condition of an obligation—

Butler v. Wigge, 1 Wms. Saund. 66.

They referred also to

Atkinson v. Jones, 2 Ad. & E. 439, and

Watkins v. Morgan, 6 Car. & P. 661,

and

Mounson v. Redshaw, 1 Wms. Saund. 201 n.

all which cases are mentioned in

Price v. The Great Western Railway Company (*ubi supra*).

Mr. Dickinson and Mr. Hemming, for the respondents.—The only right the appellant has is to go to a jury for damages. In the case cited of

Price v. The Great Western Railway Company (*ubi supra*),

Parke, B., said that in an action on a mortgage deed the plaintiff recovers interest in covenant, but he recovers it as damages not as interest. Had the appellant entered up judgment he would have had a charge upon his debtor's estate, under 1 & 2 Vict. c. 110. ss. 11, 13, on which he would have been entitled to interest at the rate of four per cent., and he is not to get more because he has chosen to lie by until he was forced to enter his claim.

They referred also to

Leake's Law of Contracts, 584,

and

Calton v. Bragg, 15 East 223,

and to

Mounson v. Redshaw, 1 Wms. Saund. (1871 edit.), p. 205 (5th edit., 1845), p. 200.

Mr. Karslake replied.

NEW SERIES, 43.—CHANC.

THE LORD CHANCELLOR (LORD CAIRNS), after stating the facts of the case, said—It will be observed that, so far as the literal construction of this warrant of attorney and defeasance goes, there is no notice of any contract of debt or of any contract for forbearance of money for any length of time beyond the time specified upon the face of the defeasance. It is an authority to enter up judgment, and a stipulation that execution is only to issue in one way and for one purpose. It is to issue on the 2nd of June following the date of the warrant of attorney; it is to issue then "in default of payment of 1,330*l.* and interest thereon," which of course means the interest stipulated at the rate of sixty per cent. on the day aforesaid, that is, on the 2nd of June, and then in that case "execution and other process may issue for the said sum of 1,330*l.* and interest" (which of course may necessarily mean interest at that rate and due up to that day), "together with the costs of entering up judgment, registering the same, and writ and writs of execution or executions, sheriffs' poundage and so on." Therefore, taking the literal construction and effect of the warrant of attorney and defeasance, it would appear to me to amount to an authority to issue execution on the 2nd of June for one total sum, which is to be composed of the principal sum of 1,330*l.*, interest at sixty per cent. up to the 2nd of June, and those expenses unascertained in the first instance, but to be ascertained at the time, described as expenses of sheriffs' poundage, and other matters of the same kind.

It appears to me that, upon the literal construction of this instrument, it is nothing more than an authority to enter up a judgment which would be substantially a judgment of those various sums, their amount to be ascertained on the 2nd of June, 1864, and that then, if execution is not levied at that time, and payment is not at that time enforced under the execution, the judgment creditor would stand from that time forward as a creditor for the sum for which he might then have levied, together with the ordinary statutable rate of interest upon that sum, namely, the rate of four per cent.

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If that view should be adopted (and it appears to me that it might safely be adopted in this case) there would be no necessity to go farther. But I will ask your Lordships to consider also the alternative view by which, I think, the same conclusion may be arrived at. If this is not merely a judgment for the principal sum and the amount of interest and costs up to the 2nd of June, which judgment is thenceforward to bear interest at the rate of four per cent., it is at all events a warrant of attorney and defeasance which is given to secure a debt of 1,330*l.* with interest up to a certain day, and without any mention of subsequent interest upon the face of the instrument. If so, according to the well known principle which has been referred to in many cases, and which may be taken most conveniently from a note in the case of *Mounson v. Redshaw* (*ubi supra*), any claim in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certainly might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.

Apply that to the present case, and let me ask your Lordships to look for a moment at the very peculiar circumstances of the present case. This warrant of attorney and defeasance or judgment was given by William Beavan on the 2nd of May, 1864. He died on the 25th of the same month, before the time stipulated for the payment of the principal sum with the high rate of interest, namely, the 2nd of June. It appears that his executors were not aware of this warrant of attorney or of the stipulation in the defeasance. On the 11th of June, a few days after his death, an administration suit was instituted, and

on the 25th of June the usual decree was made in that suit for the administration of the estate of the testator.

On the 4th of July, 1864, the present appellant Cook filed a bill as a judgment creditor and mortgagee and in other characters, but giving no specification and no particulars with regard to this warrant of attorney and defeasance. Finding that he was asserting rights as a creditor generally, the executors adopted the usual course. He was served with a notice of the decree in the first administration suit—*Robinson v. Wood*, which of course stayed his own suit, but he did not come in and prove his debt or explain the character of his security which he held. On the 11th of March, 1867, that is to say, after Cook had lain by for nearly three years, the executors, inasmuch as he had not come in under the suit and claimed to have securities as a mortgagee, were forced to file a bill against him which is the bill in *Wood and Roberts* (the executors of Beavan) *v. Cook*. That bill was filed on the 11th of March, 1867; it was filed for an account and to redeem whatever securities he might hold, the plaintiffs alleging that Cook would not disclose the particulars of his securities. On the 14th of May, 1867, Cook put in his answer in that suit, and referred to this warrant of attorney, but referred to it in general terms without giving any details as to the rate of interest which he claimed to be running on under the warrant of attorney. On the 12th of June, 1868, an agreement was come to between Cook and the executors, who were still without information as to the details of this defeasance. By that agreement, although the time for proving debts in the first suit of *Robinson v. Wood* had passed, Cook was to be admitted to come in as a creditor in *Robinson v. Wood* to whatever might be found to be due to him. Under that agreement on the 28th of November, 1868, that is to say, more than four years after the death of Beavan, an affidavit was filed by Cook, for the first time giving the particulars of this warrant of attorney and defeasance upon which this case now rests, and upon which he claims that interest had been running on during

the whole time at the rate of sixty per cent.

Now, my Lords, if this is to be judged of in the manner most favourable to the appellant, namely, as a case in which Cook is coming and claiming damages for the non-payment of a debt due to him on the 2nd of June, 1864, it appears to me to be clear that any tribunal judging of that claim for damages would be bound to take into account the circumstances to which I have referred—circumstances that shew that Cook was endeavouring to prevent the character of this defeasance from transpiring, that he was endeavouring to keep back his security, and thereby to become entitled to claim this high rate of interest for a long period of time, whereas it is obvious that, if he had at the first disclosed the nature of the claim in respect of interest which he was prepared to allege, steps would have been taken to pay off the principal sum that was due to him.

Therefore, whether it be treated as a judgment for a specific sum, bearing no interest beyond the statutable interest of four per cent., or as a claim for damages for the detention of a debt; in either case it appears to me to be out of the question that the rate of sixty per cent. could be allowed. It appears to me that in the first view the rate of four per cent. is the rate absolutely assigned by statute upon payment of judgment debts; and, in the second case, it is for the tribunal to fix the rate of damages. It is possible that the rate of five per cent. might be given by a jury or by a Judge who was performing the functions of a jury; but the primary Judge having in this case only given the usual rate assigned in the Court of Chancery, namely, four per cent., I certainly do not propose to advise your Lordships to disagree with that opinion at which he has arrived, but on the contrary I advise and move your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD.—I think the order of Stuart, V.C., refusing the appellant's interest at the rate of five per cent. per month after the 2nd of June, 1864, and allowing him interest at the rate of four per cent. per year from that day, is right and ought to be affirmed.

There is no authority that I can find to support the argument of the counsel for the appellant, that where a security of money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards. On the contrary, the distinction seems to be well established between cases where the interest is expressly reserved in the instrument and where it is not. In the latter case, it is recoverable, not as interest according to the contract, but as damages for the breach of it.

In the present case there is, properly speaking, no contract. The defeasance of a warrant of attorney is not a contract, but merely a description of the object of the security, and of the means by which the judgment creditor, in case of the debtor's default, might enforce payment of the sum secured. That sum in the present case is 1,330*l.*, with interest at and after the rate of five per cent. per month on the 2nd of June then next. If the judgment had been entered upon that day upon the default of payment, execution might have been issued immediately for the principal sum and interest at the rate specified. Or the appellant might have brought action upon the judgment, and might have recovered farther interest, not as interest *eo nomine*, but by way of damages.

The appellant, by delaying to enter up judgment, cannot place himself in a better position than if he was a judgment creditor. And as he would then, according to the practice of the Court, have been allowed interest only at four per cent., the allowance by the Vice-Chancellor of that rate of interest after the 2nd of June, 1864, is as much as he is entitled to.

LORD HATHERLEY.—The question as to whether interest should be calculated at the rate mentioned in the original warrant of attorney resolves itself simply into this. Is there or is there not any contract after the day upon which judgment was to be entered up for the payment of any specific sum and interest? The cases which are cited with reference to mortgages shew clearly that the interest after a given day, upon which day the principal

and interest secured by the mortgage was made payable can only be given in the nature of the damages. Among the numerous cases which may be cited in which this point has been fully discussed, I will just take leave to refer your Lordships to one, because it contains some observations of Mr. Justice Bayley which seems to me to be peculiarly applicable to this case. The case to which I refer was the case of *Cameron v. Smith* (1). The simple point in that case was whether or not a petitioning creditor's debt in bankruptcy could be supplemented by adding interest to his debt (which the commissioners had done) when there was no express stipulation for interest, and it was there held that that could not be done, because the commissioners had no power to award damages after bankruptcy; and as any interest that could be allowed would have to be allowed by way of damages, and not by way of interest, it was beyond the province of the commissioners. In considering the case, Mr. Justice Bayley makes these observations—"Although, by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but it is in the nature of damages which must go to the jury in order that they may find the amount; and it is competent for them either to allow five per cent. or four per cent. according to their judgment of the value of money, or they may even allow nothing in case they are of opinion that the delay of payment has been occasioned by the default of the holder"—that is, the holder of the instrument.

My Lords, I think that in this particular case the appellant could not put his case higher than the two ways in which it has been put by my noble and learned friend on the woolsack, namely, to treat the case either as a judgment actually entered up, which it was not, or else as a claim to damages in consequence of the default of payment; and in that case really it would only come within the ordinary rule of the Court of Chancery, which is to allow interest at the rate of four per cent.

LORD SELBORNE.—My Lords, unless it can be laid down as a general rule of law that upon a contract for the payment of money, borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a farther contract for the continuance of the same rate of interest after that day until actual payment, is to be implied, the decision of the Vice-Chancellor in this case is not erroneous.

I entirely agree with those of your Lordships who have preceded me that no such contract is to be implied, unless there is something to justify it upon the construction of the words of the particular instrument; and that although in cases of this class, interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a Court or jury as a proper measure of damages for the subsequent delay, but that is because, ordinarily, a reasonable and usual rate of interest, which, it may be presumed, would have been the same, whatever might be the duration of the loan, has been agreed to. But in the case before your Lordships, the agreed rate of interest is excessive and extraordinary; and, although no question is raised between the present parties as to its fairness or reasonableness, so far as it was a matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time. In my opinion no Court or Judge could, under the particular circumstances of this case, have adopted that rate of interest as a proper measure of damages without a very great miscarriage of justice.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Mr. J. MacDiarmid, for appellant;
Messrs. Thomas White & Son, for respondent.

(1) 2 B. & Ald. 305.

BACON, V.C. } THE MERCHANT BANKING
1874. } COMPANY OF LONDON v.
July 30. } MAUD.

Appeal—Repayment—Interest.

Interest at 4l. per cent. was allowed on money which had been paid on an order which was reversed on appeal.

The plaintiffs received on the 9th of March, 1871, a sum of money for principal, interest and costs, under an order made by the Lord Chancellor, which reversed the decree of Vice-Chancellor James. In June, 1874, the House of Lords reversed the orders of the Lord Chancellor, and ordered that the decree of Vice-Chancellor James should be restored and the appeal to the Lord Chancellor dismissed.

The plaintiffs had proved for the money thus claimed in the bankruptcy of one Barrow, and consequently were entitled to receive a dividend out of the money received under the order of the Lord Chancellor.

A motion was now made by the defendants, who had paid the plaintiffs and were entitled to be repaid, that interest, which had been calculated at the rate of 5l. per cent., should be paid.

Mr. Robinson, for the motion, relied on—

Rodger v. The Comptoir d'Escompte de Paris, 38 Law J. Rep. (N.S.) P.C. 30; s. c. Law Rep. 3 P.C. 465.

As the principle was settled in that case he would be entitled to the costs of this motion.

Mr. Eddis, for the plaintiffs, said the case of

Rodger v. The Comptoir d'Escompte de Paris (ubi supra)

was an Indian appeal, and decided on the practice of the Courts in India. The rule as applied in this Court was the contrary, as settled in—

Parker v. Morrell, 2 Phill. 453; s. c. 17 Law J. Rep. (N.S.) Chanc. 226.

BACON, V.C., said five per cent. interest was excessive, four per cent. only could be allowed, but the principles of the decision of the Privy Council in *Rodger v. The Comptoir d'Escompte de Paris (ubi supra)* were to be applied to all cases.

The rule laid down there was just and reasonable, and one he should adopt. The amount, therefore, must be repaid, with simple interest at four pounds per cent.

Solicitors—Messrs. Flux & Argles, for plaintiff;
Messrs. Champion, Robinson & Poole, for defendants.

MALINS, V.C. }
1874. } HULL v. CHRISTIAN.
March 25. }

Will—Construction—Gift of Annuity to Trustee—Determination of Trusts—Cesser of Annuity.

An annuity was given by will to A. B., one of the trustees of the testatrix, "so long as he should continue to execute the office of trustee under her will:"—Held, that the annuity ceased when the estate was handed over to a cestui que trust absolutely entitled.

This suit was instituted to administer the estate of Sarah Rowe, who died in 1847, possessed of considerable estate. By her will the testatrix amongst other things gave an annuity of 100l. to Mr. William Wareing, one of the trustees, "so long as he should continue to execute the office of trustee under her will;" and she gave all her real and personal estate upon certain trusts under which Miss Hull, the plaintiff in the suit, became absolutely entitled upon attaining the age of twenty-one years.

Under the order made on the further consideration of the suit, on the 16th of March, 1868, a sum of 3,333l. 6s. 8d. had been set apart to answer the annuity to Mr. Wareing. The plaintiff, having attained the age of twenty-one years on the 14th of August, 1873, now presented a petition for the payment out of the whole of the fund in Court (which had arisen from the realization of the estate), including the sum set apart to answer the annuity to Mr. Wareing; and the only question was, whether Mr. Wareing was any longer entitled to claim his annuity.

Mr. Glasse and *Mr. North*, for the petitioner, contended that as the trusts of the will had come to an end, *Mr. Wareing's* annuity had ceased also.

Mr. Cotton and *Mr. Cozens Hardy*, for *Mr. Wareing*, argued that *Mr. Wareing* was still a trustee, and ready to act in case occasion should arise, though he had no longer any active duties to perform. The legacy was not in terms given as a compensation for his trouble, and at the date of the order on further consideration, when a fund was ordered to be set apart to answer this annuity, his active duties had then already ceased.

They referred to

Baker v. Martin, 8 Sim. 25; s. c. 5
Law J. Rep. (N.S.) Chanc. 205.

Mr. Glasse, in reply, cited

Henrion v. Bonham, Dru. 476.

MALINS, V.C., regretted that the petitioner should have thought it worth while to disturb the arrangement effected by the order on further consideration, but she was entitled to have the question determined whether the an-

nuity had ceased or not. Now the annuity was given to *Mr. Wareing* so long as he should continue to execute the office of trustee. He had executed the office from 1847 to the present time, when all the trusts had come to an end, and there was no other property except that represented by the fund in Court. The expression in the testator's will in its very terms implied remuneration for services to be rendered, and when the trouble ceased the remuneration must cease also. His Honour, therefore, came to the conclusion that the annuity was to continue only so long as *Mr. Wareing* continued to have the trouble of executing the trusts of the will, and made an order according to the prayer of the petition.

Solicitors—Messrs. Norris, Allens & Carter, agents for Messrs. Simpson & North, Liverpool, for the petitioner; Mr. Worthington Evans, for *Mr. Wareing*.



INDEX

TO THE SUBJECTS OF THE CASES IN THE

COURTS OF CHANCERY

AND ON APPEAL THEREFROM IN

THE HOUSE OF LORDS

IN THE

LAW JOURNAL REPORTS,

NEW SERIES, VOL. XLIII.

ACCUMULATIONS. See Perpetuity.

ACQUIESCENCE. See Copyright. Specific Performance.

ACTION AT LAW—Jurisdiction to restrain. See Jurisdiction.

ADEMPMENT—legacy of debt: payment: new debt: codicil: revival by republication—Testator by his will said, "Whereas there is due to me from my son 1,440*l.* or thereabouts, secured by bills or notes or otherwise, I release my said son from the payment of any interest up to the time of my death, and I direct that he shall have time for payment of the said sum by paying one-sixth in every year next after my death." He afterwards made a codicil, whereby he confirmed his will. The son paid the debts due at the date of the will, amounting to about 1,440*l.*, and afterwards incurred fresh debts to the amount of about 1,300*l.*, which were due at the date of the codicil and at the death of testator:—*Held*, that the legacy was specific, that it was adeemed by payment of the debt, and that the confirmation of the will by the codicil did not give the son any benefit in respect of the debts then due. *Sidney v. Sidney*, 15

—**adeemed devise: rents**—Where a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed.—*Held*, that the rents received between the death of testator and the conveyance of the property passed to the devisees. *Watts v. Watts*, 77

—See Legacy.

NEW SERIES, 43.—INDEX, *Chanc.*

ADMINISTRATION OF ESTATE—necessary parties: costs where objection not taken by answer—A bill for administration of the estate, or execution of the trusts of the will, of a deceased testator cannot be sustained against the executor *de son tort* without the legal personal representative—*Rayner v. Koehller* (41 Law J. Rep. *Chanc.* 697), and *Coote v. Whittington* (42 Law J. Rep. *Chanc.* 846) dissented from. *Roswell v. Morris*, 97 Where it appears on the bill that the suit is defective for want of parties, a defendant who takes the objection at the hearing is entitled to the costs of the day, though he has not taken the objection by his answer. *Ibid*.

—**capital: income: profits of business**—In administering an estate a proportionate amount of capital and the income actually made in the first year are to be applied in payment of debts, legacies, funeral and testamentary expenses and costs, and the profits made in a business are to be treated as income. *Lambert v. Lambert*, 106

—**primary fund for payment of mortgage debt: apportionment between freeholds and leaseholds**—The 30 & 31 Vict. c. 69 amounts to a legislative declaration that the Court of Chancery had put a wrong interpretation on the 17 Vict. c. 113 (*Locke King's Act*), and though it only expressly enacts that a direction for payment of debts out of personalty shall not be held to indicate a contrary intention to the rule that a mortgage is to be paid primarily out of the estate subject to it, it really overthrows the whole reasoning on which the former cases had proceeded. *Hall v. Fenwick*, 178

A testator seized of an estate partly leasehold and partly freehold subject to a mortgage devised it

specifically, and also created a mixed fund consisting of personality the proceeds of sale of some realty and annuities to be raised out of the mortgaged estate and other estates, and directed his debts to be paid out of this mixed fund:—*Held*, that he did not manifest a contrary intention to the rule laid down by Locke King's Act, but as leaseholds were not within that Act the mortgage ought to be apportioned between the freeholds and leaseholds according to their values at the testator's death and the part apportioned in respect of the leaseholds paid out of the mixed fund. *Ibid*.

ADMINISTRATION OF ESTATE (continued)—mortgagee's suit for sale and administration: devise: priority of costs—In a suit by legal mortgagees of real estate for sale of the mortgaged property, and for the general administration of the mortgagor's estate, the proceeds of the mortgaged property will be applied in payment to the mortgagees of their principal, interest and costs, in priority to the payment to devisees or executors, who had been made parties, of their costs of the suit. *Pinchard v. Fellows*, 227

—jurisdiction: carrying on business—In a suit instituted for administration of the estate of an intestate trader by beneficiaries, where there are infants interested, the Court has no jurisdiction to authorise the administrator to carry on the trade of the intestate. *Land v. Land*, 311

—admission of assets: form of decree—Where an administratrix had distributed the whole of the intestate's assets without making provision for calls on shares,—*Held*, that there ought to be a decree for payment, and in default for administration. *Price v. Mayo*, 403

—residuary devise—Residuary devised estates are subject to payment of debts before specifically devised estates. *Lancefield v. Iggulden*, 570

—trust for sale of real estate: legacy payable out of proceeds: interest when payable—Testator by his will directed that certain pecuniary legacies thereby given should be paid out of the proceeds of sale of his real estate. Testator's estate became the subject of an administration suit, upon the further consideration of which the question arose from what time the interest on the said legacies was payable:—*Held*, that the interest ran from a year after testator's death. *Turner v. Buck*, 583

—husband of residuary legatee, executor: wasting assets: fund in Court: wife's equity to a settlement—A wife's equity to a settlement attaches only to property which comes to her husband's hands in his marital right. If a testator bequeaths his property to a married woman, and makes her husband his executor, and he acts, he is primarily responsible to the estate; and

if largely indebted to it, his wife has no equity to a settlement out of any part of it till her husband's liabilities to it are discharged. *Knight v. Knight*, and *Jephs v. Knight*, 611

—decree: supplemental bill: facts discovered since decree: infant: petition: affidavit in support—A common administration decree having been made, and an infant interested in the estate some years afterwards having presented a petition by her next friend for leave to file a supplemental bill, with the object of charging a trustee of the estate with a breach of trust, which she alleged had been discovered since the date of the decree,—the Court granted leave accordingly, without requiring an affidavit by the next friend that the alleged breach of trust could not with reasonable diligence have been discovered at the date of the decree. *In re Hoghton's estate; Hoghton v. Fidley*, 758

Semble, in such a case, the object being to obtain an addition to a decree already made, the proper mode of applying for leave is by petition. *Ibid*.

—See Annuity. Charge. Charitable Legacy. County Court. Practice. Solicitor's Lien. Trust and Trustees.

ADVANCEMENT. See Portions.

AFFIDAVIT. See Practice.

ANNUITY—charge on corpus or income: powers of distress and entry, to recover annuities as if they had been secured by a lease for years: arrears—J. T. died in 1839, having by his will devised and bequeathed the residue of his real and personal estates to trustees for eleven years from his death, upon trust out of the rents and proceeds to pay (in the events which had happened) certain annuities, one of which was an annuity of 500*l.* to the two petitioners for their lives, and the life of the survivor of them. The residue of the rents and proceeds was, during the eleven years, to be accumulated for the benefit of the person who at the end of that time should be entitled to the residuary personality. At the end of the eleven years the real estate was to go, "subject to, and charged with, the payment of the annuities, and with power of distress and entry for the recovery of the same, as if they had been secured by a lease for years," to testator's nephew, J. T., for life, with remainder to his first and other sons in tail, with remainders over. Part of testator's real estates had been sold, and were now represented by a fund in Court of 18,738*l.* 1*s.* 5*d.* Consols. The petitioner's annuities had been paid in full till 1868; but there was now a sum of 1,367*l.* 6*s.* 5*d.* for arrears owing to the annuitants:—*Held*, first, that the mode in which the payment of the annuities was secured did not necessarily make them a charge on the corpus of the estate; second, that the arrears of the annuities were payable out of the income, and not the corpus of the estate; third,

that they were not necessarily payable out of the income of any particular year; and, fourth, that the remedy against the income for arrears continued beyond the lives of the annuitants. *Taylor v. Taylor*, 314

— See Contract—*Attorney-General v. Ray*.

ANTICIPATION—*absolute bequest of sum of Consols : married woman : restraint on anticipation*—A restraint on anticipation may apply as well to a personal fund producing income, to which fund a married woman is absolutely entitled, as to real estate producing rent, and will in either case prevent alienation during coverture. *Re Ellis's Trusts*, 444

Testatrix by will gave 500*l.* consols to A. B., a married woman, absolutely. By codicil she declared that all gifts, whether absolute or limited, made by her will to any female, should be for her separate use without power of anticipation. The fund was paid into Court:—*Held*, on petition for payment out by A. B. that the restraint on anticipation applied to the consols, and that A. B. was only entitled to receive the income during coverture. *Ibid*.

APPEAL—*irregular notice of appeal : subsequent enrolment of order*—Notice of an appeal motion which was served upon the respondent's solicitors was irregular by reason of it being neither dated nor signed by the appellants' solicitors, although their names appeared on the back of it. The irregularity having been discovered, the appellants' solicitors applied to the respondent to waive it, but he refused to do so and stated that he would avail himself of every technical objection. The appeal was afterwards set down for hearing, but no proper notice of its having been set down was served on the respondent's solicitors. Before the appeal came on to be heard, the respondent's solicitors enrolled the order appealed from. The appellant moved to have the enrolment vacated:—*Held*, that the respondent was under the circumstances entitled to avail himself of the irregularity in the notice of motion of appeal and to retain his enrolment. *In re the Limehouse Works Co. (Lim.)* 483

— *by defendant : security for costs of appeal*—Upon appeal by a defendant, it having been proved that he was a man without property, and had no substantial interest in the suit, but was defending it on behalf of another person, he was ordered to give security for costs. *Mayor, &c., of Hastings v. Wall*, 728

— to the Judges as visitors of the Inns of Court. See Jurisdiction.

APPOINTMENT—See Power of Appointment.

APPORTIONMENT—*mortgages : grantees of rent-charge*—The second section of the Apportion-

ment Act, 4 & 5 Will. 4. c. 22. s. 2, is not intended to apply as between a mortgagee (of a tenant for life) who has not entered and a remainderman, so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived. *Paget v. The Marquis of Anglesea—Watkins's claim*, 437

— *rents of real estate specifically devised : apportionment between devisee and executor*—Testator, seized in fee, specifically devised real estate by a will made before the Apportionment Act, 1870. By a codicil made after the Act he confirmed his will, and he subsequently died between the half-yearly days on which the rents of the devised estate were payable:—*Held*, that, under the Apportionment Act, 1870, the rents of the devised estate were apportionable between the devisee and the personal representative of testator. *Capron v. Capron*, 677

Observations upon the Apportionment Act, 1870, and upon *Jones v. Ogle*, 42 Law J. Rep. (n.s.) Chanc. 334. *Ibid*.

— See Administration of Estate—*Gall v. Fenwick*.

ARBITRATION—*motion to set aside award : last day of term : making complaint*—The last day of term is too late for the commencement of a proceeding to set aside an award under 9 & 10 Will. 3. c. 15. s. 2. *The Corporation of Huddersfield and Jacomb*, 748

Service of notice of motion to set aside an award which has been made a rule of the Court of Chancery is "making a complaint" within the meaning of the statute. *Ibid*.

— See Partners—*Plow v. Baker*.

ATTACHMENT. See Contempt.

ATTACHMENT OF DEBT. See Banker. Jurisdiction.

BANKER—*lien on deeds deposited for safe custody : committees of lunatic : garnishee orders : injunction : damages*—Bankers have no general lien on boxes containing securities deposited with them for safe custody. And a customer who had deposited such boxes for safe custody, having become lunatic, and his committees having been appointed,—*Held*, that the bankers had no right to retain or open the boxes as against the committees. *Leese v. Martin*, 193

The bankers who claimed such a lien having obtained garnishee orders against debtors of their lunatic customer through information obtained after opening the boxes, the Court granted an injunction to prevent them from enforcing their garnishee orders with respect to the securities in question, but refused damages for the opening of the boxes. *Ibid*.

BANKER (continued)—deposit of deeds: condition precedent to right to detain—Certain title-deeds, which had been handed by the plaintiff to his brother, F. B., to enable the latter to borrow 600*l.* from H. for seven days, were deposited by F. B. with a bank, with a memorandum purporting to be signed by the plaintiff, and stating that the deposit was made in consideration of the bank lending F. B. 1,000*l.* for seven days. The bank made him no loan for seven days, but, during the seven days next after the deposit, they allowed him to draw by cheques to an amount exceeding 900*l.* Upon a bill filed by the plaintiff against the bank for the delivery up of the deeds, on the grounds, first, that the memorandum of deposit was a forgery; and second, that the bank had not lent F. B. 1,000*l.* for seven days,—*Held*, that the question of forgery was one for a jury only, but that, assuming the memorandum to be genuine, the bank had no right to retain the deeds, inasmuch as they had not fulfilled the condition on which the deposit was made. *Burton v. Gray*, 229

BANKRUPTCY—administrator dealing with intestate's effects as absolute owner: bankruptcy of administrator: goods in "order and disposition" of bankrupt: bill of sale: delay in enforcing—Upon the death of an intestate his administratrix continued his business on her own account and took possession of certain furniture forming part of his estate, but which had been mortgaged by him to plaintiffs under an unregistered bill of sale. She remained in possession of the furniture for fourteen months, ostensibly as absolute owner, no steps having been taken by plaintiffs to enforce their bill of sale. She then became bankrupt; whereupon plaintiffs instituted a creditor's suit against her for the administration of the intestate's estate, and claimed the furniture as part of his estate:—*Held*, that the furniture was at the time of the bankruptcy of the administratrix in her order and disposition with the consent of the plaintiffs as true owners, and therefore passed to her creditors and not to the creditors of the intestate. *Kitchin v. Ibbetson*, 52

BILL OF EXCHANGE—authority to accept: secret partnership: winding up: proof—Four mercantile firms, each of whom carried on a separate trading business of its own, agreed to carry on jointly a particular trade which had been theretofore carried on by F., one of the four firms, alone. The agreement between the four firms provided that the business should be carried on under the style of F., who were to keep separate books for the purpose, and that each party to the agreement should be liable in respect of the business in proportion to his share in the undertaking, and in the event of being under cash advance he should receive interest for the same; but it was "understood and agreed, that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged." The as-

sociation was known to the members as the A. company, but its name and existence were kept secret. In order to raise money for the purposes of the business a number of bills of exchange were drawn by M., one of the firms, upon each of the other three, were accepted by them respectively, and were discounted by bankers, the money thus obtained being applied to the purposes of the joint business. The bankers were ignorant of the existence of the association. An order was afterwards made to wind up the association, as an unregistered partnership consisting of more than seven members:—*Held* (reversing a decision of *MALINS, V.C.*), that only those of the firms whose names appeared upon the bills of exchange were liable in respect of them, and that consequently the holders of the bills could not prove upon them in the winding up. *In re the Adanson Fibre Company; Miles's Claim*, 732

BILL OF LADING—negotiable instrument: mate's receipt: assignment: custom—Brokers delivered goods on board a ship, and took mate's receipts in the name of their principals, who afterwards endorsed the receipts to the brokers. The captain signed bills of lading without notice of the endorsement:—*Held*, that the holders of the bills of lading were entitled to the goods, that the captain was justified in signing the bills of lading, and that the brokers had no claim for indemnity from the owners. *Hathesing v. Laing*, 233

Notice to the captain would not have affected holders of the bills of lading for value without notice. *Ibid.*

A local custom making mate's receipts negotiable would not bind the goods elsewhere. *Ibid.*

—**policy: assignment: power of sale**—Bills were drawn against cotton consigned to England. The cotton was hypothecated, by means of a letter in favour of a bank which bought the bills; at the same time bills of lading and a policy were handed to the bank. The letter contained a power to keep insured, and a power to sell the cotton in case of non-payment, and to apply any balance, after satisfaction of the bills, towards other debts due from the consignor to the bank:—*Held*, that money received on the policy could not be applied in payment of anything beyond what was due on the bills. *Latham v. The Chartered Bank of India, China and Australia*, 612

BILL OF SALE—Delay in enforcing. See Bankruptcy.

BOND—restraint of trade: sufficiency of consideration—In the year 1864 R. G., a surgeon, apothecary and man-midwife, engaged T. B., a medical student, as his assistant, at a salary. In 1870 T. B., at R. G.'s request, executed a bond by which he bound himself to pay R. G. the penal sum of 1,000*l.* The bond then recited that R. G. some time since took T. B. into his

employ and confidence as an assistant in his profession or business, which employment was to continue so long as the parties to the bond should agree, and that for the aforesaid consideration T. B. had agreed to enter into the same bond. The condition of the bond was that it should be void in case T. B. did not carry on the business of a surgeon, apothecary or man-midwife within the parish of N. or within ten miles thereof (excepting at L.) during so long as R. G. or his successors in the business should carry on the same. Later in 1870 R. G. discharged T. B. from his employment, and in 1874, T. B. having qualified himself to practise as a surgeon, apothecary and man-midwife, commenced business about four miles from N. On motion for an injunction by R. G.,—*Held*, that there was sufficient consideration to support the bond, and the injunction was granted. *Gravely v. Barnard*, 659

—Delivery up of Bond. See Equity.

BRISTOL IMPROVEMENT ACTS—Party Wall. See Injunction—*Weston v. Arnold*.

BURIAL—*new burial ground: dwelling house*—The provisions of s. 9 of 18 & 19 Vict. c. 128, whereby it is enacted that no ground not already used as or appropriated for a cemetery shall be used for burials under 15 & 16 Vict. c. 85, or that Act, within the distance of 100 yards from any dwelling-house, without the consent in writing of the owner, lessee and occupier, are general provisions, and apply to all new burial grounds, whether parochial or non-parochial. *Greenwood v. Wadsworth*, 78

CANAL—Use of water. See Injunction—*The Wilts and Berkshire Canal Co. v. The Swindon Water Works*.

CHARGE—*on real estate: bequest of sum charged: failure of purpose: heir or next-of-kin*—A tenant for life of real estate under a settlement, having power to charge the same with 6,000*l.*, to be raised and paid at such time and to such purposes as he should think fit, by deed charged the estate with the above sum, payable to trustees for such purposes as he should by will appoint, and afterwards appointed the same by his will for certain purposes, which partially failed:—*Held*, that the part of the money undisposed of was personality, and went to the estate of the next-of-kin. *Simmons v. Pitt*, 267

—See Judgment Creditor. Mortgage.

CHARITABLE LEGACY—*marshalling assets*—Testator directed his personal estate, including leaseholds, to be converted into money, and the residue of the proceeds, after payment of his funeral and testamentary expenses, debts and legacies, to be invested, and, subject to a life interest therein given to his wife, and to certain

annuities and legacies including a charitable legacy of 100*l.*, bequeathed all the residue of his personal estate in equal thirds to three charitable institutions, and directed that the three last-mentioned legacies should be paid out of such part of his personal estate as could lawfully be applied to the payment thereof, and which should be reserved by his trustees for that purpose:—*Held*, reversing the decision of one of the Vice-Chancellors, that the assets must be marshalled in favour of the three charities so as to throw the debts, funeral and testamentary expenses, including costs of administration, suit and legacies, except the 100*l.* charitable legacy, upon the impure personality, but that there could be no marshalling as against the 100*l.* charitable legacy which must be paid in the proportion which the pure personality bore to the impure, and fail as to the residue. *Miles v. Harrison*, 585

—See Will—*Thomas v. Howell*. And see Mortmain.

CHARITY COMMISSIONERS—*jurisdiction in contentious cases: appointment of trustees who act contrary to intention of founders: interference of Court of Chancery*—The Charity Commissioners have jurisdiction to appoint new trustees in contentious cases. *Re Burnham National Schools*, 340

Where the Charity Commissioners have jurisdiction the Court of Chancery will only interfere in a case of great miscarriage. *Ibid*.

Under 6 & 7 Will. 4. c. 70, two joint rectors of a parish were *ex officio* trustees of a church school, and through their disagreement a vacant mastership was not filled up, and the school was consequently closed for more than two years. The Charity Commissioners appointed three additional trustees (all members of the Church of England), who immediately after their appointment, with the concurrence of one of the old trustees, transferred the school to the School Board. The Court refused to interfere with the appointment of the additional trustees. *Ibid*.

Semble.—It is very doubtful whether the Charity Commissioners could have removed the *ex officio* trustees. *Ibid*.

If either of the new trustees had not been a member of the Church of England the appointment would have been improper. *Ibid*.

CHARITY TRUSTEES. See Payment out of Court.

CHURCH DISCIPLINE ACT—*commission of enquiry: fitness of promoter: prohibition*—Whether it is competent to the bishop to refuse to entertain an application for a commission of enquiry under section 3 of the Act 3 & 4 Vict. c. 86, made by any person whatever, *quære*. But at least it is in his discretion to issue such commission when he has been applied to for that purpose. Therefore an application by the

accused person for a prohibition restraining the issuing of the commission until objections to the fitness of the promoter should be determined was refused as unfounded and frivolous. *Ex parte Edwards*, 350

COMPANY—*prospectus: liability of directors for misrepresentation: liability of estate of deceased director: indemnity to transferee of shares: delay in instituting proceedings: decrees appealed from affirmed on different grounds*—In proceedings in equity for damages, by one who has been deceived to his own injury by the misrepresentations of another made in a prospectus, the only amount of delay which is a bar to relief is that fixed by the Statute of Limitations as to actions for deceit at law. *Peck v. Gurney* (H.L.), 19

Non-disclosure of material facts, though a ground for setting aside an allotment or purchase of shares, is not a ground for an action for deceit or for proceedings in equity in the nature of such an action. *Ibid.*

The office of a prospectus is to invite persons to become allottees, and, the allotment having been completed, such office is exhausted, and the liability to allottees does not follow the shares into the hands of subsequent transferees—*Bedford v. Bagshaw* (29 Law J. Rep. (N.S.) Exch. 69) and *Bagshaw v. Seymour* (29 Law J. Rep. (N.S.) Exch. 60), note, disapproved; *Scott v. Dixon* (29 Law J. Rep. (N.S.) Exch. 62), note, and *Gerhard v. Bates* (22 Law J. Rep. (N.S.) Q.B. 364), distinguished. *Ibid.*

Prospectus not only intentionally concealing material facts, but also containing statements amounting to an active misrepresentation, for which the promoters who signed it would be personally liable either at law or in equity to one who, on the faith of the prospectus, had applied for and obtained an allotment of shares in the company. *Ibid.*

A purchaser of shares in the open market has no remedy against the promoters, though he bought on the faith of the representations contained in the prospectus. *Ibid.*

A person who took no part in the preparation or issuing of the prospectus, but, with full knowledge of all the facts, consented to be a director, and allowed his name to remain unchallenged at the foot of the prospectus, and signed the memorandum and articles of association which referred to the prospectus was held as liable as the other directors who prepared and issued the prospectus. *Ibid.*

A director having died before the suit was instituted,—*Held*, that as the suit was, not to recover profits derived by their testator or by his estate, but to recover damages for the wrong done by him, the suit could not be sustained against the executors of such deceased director, either in a Court of Equity or in a Court of Law, on the principle *actio personalis moritur cum persona*. *Ibid.*

Directors though not liable to a criminal prosecution under 24 & 25 Vict. c. 96. s. 84, may

be liable in a Court of Equity to indemnify persons taking shares on the faith of representations made by them in a prospectus. *Ibid.*

— *registration of transfers: distribution of shares for voting purposes*—Where there is no reason to the contrary under the articles of association of a company, it is the duty of directors to receive and register transfers at once, and this, although the object of the transfers is to distribute the shares and so to obtain a larger number of votes, and command greater influence at a meeting of shareholders already summoned. *Re Stranton Iron and Steel Co.*, 215

— *infant transferee: action against vendor and compromise by retransfer: suit by vendor for indemnity against the real purchaser*—E. E. instructed his brokers to purchase 100 shares in a joint-stock company to be transferred into the name of his son G. E. The shares were accordingly purchased from M., and transferred by E. E.'s direction into the name of his son, G. E., who was an infant, but not known by M. or his brokers to be so. The company was shortly afterwards wound up, and G. E., who had been placed on the list of contributories, commenced an action at law against M., who was an auditor of the company, for repayment of the purchase money, charging fraud and failure of consideration. The action was compromised by M. repaying the purchase money and taking back the shares, the charge of fraud being withdrawn, and M.'s name was substituted for that of G. E. as a contributory. Two and a half years afterwards M., who had paid several calls under the winding-up, filed his bill against E. E. for repayment and indemnity, alleging that E. E. was the real purchaser for his own benefit, and had passed the name of G. E. as the purchaser in order to evade liability, and also stating that the plaintiff did not know at the time of the compromise of the action that E. E. was the real purchaser:—*Held*, reversing the decision of one of the Vice-Chancellors, that the compromise of the action was a bar to the suit. *Maynard v. Eaton*, 641

— *mortgages of shares: transfer of into name of servant: trustee*—Shares in a company were, to escape liability, transferred by the direction of a mortgagee into the name of the mortgagee's servant. The servant afterwards claimed the shares, and contended that as the transaction was fraudulent as against the company, the Court would not assist the mortgagee by declaring that she was a trustee of the shares for him:—*Held*, that the mortgagee, not being under any liability to the company, or to the creditors of the company, had a right to direct this transfer to be made, and was entitled to a declaration that the servant held the shares in trust for him. *Colquhoun v. Courtenay*, 338

— *rights of minority of shareholders: parties*—Though a shareholder in a company is entitled to vote with an exclusive view to his own interest, yet where the majority of shareholders deal with the assets of the company for their own benefit, to the exclusion of the minority, the Court will, at the instance of the minority, restrain such dealing, and compel the majority to account in respect of such dealings. *Menier v. Hooper's Telegraph Works (lim.)* 330

— *sale of company's business in consideration of shares in another company: ultra vires*—A resolution to sell a company's business under section 161 of the Companies Act, 1862, in consideration of shares in another company, must be an agreement to sell to such other company itself; and, therefore, an agreement to sell to an individual in consideration (in part) of shares in a company he intends to form is *ultra vires*, even if such agreement is intended to be followed by a resolution to wind up, and *a fortiori* if it is not. *Bird v. Bird's Patent Sewage Co.*, 399

— *surrender of shares: redistribution of capital: issue of new shares with different amount paid thereon*—A company not authorised by its original articles of association to accept surrenders of shares, by special resolutions altered their articles so as to authorise the cancellation of existing shares, and the issue of new shares in lieu thereof under an arrangement which varied the liability of the respective shareholders, diminishing the liability of some of them on their shares, and increasing that of others, but which in the ultimate result materially increased the amount of capital raiseable on all the shares collectively:—*Held*, that the alteration was *intra vires* and effectual, and that a surrender of the old shares under the altered articles was valid. *In re the County Palatine Loan and Discount Co.; Teasdale's Case*, 578

— *shares issued without filing of contract: rectification of register*—A new company was formed under the Companies Act, 1862 and 1867, for purchasing the assets, and carrying on the business of an old one. The members of the two companies were the same persons. The transaction was to be effected, and the purchase money satisfied, by fully paid up shares. The shares were issued by the new to the old company; but no contract in writing was filed, as required by the Companies Act, 1867, s. 26. The question, therefore, was whether, under that section, the shares could be considered as fully paid up? A motion was made by the new company to rectify its register by striking out the names of all the allottees in order to file the contract, and then replace the names:—*Held*, that the register might be rectified accordingly. *In re the Droitwich Salt Co. (lim.)* 581

— *fully paid up shares: registered contract: issue of shares*—The owners of certain works

and patents agreed with T., the promoter of a company, to sell the same for a sum in cash and a number of fully paid up shares in the company. A contract was subsequently entered into between the vendors and the company by which the company agreed to purchase the property for a much higher consideration, including a larger number of fully paid up shares, but it was arranged between the parties that the vendors should receive only the consideration mentioned in the original agreement, and that the excess should be received by T. Accordingly the vendors received only the original consideration, and the directors passed a resolution that the additional shares should be allotted to T. The contract was afterwards registered at the office of Joint Stock Companies. Subsequently T. transferred twenty of his shares to B. for value. It did not appear when these shares were actually allotted to T., but the certificates of them were dated after the registration of the contract:—*Held*, that the contract registered was sufficient to satisfy the 25th section of the Companies Act, 1867. *Held* also, that there was no evidence that these shares became the property of T. until the certificates were issued, and that accordingly they must be taken to be fully paid up shares, and that the purchaser was not liable as a contributory in respect of them. *In re the Imperial Rubber Co. (lim.)—Bush's Case*, 772

— *motion to rectify register: misrepresentation and concealment in prospectus: holder of fully paid up shares: right to summary relief: practice*—Where a holder of fully paid up shares in a limited company applied by motion under the 35th section of the Companies Act, 1862, to have his name struck off the register of shareholders, on the ground that he had been induced to take the shares through misrepresentation and concealment of material facts in the prospectus, and his application had been granted in the Court below, the Lords Justices on appeal declined to dispose of the case, on the grounds that the effect of granting the application would be to entitle the applicant to recover from the company as of course the money he had paid for his shares, that the question would be more properly heard and determined in an action or suit than in a summary way upon an application of this kind, and that since the applicant's shares were fully paid up he would be subjected to no liabilities by being retained on the register pending such proceedings. They accordingly directed the motion in the Court below to stand over, with liberty to the applicant to take such proceedings as he might be advised. *In re The Ruby Consolidated Mining Co., lim.; Askew's Case*, 633

— *dissolution by Act of Parliament: demurrer ore tenus: costs*—Under an agreement sanctioned by Act of Parliament a railway company was sold and transferred to another railway

company, who were to issue 155,000*l.* rent-charge stock at the selling company's request (the dividends to be paid out of a perpetual rent-charge of 7,000*l.*, payable by the purchasing company), and the proceeds of the stock and of the sale of certain surplus lands and other reserved assets were to be applied by the selling company in payment of certain vendors' debts, charges and costs, and the surplus to be divided between the preferential shareholders and creditors of the selling company in proportion to the amount of their shares and debts. The agreement further provided for the issue by the purchasing company to the ordinary shareholders of the selling company of ordinary stock in the purchasing company. The agreement provided that when the company's affairs had been wound up as above, notice was to be advertised in the "London Gazette," and thereupon the selling company was to be dissolved. The agreement was sanctioned in 1866. In 1874 a creditor and ordinary shareholder of the company filed a bill on behalf of himself and all other the creditors and shareholders of the selling company against that company, alleging (amongst other things) wilful delay in winding up the company, default in payment of debts, and refusal or neglect to deliver to the plaintiff the ordinary stock to which he was entitled, and praying a winding up and other consequential relief. On demurrer to the bill for want of equity, — *Held* (affirming the decision of *MALINS, V.C.*), that on the allegations plaintiff was entitled to some relief as a creditor, and the demurrer was not sustainable for want of equity; but held also, that plaintiff's claim as an ordinary shareholder made the bill demurrable for multifariousness and misjoinder, and on this ground the demurrer was allowed, but with liberty to amend. *Ward v. The Sittingbourne Rail. Co.*, 533

The demurrer being sustained only on the grounds alleged *ore tenus*, plaintiff was allowed his costs under Consol. Ord. xiv. rule 1. *Ibid.*

— Registration of Shareholder. See Specific Performance—*In re the Tahiti Co.*

— See Contributory. Parties. Winding up of Company.

COMPENSATION. See Elementary Education Act, 1870.

COMPROMISE—Effect of. See Company—*Maynard v. Eaton*.

CONFIDENTIAL COMMUNICATION—Telegram Cyphers. See Injunction—*Reuter's Telegram Co. v. Byron*.

CONTEMPT—imprisonment for debt: compromise] —A solicitor was ordered to pay money to a receiver of the Court on pain of sequestration

and imprisonment. His property was seized on a *fi. fa.* under the order, but possession was given up under an agreement:—*Held*, on breach of the agreement by him, that he could not be attached under the order. *Harvey v. Hall*, 95

CONTRACT—acceptance, qualified or absolute]—The owners of land in answer to a written offer to buy it, wrote saying they had received the offer, and added, "which offer we accept, and now hand you two copies of conditions of sale which we have signed; we will thank you to sign same, and return one of the copies to us":—*Held*, that this was not an unqualified acceptance, and did not make a contract. *Crossley v. Maycock*, 379

— government annuity: misrepresentation: avoidance of contract]—An insurance company purchased government annuities on the life of T. C., with a statement and declaration that he was born at Barking in 1779, he having, in fact, (as was discovered after his death,) been born at Brighton in 1786, and T. C. of Barking having died in early infancy. The Act (10 Geo. 4. c. 24) under which the purchase was made enabled the Commissioners (section 45) to correct, rectify or amend any contract or certificate in cases wherein any mistake or accidental error should have been made. The insurance company offered to pay, with interest, the difference between the price they paid and the price they ought to have paid, but the Commissioners desired to treat the contract as void *ab initio*:—*Held* (affirming the decision below, page 321), that they were entitled to a decree on that footing, that the power of rectification in the Act was merely discretionary, and that neither on the general law nor under that power could the company demand a rectification of the contract. *Attorney-General v. Ray*, 478

— railway contractor: account: interest costs]

—A contract between a railway company and their contractor, which contemplated that from time to time certain sums, ascertainable at the end of each month, would be paid over, and provided for monthly payments, was not considered to be one to pay sums at certain specified times, so as to carry interest. For payment of interest, there must be an express agreement except in mercantile contracts, such as bills of exchange, and promissory notes, and some cases which are subject to special usage in trade. And interest can only be recovered under the 3 & 4 Will. 4. c. 42. s. 28, where there is a demand in writing of a sum certain payable at a certain time. *Hill v. South Staffordshire Railway Co.*, 566
Mildmay v. Methuen (3 Drew. 91) and *Mackintosh v. The Great Western Railway Company* (4 Giff. 683) not followed. *Ibid.*

Costs were allowed to plaintiffs, though they failed in great part of their claim. *Ibid.*

— Agreement at Will. See Copyright. And see Bill of Lading.

— for amalgamation of companies by an agreement in two parts not agreeing. See Contributory.

— See Specific Performance.

CONTRIBUTORY—*contributories on the B list: extent of liability: application of their contributions*—A past member of a company in course of winding-up is only liable to contribute in respect of debts contracted before he ceased to be a member to the extent to which those debts remain unsatisfied after the application, *pari passu*, of the contributions of the present members to the payment of the general liabilities of the company; and he is at liberty to make any arrangement with the creditors in respect of those debts; and if the result of such arrangement be that the company is released from those debts, he will escape all liability as a contributory. *In re The Blakeney Ordnance Company (Lim.)*; *Brett's Case*; *In re the Oriental Commercial Bank (Lim.)*, *Morris's Case*, 47

But the contributions of past members are part of the general assets of the company, and are not applicable exclusively to the discharge of those debts in respect of which they are paid. *Webb v. Whiffin* (42 Law J. Rep. (N.S.) Chanc. 161) examined and explained. *Ibid.*

— *amalgamation of companies: transfer of shares after amalgamation to avoid liability*—A company with the consent of all the shareholders made over its business and all its assets to another company. Afterwards an arrangement was made between the second company and the directors of the first company for rescinding the amalgamation, and the directors of the first company thereupon elected several new directors, of whom A. was one, and at a meeting of directors at which A. was present a transfer of 200 shares out of A.'s name was sanctioned. The transfer was registered, and the company was now being wound up. The articles only gave the directors power to refuse to sanction a transfer on condition of their getting some other transferee to take the shares at the market price. But at the time of A.'s transfer the shares were worse than valueless:—*Held*, that the transfer by A. was invalid, and he was properly placed on the list of contributories for the 200 shares. *In re The Accidental Death Insur. Co.*—*Allin's Case*, 116

— *agreement for amalgamation in two parts: variation in the parts: allotment of shares: acquiescence*—Invalidity of agreement, for amalgamation of companies, in two parts, one of which varied from the other in having a clause limiting the company's liability to the amount of its capital stock. Allotment of shares not

amounting to contract, and allottee not bound by reason of acquiescence or laches. *In re The United Ports Insur. Co.*—*Wynne's Case*, 138

— *set-off: verbal understanding that shares were to be allotted as payment for land sold*—M. in November, 1865, signed the memorandum of association for one hundred 10*l.* shares, and alleged that at the time he did so there was a verbal understanding that the shares were to be paid for by the conveyance of certain land to the company. No allotment was made, but M. acted as a director, for which a qualification of twenty shares was required. Six months after the memorandum was signed, M. agreed to sell and afterwards conveyed the land to the company, and the consideration was stated to be 1,000*l.*; 100 shares were afterwards allotted to M. in pursuance of the purchase as fully paid up shares. M. afterwards purchased ten other fully paid up shares, and his name was on the register for 110 shares only:—*Held*, by one of the Vice-Chancellors, that in the absence of any written evidence of the understanding or agreement, the 100 fully paid up shares allotted for the land could not be taken as being the 100 shares for which M. signed the memorandum of association, but that he must be considered liable for 100 shares. But upon appeal this decision was reversed, and it was held that M.'s name ought not to be on the list for any other than fully paid up shares. *Re The Matlock Old Bath Hydropathic Co. (Lim.)*—*Maynard's Case*, 146

— *director: acceptance of office: contract to take qualifying shares*—By articles of association of a joint stock company the qualification for a director was fixed at fifty shares. The promoter of the company applied to B. to become a director, and promised to provide his qualification out of some fully paid up shares to which the promoter was entitled. B. consented and was appointed a director, and took his seat at the board. The promoter then requested the directors to allot to B. fifty of the promotion shares, which was done, the shares being entered in the register as fully paid up. B. never had any other shares. On the winding up of the company,—*Held*, affirming the decision of Wickens, V.C., that no contract to take shares other than the fully paid up shares registered in his name could be inferred from B.'s acceptance of the office of director, and therefore he was not liable as a contributory. *Re The Metropolitan Public Carriage and Repository Co. (Lim.)*—*Brown's Case*, 153

— *sale in consideration of paid-up shares: memorandum of association: collateral agreement: payment in money's worth*—A company was formed with a capital of 7,500 *l.* shares for the purpose, as stated in the memorandum of association, of purchasing the business of C. C. subscribed the memorandum for 2,500 shares, and other persons subscribed it for

3,625 shares, making the total number of shares subscribed for 6,125. The articles, which bore the same date as the memorandum, stated that an agreement had been prepared for the purchase of C.'s business, and that the purchase money was to be 5,000*l.*, half to be paid in cash and half in fully paid-up shares. The articles also authorised the company by special resolution to create new shares. Two days afterwards the agreement between C. and the company was executed, and it contained the same provisions as to the payment of the purchase money, but did not in terms state that the 2,500 shares for which C. had subscribed were the 2,500 fully paid-up shares he was to receive in part payment. This agreement was duly registered as a compliance with the 25th section of the Companies Act of 1867, and 2,500 shares were subsequently allotted to C. as the shares for which he had subscribed the memorandum and articles of association, and C. was treated by the company and appeared on the register as the holder of 2,500 fully paid-up shares only:—*Held*, in the winding-up of the company, that the 2,500 shares for which C. had subscribed were the 2,500 fully paid-up shares which he was to receive in part payment, and that having given money's worth for them, he had in fact paid for them in "cash" within the meaning of the 25th section, and was not liable to be placed on the list of contributories. *In re Limehouse Works Co. (Lim.)—Coates' case*, 538

Observations upon *Den's case* (42 Law J. Rep. (N.S.) Chanc. 857), *Spargo's case* (42 Law J. Rep. (N.S.) Chanc. 488), and other authorities. *Ibid*.

CONTRIBUTORY (continued)—*calls on shares: payment in cash: set-off*—F. was the holder of fifty shares in the company, which had been issued before the Companies Act, 1867, came into operation, and on each of which 1*l.* was unpaid. In 1868 W. brought an action against the company, which was compromised upon the terms that the company should pay to W. 3,200*l.* and should credit F. with 700*l.* in respect of his shares so as to make them fully paid-up shares. The arrangement was carried out and certificates for fully paid-up shares were issued to F. The company was afterwards wound up:—*Held* (affirming the decision below, page 264), that there had been payment in full of the amount due upon F.'s shares, and therefore he was not a contributory. *In re Paraguassu Steam Tramroad Co. (Lim.)—Ferreao's case*, 482

Semble.—The 25th section of the Companies Act, 1867, is not retrospective so as to apply to shares taken before the commencement of the Act. *Ibid*.

— *transfer: calls due: unsuccessful appeal by official liquidator: costs*—A transfer of shares in a company subject to the provisions of the Companies Act, 1845, which is made whilst calls are due and is duly registered, is not invalid under the 16th section of the Act, and the

transferor is not liable as a contributory. The restriction placed by the 16th section upon the transfer of shares on which calls are due was enacted for the protection of the company, and may be waived by them. *In re Hoylake Rail. Co.—Littledale's case*, 529

The respondent's costs of an unsuccessful appeal by the official liquidator ordered to be paid by the liquidator. *Ibid*.

— *agreement for amalgamation: application for shares: allotment on different terms: acquiescence: costs*—An amalgamation between two companies was agreed upon, on the terms that the shareholders in the selling company should receive in exchange for their shares in that company shares credited with an equal amount in the purchasing company. In pursuance of this arrangement B., a shareholder in the selling company, applied for two hundred shares in the purchasing company. The shares were allotted upon different terms, only an unascertained amount, proportionate to the assets of the selling company, being credited thereon. Notice of allotment upon these terms was sent to B., and his name was placed on the register in August. B. thereupon wrote for the share certificates. These were never sent him, although repeatedly asked for. The company was wound up in November. The amalgamation was afterwards held to have been altogether void:—*Held*, that owing to the variation in the terms of the allotment from those of the application for shares, there never was any contract between B. and the company to take these shares, and under the circumstances there had been no acquiescence by B. in the allotment; and that his name must therefore be removed from the list of contributories. *In re The United Ports Co.—Beck's case*, 531

The appeal of an official liquidator of a company seeking to settle a respondent upon the list of contributories being dismissed with costs, the respondent's costs will, as a rule, be ordered to be paid by the official liquidator and not out of the estate. *Ibid*.

— *purchase of shares by company: powers of directors: implied authority of manager or agent*—The articles of association of a loan and discount company gave the directors power to purchase, with the company's moneys, the shares of any shareholder, and also gave them power to appoint a general manager to perform such duties as they might determine:—*Held*, that the power to purchase shares, which was expressly given to the directors themselves, could not be delegated by them to the manager. *Held also*, that the manager could not, by implication, bind the company by a contract to purchase shares, such an act not being within the ordinary scope of the authority of the manager of such a company. *In re The County Palatine Loan and Discount Co. (Lim.)*; *Cartnell's case*, 588

In 1871 the manager told one of the shareholders

that the company would purchase his shares. The shareholder thereupon executed a transfer to two trustees for the company. They, however, knew nothing of the transfer, and had not authorised the making of it. It was registered in the books of the company, and thenceforth the transferee was not treated as a shareholder, but received interest on the purchase money, which he left on deposit with the company. In 1873 the company was ordered to be wound up:—*Held*, that the transferee had not ceased to be a shareholder, and that he was liable as a contributory. *Ibid*.

— *paid up shares: contract in writing by articles of association*—The persons engaged in working a mine as shareholders in an unlimited company formed themselves into a limited company, for the purpose of acquiring the interests and property of the shareholders in the old company and working the mine, and they subscribed for the whole number of the shares in the new company. By a clause in the articles of association of the new company, it was agreed that each of the shares of the new company (which were of the nominal value of 10*l*. per share) should be credited with 7*l*. per share as paid up thereon; and that in consideration thereof, the interest of the parties engaged in working the mine should by the articles be transferred to the new company. No other contract as to the transfer of the property was entered into. The articles were signed by all the shareholders and duly registered, and the new company took possession of the property of the old company. The shares were duly allotted in accordance with the agreement, and in the register of shareholders and books of the company, each share was credited with the sum of 7*l*. as paid up thereon:—*Held*, in the winding up of the new company, this clause in the articles of association constituted a sufficient contract in writing within the meaning of the 25th section of the Companies Act, 1870, to exonerate the shareholders in the new company from any further payment in respect of the 7*l*. per share credited as paid up on each share. *In re Appletree-lead Mining Co., Ltd.*, 793

— *qualification of director: attendance at board meetings: application within reasonable time*—In March, 1865, G. was asked to become a director of a company. He then attended three board meetings of the directors, and his name was entered in the minute book as attending, but he alleged he merely came as a visitor, and to see how the company was managed. He allowed a prospectus to be issued on which his name appeared as a director. In May, 1865, he wrote to the secretary, requesting that his name might be withdrawn, and though he afterwards acted for the company as auctioneer, he never again interfered as director. No shares were allotted to G., and his name did not appear on the register of members. In 1870 the company was ordered to be

wound up. In July, 1873, the official liquidator, for the first time, fixed G. on the list of contributories, in respect of twenty shares, the number required by G. for his qualification as director:—*Held*, that having regard to the lapse of time, and as G. had entered into no actual contract to take shares his name was improperly placed upon the list. *Re The Freehold and General Invest. Co. (Lim.)*; *Green's Case*, 629

— *partnership: promoter: misrepresentation*—Persons subscribed to a scheme for the purchase and resale of a theatre. The association was wound up. The subscriptions amounted to over 5,000*l*. and were attached to a form appended to a prospectus which falsely stated that out of 12,000*l*. 5,000*l*. only remained for subscription:—*Held*, that the promoters who issued the prospectus were contributories to an extent proportionate to the amount not subscribed for. *In re the Victoria Palace Theatre Syndicate*, 751

— See Company. Winding Up of Company.

COPYHOLD—fine in case of Infant. See Jurisdiction—*Harbroe v. Combes*.

COPYRIGHT—*license to publish: agreement at will: unsold copies: married woman*—A married woman agreed with some publishers that they should publish a book she had written at their own expense, and sell it at a shilling a copy, paying her a royalty of a penny for every copy sold, reckoning thirteen copies as twelve. She afterwards gave notice to terminate this agreement and made a fresh arrangement with other publishers for the bringing out of a revised edition. The first publishers sought to restrain the further publication of the book until the copies printed by them under their agreement with the authoress were sold:—*Held*, that they were not entitled to any such relief, as they were endeavouring to import into the contract a term which it did not contain. *Warne v. Routledge*, 604

Semble, if the married woman had expressly entered into a contract restricting her right to publish the book, such contract might have been enforced by injunction against her, or any person claiming under her with notice. *Ibid*.

— *second edition of work: acquiescence*—The "offence" mentioned in the 15th section of 5 & 6 Vict. c. 45, which gives to the proprietor of a copyright a special action on the case, is not co-extensive with the "offence" referred to in section 26 of the same Act, with respect to which all actions, suits, bills, indictments or informations must be brought, sued and commenced within twelve calendar months next after such offence committed. Therefore, a plaintiff who allowed a defendant to publish one edition of a work containing piracies from his works, and then, after the lapse of more

than twelve months, filed a bill in equity to restrain the publication of a second edition of defendant's work, with the same and other piracies in it, was neither compelled to proceed at law under the 15th section, nor prevented from suing in equity, by the 26th section of the statute. *Hogg v. Scott*, 705

Special facts constituting the piracy complained of by plaintiff, and circumstances under which he was held not to have acquiesced in the defendant's acts; but to be entitled to an injunction with costs. *Ibid.*

COPYRIGHT (continued) — *extension of term: owner: benefit to author*] — A committee of seven persons on behalf of a religious body compiled a hymn-book, which was registered under 54 Geo. 3. c. 156 as the property of the compilers, but was published by and sold for the benefit of the religious body. No minute of consent having been registered under the Act of 5 & 6 Vict. c. 45, — *Held*, that the term of the copyright had not been extended under that Act, but ceased on the death of the last survivor of the seven compilers. *Marzials v. Gibbons*, 774

COSTS — *stakeholder: interpleader: parties*] — A suit was filed against stakeholders; to this the persons entitled were not made parties, but an offer to make an arrangement to protect the goods, *pendente lite*, was made them. They, nevertheless, sued the stakeholders at law. They were made parties to the suit by amendment on an order made before the action was commenced. The stakeholders sued to restrain the action, not making the plaintiffs in the first suit parties to their suit. The first bill was dismissed: — *Held*, that the plaintiffs in the second suit must be allowed their costs out of the fund. *Laing v. Zeden*, 239

— *application for costs in old and second suit*] — Where a party claims his costs out of a fund paid into Court in an old suit, and a second suit is instituted with respect to the fund, which latter suit afterwards abates, the proper course for the claimant to adopt is to present a petition, entitled in both suits, stating the special facts of the case, and praying relief accordingly. *Harris v. Rich*, and *De Rozas v. Rich*, 440

— *several defendants: severance*] — Though a solicitor who accidentally (or upon separate retainers) represents two or more parties ought to distinguish the charges incurred for each separate party, yet where there is a joint retainer (or by trustees not severing in their defence) he can enforce the whole bill of costs incurred against either of the parties. *Watson v. Row*, 664

Two trustees gave a joint retainer in a suit to administer the trust estate. One became insolvent and was indebted to the estate: — *Held*, that the surviving trustee should have the

whole costs of himself and his co-trustee allowed out of the estate without any set-off in respect of the estate. *Ibid.*

— *term for raising portions: raising costs as well as portions*] — Power to raise a sum of money by mortgage includes power to raise also by mortgage the costs of effecting the security. *Armstrong v. Armstrong*, 719

Trustees of a marriage settlement made in 1802 were empowered to raise and levy the sum of 6,000*l.* for portions on the security of a term of 300 years in certain freeholds. Part of the 6,000*l.* was raised. In 1872 it became necessary to raise the residue, which then amounted to the sum of 3,290*l.* 8*s.* 4*d.* By an order then made in this suit which was instituted for the execution of the trusts of certain indentures of settlement, certain trustees were authorised to advance this amount out of their trust funds upon the security of the term. Considerable costs had to be incurred in effecting the security, and it was now asked that the lastly named trustees might be at liberty to advance a further sum out of their trust funds upon the same security to cover the costs so incurred: — *Held*, that the term of 300 years might properly be taken as a security, not only for the whole amount of 6,000*l.*, but also for the costs. *Ibid.*

— of the day where objection for want of parties not taken by answer. See Administration of Estate.

— See Administration of Estate. Contract. Contributory. County Court. Executor. Injunction. Railway Company. Security for Costs. Solicitor. Taxation of Costs. Winding up of Company.

COUNTY COURT — *concurrent jurisdiction: costs*] — A plaintiff who sues in Chancery for a sum within the County Court limit, and obtains a decree, is entitled to the usual costs, and not merely to those which he would have been allowed in the County Court. *Brown v. Rye*, 228

— *subject matter of plaint exceeding 500*l.* in value: dismissal of suit, or transfer to Court of Chancery*] — A County Court plaint alleged that the subject matter of the suit was less than 500*l.* in value, but upon the suit coming on for hearing it was proved that the value exceeded 500*l.*, whereupon the County Court Judge, acting under s. 14 of the County Courts Act, 1867, dismissed the plaint with costs. Upon appeal, *Held* (reversing the decision of the County Court Judge), that he ought to have directed the suit to be transferred to the Court of Chancery, under s. 9 of the County Courts Act, 1865. Section 14 of the Act of 1867 applies only to actions and suits relating to matters over which the County Courts have no jurisdiction. *Thomson v. Finn*, 256; *Birks v. Silverwood* (41 Law J. Rep. (n.s.) Chanc. 638) observed upon. *Ibid.*

— *administration suit: action by creditor against executor de son tort: injunction to stay before decree*—A creditor of an intestate having brought an action against the executor *de son tort*, for the recovery of his debt, an injunction staying the action was granted by the County Court Judge, acting under the County Court Order XII. r. 1, upon the *ex parte* application of the plaintiff in an administration suit against the rightful administrator of the intestate and the executor *de son tort*, but before any decree had been made in the suit:—*Held*, on appeal, that Order XII. r. 1, gave no authority to the County Court Judge to grant the injunction, and that he was wrong in granting it on an *ex parte* application. Order of injunction accordingly discharged. *Nokes v. Gandy*, 276

COVENANT—in restraint of trade. See Bond.

— to settle after acquired property. See Will.

CUSTOM. See Bill of Lading.

DAMAGES. See Banker. Light and Air. Specific Performance.

DEBTOR AND CREDITOR—Garnishee Order. See Banker.

DEBTORS ACT. See Prisoner.

DECEIT. See Company—*Peck v. Gurney*. Contract—*The Attorney-General v. Ray*.

DECREE—Enrolment of. See Practice.

DEED—deposit of. See Guarantee.

DEFAMATION—fair expression of opinion. See Injunction—*Glover v. Royden*.

DEMURRER. See Company.

DEVISE. See Ademption. Annuity. Will.

DISCOVERY—*privilege: communications with solicitor*—Communications (including a bill of costs) of suitor with his solicitor, relating to the matters in suit, before commencement of proceedings, held privileged, though the solicitor made an affidavit on behalf of the suitor.—*Ninet v. Morgan* (42 Law J. Rep. (n.s.) 627), followed. *Turton v. Barber*, 468

— *exceptions to answer: redemption suit: refusal to account before decree*—A mortgagee in possession, defendant to a bill for redemption, admitting himself by his answer to be redeemable, cannot decline to answer interrogatories requiring him to set forth an account of the rents and profits of the mortgaged hereditaments, the rule being that when a party

answers he is bound to answer fully. *Elmer v. Creasy*, 166

— *of accounts not material to the issue*—A bill was filed by a company to make the defendants (a solicitor and a mining agent) account for a secret profit made on the sale to the company of a colliery which the defendants were alleged to have purchased on their own account in the name of the ostensible vendor, and resold to the company at an advanced price while they were engaged in getting up the company, and acting in a fiduciary relation towards it. The defendants were interrogated as to the cheques drawn on a banking account opened for the purposes of the purchase:—*Held*, that the required discovery was immaterial to the real question in the suit (whether an agency had existed at the time of the purchase), and that the Court would not compel the defendants to answer the interrogatory. *The Great Western Colliery Co. v. Tucker*, 518

— *answer: exceptions: suit for recovery of assets: alleged appropriation by late partners*—The executors of a wine merchant were authorised by his will to carry on his business. His executrix entered into partnership with B. and G., and carried on the business in partnership with them for fourteen years. At the end of that term the partnership was dissolved. Shortly afterwards the executrix having discovered that B. and F. were carrying on together the business of wine merchants in the neighbourhood of the old firm, filed her bill against B., F., G. and others, alleging that under a scheme concocted by B. and G. the goodwill and stock-in-trade and assets belonging to the old firm had been appropriated to and used in the business of B. & F., and claiming that the testator's estate was entitled to share in the profits made by B. & F. F. declined to answer an interrogatory asking what sums had been drawn out of the business of B. & F. by the several partners therein:—*Held*, on exceptions, that F. must answer this interrogatory. *Saull v. Browne*, 568

DOMICILE—*abandonment of domicile of origin*—In 1858 M. left Canada, which was his domicile of origin, sold his house and burial-ground there, and came to Paris to educate his children. He lived in Paris ten years, but went over several times to Montreal, and amongst other things made his will there, describing himself as of Montreal. In 1868 he came to England and took a lease of a house in London. His daughter married and settled in London, and he purchased for his son a share in a business in London. M. died in 1871:—*Held*, that M. had acquired and shewn an intention to retain an English domicile. *Stevenson v. Masson*, 134

DONATIO MORTIS CAUSA. See Husband and Wife.

EASEMENT. See Light and Air.

EJECTMENT BILL. See Infant.

ELEGIT—writ of. See Judgment Creditor.

ELEMENTARY EDUCATION ACT, 1870—*buildings by School Board: lands injuriously affected: compensation: injunction*—The sections of the Lands Clauses Consolidation Act, 1845, relating to the purchase of lands, are incorporated in the Elementary Education Act, 1870, for all purposes, and their application is not confined to cases where the relation of vendor and purchaser exists. Therefore the remedy of a person whose lands are injuriously affected by the works of the School Board, but no part of whose land is taken, is by proceeding for compensation under section 68 of the Lands Clauses Act, and not by bill for an injunction. *Macey v. The Metropolitan Board of Works* (33 Law J. Rep. (N.S.) Chanc. 377) approved of and followed. *Clark v. The School Board for London*, 421

EQUITABLE MORTGAGE—*deposit of deeds: marriage settlement: constructive notice of charge by non-enquiry as to deeds: negligence of solicitor*—A. deposited the title deeds of an estate with his bankers, and signed a memorandum charging the estate with payment of a sum due from him to the bankers. He afterwards married, and in consideration of such marriage he settled the estate by articles and shortly after marriage executed a settlement conveying the legal estate to a trustee. During the negotiations he told the lady's solicitor that he was entitled to the estate free from incumbrances, and that the deeds were at his bank for safe custody:—*Held*, that the solicitor ought to have enquired of the bankers whether they had a charge upon the deeds, and that, as he omitted to do so, all persons claiming under the settlement were fixed with constructive notice of the charge. *Maxfield v. Burton*, 46

EQUITY—*delivery up of bond*—No bill will lie in equity for the delivery up of a bond, after the bond debt is paid, though by the tenor of the bond the money secured would be payable at a future date, so that there was no present right of action. *Binns v. Fisher*, 188

— Remedy at Law. See Voluntary Payment.

ESTOPPEL—*by representations: equitable assignment: specific appropriation*—Estoppel by representations applies only where the representation is as to a fact in existence at the time, not where it is as to something yet to come or as to a matter of future intention. *Citizens' Bank of Louisiana v. The First National Bank of New Orleans* (H.L.), 269

A representation or assurance given by the drawer of a bill, that the bill was drawn "specially" or "expressly" against funds already remitted by him more than sufficient to meet the bill on maturity, does not amount to a specific appro-

priation or equitable assignment of the funds so remitted, although it be given to one who is induced thereby to purchase the bill, unless it is also represented, or the fact is, that there was a trust already constituted, by which the payer of the bill would hold funds in trust for the payment of the particular bill, or of bills of that particular class or description. *Ibid.*

— See Priority. *Heath v. Crealock*.

EVIDENCE. See Witness.

EXECUTION—*legal remainder*—An estate in remainder cannot be delivered in execution by the sheriff. *In re South*, 441

— See Judgment Creditor.

EXECUTOR—*of executor: original executor insolvent: breach of trust by original executor: costs*—An executor died insolvent, having misapplied the assets. An administration suit having been instituted against his executors, who had received part of the testator's estate, they duly accounted for what they had received:—*Held*, that they were entitled to the costs of accounts against themselves, not to costs of accounts against the estate of the insolvent executor, and that as to other costs of suit, being parties in both capacities, they should have half the costs. *Palmer v. Jones*, 349

— *right to interest*—An executor who expended money of his own for the benefit of the estate was allowed simple interest at 4l. per cent. *Finch v. Prescott*, 728

— See Trust and Trustee—*Jervis v. Wolferstan*.

FOREST OF DEAN—*exhaustion of gale*—A gale to work a coal mine is "exhausted" within the meaning of 1 & 2 Vict. c. 43. s. 61, when there is not enough coal left in it to make it worth working. *Elthway v. Davis*, 75

— *rights of free miners: application for gale: death of applicant before grant: right of representatives*—A free miner of the Forest of Dean applied for an unoccupied gale. The gaveler acceded to the application, duly entered it in his book, and gave notice of his intention to make the grant upon a certain day. Conflicting claims being set up, the actual grant of the gale was delayed, and, in the meantime, the free miner died. The devisees under his will then presented their petition of right, praying that the gale might be granted to them in right of their testator. Upon demurrer by the Crown,—*Held*, that the 38th section of the Act, 1 & 2 Vict. c. 43, applied only to the state of things at the passing of the Act, and that the free miner had acquired a title transmissible by will; and the demurrer was overruled accordingly. *James v. The Queen*, 754

FORFEITURE—name and arms clause: remainderman: ignorance of clause—Section 4 of 3 & 4 Will. 4. c. 27, extends to forfeitures which operate to accelerate an estate under a conditional limitation as well as to forfeitures, of which the heir-at-law only can take advantage. *Astley v. The Earl of Essex*, 817

A devisee under a conditional limitation is not protected from forfeiture by ignorance of the condition. *Ibid.*

FRAUD. See Undue Influence.

FRAUDS, STATUTE OF. See Specific Performance—*Sale v. Lambert*.

FUND IN COURT. See Practice. Will—*In re Row's Estate*.

GUARANTEE. See Banker.

HUSBAND AND WIFE—donatio mortis causa: railway scrip certificates: deposit note—Plaintiff (who was her husband's executrix) claimed railway certificates and a deposit note, either as having been given to her by her husband in his lifetime, or on the ground that he had constituted himself a trustee of them for her, or as *donationes mortis causa*:—*Held*, following *Ward v. Turner* (2 Ves. sen. 431) that railway certificates could not be made the subject of a *donatio mortis causa*; and held, on the facts, that she was not entitled to the railway certificates, but was entitled to the deposit note as a *donatio mortis causa*. *Moore v. Moor*, 617

— Alienation during coverture. See Anticipation.

— Wife's equity to a settlement. See Administration of Estate—*Knight v. Knight*.

— See Marriage Settlement.

INDEMNITY. See Bill of Lading. Company.

INFANT—recovery of land: legal title: equitable title: construction: private act of parliament—An infant may file a bill in equity to recover land under an equitable title, whether he has been in possession himself or not. *Crowther v. Crowther* (23 Beav. 305; s.c. 26 Law J. Rep. (n.s.) Chanc. 702) dissented from. *Howard v. Earl of Shrewsbury*, 495

An infant filed a bill claiming real estate under an equitable title; it was held at the hearing that on the construction of the documents he had a legal title, but the Court made a decree without requiring any amendment. *Ibid.*

A private Act of Parliament vesting lands in trustees on trust to sell, proceeding on the supposition that the lands are comprised in a settlement, does not bring the lands within that settlement if they were not in it previously. *Ibid.*

— See Administration of Estate—*Houghton v. Fidley*. Solicitor and Client—*Prichard v. Roberts*.

INJUNCTION—concurrent jurisdiction: proceedings to restrain action at law: costs—The plaintiffs in this suit were defendants in two actions at law in respect of certain policies of insurance. An order was made at law staying the proceedings in one action till the other had been tried. Defendants at law agreed to be bound by the result of the first action, but the plaintiffs at law were to be at liberty to proceed with the second action if they failed in the first. The bill in this suit was filed to restrain both actions, but proceedings in the suit were stayed till verdict was given in the first action. Ultimately the Court of Law decided the first action in favour of defendants at law. This suit was then proceeded with to restrain the plaintiffs at law from proceeding with the second action, and for the delivery up of the policies, which were the subject of both actions:—*Held*, that, as the plaintiffs were liable to have the second action brought against them, they were entitled to come to this Court and to have the proceedings at law restrained; and that as they were clearly right with respect to the subject-matter of the suit, the whole of the costs of the suit must be paid by defendants. *The London and Provincial Marine Insur. Co. v. Seymour*, 120

— *Bristol Improvement Acts: windows in party walls*—A wall may be a party wall, within the meaning of the Bristol Improvement Acts, 1840 and 1847, for part of its length or height, and an external wall for the remainder of its length or height. *Weston v. Arnold*, 123
A wall in Bristol separating buildings, but having in it, above the buildings, windows enjoying rights of light, was condemned as a party wall under the local Acts, on proceedings taken by the owner of the lights, and ordered to be rebuilt. The Acts contain provisions that there shall be no openings in party walls of new or re-erected buildings, except iron doors for communication between the separate buildings:—*Held*, that the Acts did not apply to these windows, and that the owner of the lights could maintain a suit to restrain the erection of a building that would interfere with them. *Ibid.*

— *act to be performed: negative words: substance of agreement*—In considering whether to grant or refuse an injunction to restrain a breach of a particular clause of an agreement, the Court will look to the substance of the act to be performed, and not merely to the presence or absence of negative words. *The Wolverhampton and Walsall Rail. Co. v. The London and North Western Rail. Co.*, 131

A lease of a line of railway contained an agreement by the lessee company to carry over it all traffic between certain places, and to pay the lessor company one-half the receipts in respect

of such traffic. The lease contained other provisions on which no relief could have been obtained in equity, and it contained no negative stipulation restricting the lessee company from carrying the traffic in question over other lines. On demurrer to a bill by the lessor company alleging that the lessee company were carrying the traffic mentioned in the agreement over other lines of their own, and praying for an injunction to restrain them,—*Held*, that relief could be granted in such a case, and the demurrer must be overruled. *Ibid*.

INJUNCTION (continued) canal company: water: riparian proprietor—An injunction will be granted at the suit of a canal company entitled to take water from a stream to prevent abstraction of the water though damage is only shewn to have taken place in an exceptionally dry season. *The Wilts and Berks Canal Nav. Co. v. The Swindon Waterworks Co.*, 393

Seem, that at law, an action could be brought and nominal damages recovered for the abstraction of the water, though no real damage was shewn to prevent an adverse title being acquired by prescription. *Ibid*.

Where a canal company lawfully buy land to enable them to take a stream and construct a culvert for that purpose, they acquire in respect of that land, and of the culvert constructed, the rights of ordinary riparian proprietors, and though a canal company may be entitled to sell any surplus water from their canal, they are only entitled to an injunction to prevent interference with a feeding stream so as to cause damage to their navigation or their ordinary use of the water as riparian proprietors. *Ibid*.

— **right of shooting: necessary interference with right: sale for building purposes**—G., owner of a farm of 180 acres subject to a right of shooting, which had been demised for a term to P., staked out a road across the farm, pulling down two hedges for the purpose, and put up the farm for sale by auction in thirteen lots, some of which were described as eligible for building purposes. The particulars mentioned the right of shooting, and stated that the sale was subject to such right. On bill for injunction by P. to restrain the sale,—*Held*, that it did not appear that the sale must inevitably result in an injury to the plaintiff's right of shooting, and that accordingly the bill must be dismissed with costs, and an enquiry was directed as to damages caused by the *ex parte* injunction. *Pattison v. Gifford*, 524

Principles on which Courts of equity act in granting injunctions to restrain threatened acts considered. *Ibid*.

— **performance of continuous act: Railways: Clauses Consolidation Act, 1845: working of points and signals**—Plaintiffs, a colliery company, having sidings which connected their collieries with a railway, gave notice to the

railway company of their desire to run engines and carriages over the railway, pursuant to the provisions of the 92nd section of the Railways Companies Clause Act, 1845. The railway company declined to give effect to the notice, and obstructed the passage of plaintiffs' trains over their line. Plaintiffs filed a bill to restrain the railway company from interfering with their use of the railway:—*Held*, that although plaintiffs were entitled, under the above section, to the use of the railway, the Court could not compel the railway company to employ their servants in working the points and signals on the line, or to entrust the working of them to plaintiffs' servants; and, since it was impossible for plaintiffs to exercise their rights without the use of the points and signals, their bill must be dismissed, but without costs. *The Powell Duffryn Steam Coal Co. v. The Taff Vale Railway Co.*, 575

— **confidential communication: agent: telegram: cypher**—Plaintiffs, a telegram company in London, made an arrangement with defendants, being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names and addresses of the principal customers; and defendants were described as plaintiffs' agents. In a little time the parties quarrelled, and one of the defendants came to England to carry on an independent telegram business with his partner in Australia, and sent circulars to plaintiffs' customers, mentioning that he had their cyphers. On motion to restrain him from using the cyphers,—*Held*, that there was nothing confidential in the cyphers, and that he was entitled to use them. *Reuter's Telegram Co. v. Byrom*, 661

— **injury to property: fair expression of opinion: published registry of ships**—An association formed to supply, through an annual published registry, information, as to iron ships, to members and subscribers, and reserving the right to make periodical surveys of ships registered, objected to certain alterations made in a ship of their highest classification, inserted the words "class suspended" opposite her name in their list, and refused either to omit those words or to withdraw her name from the list:—*Held*, that there being no proof of malice, falsehood or unfair dealing, the association were entitled to publish their *bona fide* opinion, although it was injurious to the property of the shipowners, and a motion by the shipowners to restrain publication of the words "class suspended," and to compel the withdrawal of the ship from the list, refused with costs. *Clover v. Royden*, 665

— **to restrain trespass**—Where the plaintiff's title is not disputed the Court will grant an injunction to restrain acts of trespass without requiring him first to bring an action at law. *Goodson v. Richardson*, 790

If the plaintiff is guilty of no acquiescence or delay he will be entitled to a mandatory injunction, though the works complained of may have been completed before the filing of the bill. *Ibid.*

— See Banker. Bond. Copyright. County Court. Elementary Education Act. Insurance. Patent. Light and Air. Specific Performance.

INNS OF COURT—Action by on suretyship bond. See Jurisdiction.

INSURANCE—*subrogation: indemnity: third party liable*—Defendant owned a warehouse at H., which he had insured for about a third of its value in several insurance offices, and which was burnt down by the negligence of servants of the corporation of H. On a motion in a suit instituted by the insurance companies to restrain defendant from suing the corporation for less than the whole loss, and from compromising the action to the prejudice of plaintiffs, and from refusing to allow plaintiffs to sue the corporation in his name, he undertook to sue the corporation for the whole loss, and not to compromise the action otherwise than *bona fide*:—*Held*, that this undertaking gave plaintiffs all the relief to which they were entitled before the hearing. *Commercial Union Insur. Co. v. Lister*, 601

— See Limitations, Statute of.

INTEREST—*appeal: interest on repayment of money*—Interest at 4l. per cent. was allowed on money which had been paid on an order which was reversed on appeal. *The Merchant Banking Company of London v. Maud*, 861

— *rate of: security for money: damages: implied contract*—Where a person borrows money for a certain period, with interest at a certain rate down to the day named, a contract for payment of interest at that rate after the day named is not to be implied. The principal and interest, if not then paid, becomes a debt, and any allowance for its detention or non-payment made by any tribunal before which the payment may be sought, is in the nature of damages, not of interest. *Cook v. Fowler* (H. L.), 855

Although the rate of interest agreed on for the time certain is usually adopted as the proper measure of the damages for the subsequent delay, the tribunal may look at all the circumstances of the case, and award such a rate of interest as shall appear fair and reasonable. *Ibid.*

— See Administration of Estate—*Turner v. Buck*. Contract—*Hill v. South Staffordshire Rail. Co.* Executor. Mortgage. Solicitor and Client.

INTERPLEADER. See Costs. Stakeholder.

NEW SERIES, 43.—INDEX, *Chanc.*

INTERROGATORIES. See Charitable Legacy. Discovery.

INVESTMENT. See Railway Company—*Fisher v. Fisher*.

JUDGMENT CREDITOR—*writ of elegit*: “actual delivery in execution:” charge on equitable estate: “incorporeal” hereditaments—To entitle a judgment creditor to a valid charge on his debtor's real estate, under 27 & 28 Vict. c. 112, there must be actual delivery in execution under the writ of *elegit*. The Act makes no distinction in that respect between hereditaments corporeal and incorporeal. *Hatton v. Haywood*, 372

Where the estate of the judgment debtor is equitable only and therefore incapable of delivery in execution the creditor should obtain the decree of the Court of Chancery vesting in him the estate of the debtor, and this will be equivalent to delivery in execution in the case of legal estates. *Ibid.*

The plaintiff recovered a judgment at law against the owner of the equity of redemption in certain real estate. The judgment was duly registered, and a writ of *elegit*, also duly registered, was issued against the lands of the judgment debtor, and delivered to the sheriff for execution, but in consequence of the debtor's interest in the lands being merely equitable, the sheriff was unable to execute the writ, and he accordingly returned “*nil*.” The debtor subsequently became bankrupt. A bill having been filed by the judgment creditor for a declaration that his judgment constituted a valid charge on his debtor's equity of redemption, a demurrer for want of equity was allowed by one of the Vice-Chancellors, and upon appeal the judgment was affirmed by the full Court.—*Thornton v. Finch* (4 Giff. 515; 34 Law J. Rep. (N.S.) Chanc. 466) observed upon. *Ibid.*

JURISDICTION—*infant's copyhold: power to raise fine by mortgage of copyhold*—The Court has no jurisdiction to direct a fine in respect of copyholds to which an infant has become entitled as customary heir of an intestate to be raised by a mortgage of the copyholds. *Harbros v. Combes*, 336

— *action at law on suretyship bond by Inn of Court against a member of it: bill to restrain the action: appeal to the Judges*—A Court of Equity has no jurisdiction to restrain an action at law by an Inn of Court against one of its own members on his suretyship bond. The proper tribunal is that of the Judges of the superior Courts of England and Wales, in their visitatorial capacity over the Inn. *Neale v. Denman*, 409

— *attachment out of lord mayor's court: garnishee*—Plaintiffs, merchants in London and Madras, issued an attachment out of the Lord Mayor's Court, to attach moneys in

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the hands of B. for a debt due from V., of Madras. B. pleaded a prior attachment by S., a foreign creditor, and so the action of the plaintiffs in the Lord Mayor's Court was defeated. Plaintiffs filed a bill alleging that the prior attachment was not for a *bona fide* debt, and praying for an account and payment of their debt:—*Held*, that this Court had jurisdiction to decide the matter, and the Court being of opinion that no debt was due to S., directed payment to the plaintiffs of the debt due to them. *Shand v. Du Buisson*, 508

JURISDICTION (continued)—foreign contract and parties: stakeholder within the jurisdiction—The Court of Chancery will not entertain a suit in respect of a foreign contract, in which the parties are foreign subjects and the subject-matter is in a foreign country, although the plaintiff's claim is in respect of moneys in the possession of a second defendant as stakeholder, and who is within the jurisdiction. *Matthaei v. Galitzin*, 536

— See Administration of Estate—*Land v. Land*. Equity. Limitations, Statute of. Specific Performance. Winding up of Company.

LANDS CLAUSES ACT—lien for costs on deposited fund—A landowner has no claim against a fund deposited as security under s. 85 of the Land Clauses Consolidation Act, for his costs under the Act. *Ex parte Neath and Brecon Rail. Co.* 277

— *certificate of subscription conclusive evidence*—A certificate of two justices under section 17 of the Lands Clauses Consolidation Act, or of one police magistrate under 2 & 3 Vict. c. 71. s. 14, that the capital of a company is all subscribed, being made sufficient evidence by the Lands Clauses Act, is conclusive on all landowners with whom the company deals, unless it be proved to have been obtained by fraud. *Ystalyfera Iron Co. v. Neath and Brecon Rail. Co.*, 476

— *land purchased by railway company from limited owner: application of purchase money*—A railway company took part of the glebe land belonging to a rectory. The patron of the living and the bishop agreed with the rector that the purchase money, when paid by the company, should be applied in paying part of the expense of rebuilding the rectory house, which was in a ruinous condition, the remainder of the money required being borrowed from Queen Anne's Bounty. The company neglected for some years to pay the money, and in order to complete the rebuilding the rector advanced a sum equal to the purchase money himself. The company having paid the purchase money, the rector, the patron and the bishop petitioned that it might be paid to the rector to recoup his advance:—*Held*, that the Court had no power under section 69 of the Lands Clauses Act to direct such

an application of the money. *Williams v. The Aylesbury and Buckingham Rail. Co.*, 825

LEASES AND SALES OF SETTLED ESTATES ACT—concurrence of unascertained contingent remainders and devisees in trust for sale—Lands were devised to trustees in trust for a tenant for life, and after her death upon trust to sell, with power to give receipts, and to hold the proceeds on trust for all the children of the tenant for life who should be living at her death and should attain twenty-one, and the issue then living, who should attain twenty-one, of any child who should have previously died, *per stirpes*, as tenants in common. The tenant for life had six children, one of whom, Mrs. Were, was married and had infant children. Upon a petition for a sale under the Leases and Sales of Settled Estates Act, the trustee, the tenant for life, and all her children were either represented or willing to concur, but the infant children of Mrs. Were were not represented:—*Held*, first, that, as a class of persons entitled to a contingent interest who could not at present be ascertained, the concurrence of the infant children of Mrs. Were was not requisite. Secondly, that the property being devised to trustees upon trust for sale with power to give receipts, the concurrence of the *cestui que trusts* was unnecessary. *In re Strutt's Trusts*, 69

— *error in advertisements: payment of purchase money to trustees*—In a petition presented under the Settled Estates Act for the sale of certain devised estates, testator was correctly described as of Gotham, in the county of "Nottingham," but in the advertisements issued under s. 20 of the Act, and Gen. Ord. XLI. rules 14, 15, he was by mistake described as of Gotham, in the county of "Middlesex":—*Held*, that the error was not one likely to mislead, and that therefore the irregularity might be waived. *In re Hemaley's Settled Estates*, 72

The will contained a trust for sale and division of the proceeds, but not being immediately exerciseable by the trustees, a sale was ordered under the above Act:—*Held*, that the proceeds might be paid to the trustees, instead of being applied as directed by section 23. *In re Morgan's Settled Estates* (Law Rep. 9 Eq. 587) followed. *Ibid*.

— *interim investments: cash under the control of the Court*—Purchase moneys in Court arising from a sale under the Settled Estates Act are "cash under the control of the Court," within the 23 & 24 Vict. c. 38, ss. 10, 11, so as to empower the Court to order them to be invested as such. *In re Taddy's Settled Estates*, 191

— *application of sale moneys: permanent improvements: buildings*—Under section 23 of the Leases and Sales of Settled Estates Act, the Court has power to direct that money arising from a sale under the Act be laid out in per-

manent improvements of the remainder of the settled estate, such as the erection of new farm buildings. *In re Newman's Settled Estates*, 702

LEGACY—general or specific—A married woman having a testamentary power of appointment over a certain settled sum of stock by her will appointed the stock, "or the stocks or funds which might at her death represent such trust funds," to certain legatees:—*Held*, that the legacies were specific not general. *Davies v. Fowler*, 90

Testatrix not having exhausted the whole of the stock, appointed the residue thereof to trustees upon trust to sell and divide the proceeds, after payment thereof of her debts and funeral and "testamentary expenses," between her nephews and nieces:—*Held*, that the gift of the residue was also specific, but that the probate duty was chargeable exclusively on the residue. *Ibid*.

— *double portions: satisfaction: ademption*]
—Where a father after giving by his will a portion to his child advanced to such child a portion without any deed or instrument, such provision in the absence of circumstances negating the presumption, was held an ademption *pro tanto*. *Leighton v. Leighton*, 594

The occasion of a subsequent advancement satisfying or ademing a previous one need not be the marriage of the child or any other occasion calling specially for the advancement of the child. *Ibid*.

— *cumulative or non-cumulative*. See Will—*Whyte v. Whyte*.

— *interest on*. See Administration of Estate—*Turner v. Buck*.

— *of a debt*. See Ademption.

LESSOR AND LESSEE—underlease: covenant not to assign or underlet without license—A lease of mines was granted by S. to W., the latter covenanting not to assign or underlet without the consent of S. W. died and his representative agreed, with the consent of S., to underlet a portion of the property in the lease to B., the underlease to contain "like provisions and conditions" as the original lease. The rest of W.'s interest in the lease was then assigned to C., subject to the agreement with B. On question raised by C., as underlessor, as to whether the lease to B. should be so framed as to necessitate the original lessor or the underlessor being consenting parties to any future assignment or underlease by B.:—*Held*, that the lease must be so framed that the consent of the original lessor only should be necessary. *Williamson v. Williamson*, 382

— *underlease: covenant not to assign or underlet without license*—A lease of mines

was granted by S. to W., his executors, administrators and assigns (described as the "lessee or lessees"), W. covenanting that the lessee or lessees would not assign or underlet without the consent of S., his heirs or assigns. There was a proviso of re-entry in case they did so. W. died, and his executor agreed, with the consent of S., to underlet a part of the property comprised in the lease to B., the underlease to contain "the like provisions and conditions" as were contained in the original lease. W.'s interest in the original lease was then assigned to C., subject to the agreement with B. A question was raised by C., as underlessor, whether the lease to B. ought to be so framed as to require the consent of the original lessor or of the underlessor to any assignment or underlease by B.:—*Held* (reversing a decision of Bacon, V.C., p. 382), that the lease must be so framed as to require only the consent of the underlessor, and also that upon the true construction of the original lease, the consent of S. was not required to any assignment or underlease made by an underlessee of whom S. had approved. *Held* also, that the original lessor could not, by the terms of a license to underlet, enlarge the proviso for re-entry reserved by the original lease. *Williamson v. Williamson*, 738

LIEN—on securities. See Banker. And see Lands Clauses Act.

LIGHT AND AIR—personal inspection of buildings by judge—A Judge of the Court of Chancery ought not to make a personal inspection of buildings in order to ascertain whether a material diminution of light and air is caused in any case. *Leech v. Schweder*, 232

— *prescription act: mandatory injunction: damages*—The right of an owner of ancient lights is to prevent his neighbour from obstructing the access of sufficient light and air to such an extent as to render his house substantially less comfortable and enjoyable, and the Prescription Act (2 & 3 Will. 4. c. 71) has not altered the nature of the right or the principle on which it is to be determined whether it has been infringed, but has merely substituted a statutory title for an assumed grant. *City of London Brewery Co. v. Tennant*, 457

Semhle, where a building obstructing the access of light has been completed before bill filed, the Court has jurisdiction under Lord Cairns' Act (21 & 22 Vict. c. 27) to award damages, notwithstanding the plaintiff may not have made out such a case as would entitle him to a mandatory injunction; and *Durell v. Pritchard* (35 Law J. Rep. (n.s.) Chanc. 223) is not an authority for the contrary proposition. *Ibid*.

— *grant by owner of two tenements: general words: covenant for quiet enjoyment: extent of right*—A grant of lights by the general words in a lease or other conveyance followed by th

ordinary covenant by the grantor for the quiet enjoyment of the premises, confers on the grantee, as against the grantor and those claiming under him, a right of no greater extent than the ordinary right to light which is acquired by twenty years' user. A plaintiff, therefore, who claims under such a grant, and who complains of an interference with the access of light to his premises, must, in order to sustain his case, shew that a substantial injury has been or will be done to him.—Decision of the MASTER OF THE ROLLS reversed. *Leach v. Schweder*, 487

LIGHT AND AIR (continued)—enlargement of windows: damages—The fact that an owner of ancient lights has enlarged his windows does not disentitle him to an injunction to protect the ancient lights. *Aynsley v. Glover*, 777

In a light and air case it is immaterial that the plaintiffs are using the premises affected for a purpose for which light and air are unnecessary. It is sufficient that the premises are capable of being used for purposes requiring light and air. *Ibid.*

Wherever a plaintiff would recover substantial damages at law he has a right to sue in a Court of Equity, but there may be cases where the Court of Equity will exercise the power conferred on it by Cairns' Act, 21 & 22 Vict. c. 27, and give damages instead of an injunction. But the Court will not let the defendant gain an advantage in this respect by refusing an interlocutory injunction, and merely putting him on an undertaking to pull down if ordered at the hearing. *Ibid.*

— See Injunction—*Weston v. Arnold*.

LIMITATION—of suit. See Copyright.

LIMITATIONS, STATUTE OF—executor: probate: delay: accrues of right of action—Testator died owing a debt of 100*l.* His widow, who was tenant for life under his will of both his real and personal estate, took possession accordingly, and paid interest on the debt for some years, and then ceased to pay any interest. After an interval of rather more than six years from the last payment of interest, testator's will was proved in consequence of proceedings taken by the creditor; and shortly after the grant of probate the creditor filed a bill for administration of the real and personal estate of testator:—*Held*, that his debt was barred by the Statute of Limitations, and the bill must be dismissed with costs. *Boatwright v. Boatwright*, 12

— express trust: mutual benefit society: contract of insurance: jurisdiction: objection to not taken by demurrer or plea—The Bombay Civil Fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members, and by a grant

from the Government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands of the Government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the Secretary of State for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime,—*Held*, that there was no fiduciary relation between the trustees of the fund and a person making a claim against the fund, and that therefore the plaintiffs could only recover the arrears of the annuity which accrued due within six years before the filing of the bill. *Edwards v. Warden*, 644

Held, also, that even assuming that the suit ought to have been instituted in Bombay, still inasmuch as the defendants resident in India had appeared unconditionally, had not moved to discharge an order made for service of the bill on them in India, and had not raised any objection to the jurisdiction by demurrer or plea, and as the Government of India in fact held the money, and had taken no objection to the suit, the Court ought to decide the question in dispute. *Ibid.*

By the original rules of the fund the annuity to which the widow of a member was entitled depended upon the amount of his property at the time of his death. The rules were afterwards altered so as to give the widow of a member a fixed annuity independently of the amount of her husband's property. But it was provided that, to entitle a member to the benefit of this provision on behalf of his family, he must, after he had accepted a retiring annuity, subscribe to the fund one per cent. per annum on his annuity, or one per cent. on the total value of his annuity at the time of acceptance. A member retired while the altered rules were in operation. They were suspended a few months after his retirement, and the suspension was not removed till after his death. He never paid or tendered the subscription due from him:—*Held*, that the contract with the association was in the nature of a contract of insurance, and that, the premium not having been paid or tendered, no claim could be sustained by the member's widow against the association under the new rules. *Ibid.*

LOCAL BOARD OF HEALTH—power to take lands for public improvements: right to take more land than actually wanted for works—A corporation being, as the sanitary authority for a city, duly empowered to take certain lands specified in the schedule to their provisional order, for the purpose of public improvements, served notice to treat in respect thereof upon the trustees of a charity, who were the owners of the lands. The lands comprised in the notice were more

than were actually required for the purpose of the works:—*Held*, that the cases deciding that a railway company cannot take compulsorily more land than is actually required for its works did not apply to a corporation taking lands for public improvements, and that the corporation were entitled to take compulsorily the whole of the lands comprised in the notice. *Quinton v. The Mayor, Aldermen and Burgesses of Bristol*, 783

Observations upon *Galloway v. The Mayor of London* (2 De Gex, J. & S. 213, 639; s. c. on app. 35 Law J. Rep. (n.s.) Chanc. 477). *Ibid*.

LOCKE KING'S ACT. See Administration of Estate—*Gall v. Fenwick*.

LUNATIC—not so found by inquisition: substituted service on medical officer]—Where the medical officer of an asylum refused to allow service of a bill on a lunatic who was not so found by inquisition the Court allowed substituted service on the medical officer. *Raine v. Wilson*, 469

— See Partition. Practice—*Beall v. Smith*.

MANDATORY INJUNCTION. See Injunction—*Goodson v. Richardson*.

MARINE INSURANCE. See Bill of Lading.

MARRIAGE SETTLEMENT—*covenant to settle wife's after-acquired property*]—A covenant in a marriage settlement to settle all property to which the wife shall become entitled after the marriage, will, in the absence of any expressions in the settlement shewing a contrary intention, be restricted to property acquired during the coverture. The rule laid down in *Dickenson v. Dillwyn and Carter v. Carter* adopted in preference to that laid down in *Stevens v. Vanvoorst*. *In re Edwards*; and *In re The London, Brighton and South Coast Railways Act*, 265

MARRIED WOMAN—assignment of reversionary personality. See Set-off.

MARSHALLING ASSETS—*debts and legacies: charity*]—Testator devised real estate upon trust for sale and conversion, payment of debts and legacies; he also gave his personal estate, consisting of pure and impure personality, upon trust for payment of so much of his debts and legacies as the proceeds of sale of his real estate should be insufficient to pay, and directed his trustees to hold the residue upon trust for certain charities, and he declared that only such part of his estate should be comprised in the residue as might by law be given to charitable purposes. The proceeds of the real estate being insufficient to pay the debts and legacies,—*Held*, that the debts and legacies must be paid out of the impure personality. *Wills v. Bourne*, 89

MINN—When exhausted. See Forest of Dean.

MORTGAGE—*register county: unregistered charge: priority*]—A. took an agreement, not under seal, to execute a second mortgage of land in Yorkshire as security for money lent, but did not register:—*Held*, that a subsequent third mortgagee who registered, had priority over A.—*Moore v. Culverhouse*, 27 Beav. 639; s. c. 29 Law J. Rep. (n.s.) Chanc. 419, followed; *Wright v. Stanfield*, 27 Beav. 9; s. c. 29 Law J. Rep. (n.s.) Chanc. 183, not followed. *In re Wight's Mortgage Trusts*, 66

—*charge on book debts*]—A charge on future book debts, under a power to mortgage the property of a company, was upheld. *Bloomer v. The Union Coal and Iron Company*, 96

— *direction for payment of debts: specific devise: charge on other real estate for payment of debts*]—Testator devised his mansion house and other real estate (which were subject to a mortgage) to trustees, upon trust as to the mansion house to permit his widow to reside in it for her life, and as to the residue upon trust for certain persons in tail. He gave the trustees power to sell all except the mansion house, and out of the proceeds discharge "incumbrances," he gave his residuary personal estate to trustees upon trust to pay "debts" and legacies, and to pay the surplus, if any, to his brother, and declared that if the residuary personalty was not sufficient for payment of debts and legacies, the same should be charged on the real estate other than the mansion house:—*Held*, that the mansion house was not to be exonerated from the mortgage out of the personal estate. *Brownson v. Lawrence* (37 Law J. Rep. (n.s.) Chanc. 351) questioned. *Sackville v. Smyth*, 494

— *foreclosure: jurisdiction*]—The Court has jurisdiction to make a foreclosure decree in respect of lands situate out of the jurisdiction. *Paget v. Ede*, 571

— *redemption suit: amount chargeable against estate: transfer of mortgage: arrear of interest paid by transferee before transfer: costs*]—The interest on a mortgage being in arrear, the mortgagees in June, 1864, ordered it to be put up for sale under their power of sale. The mortgagor was a trustee, and he had committed a breach of trust in not keeping down the interest out of the rents of the property. He procured a person to take a transfer of the mortgage, who on the 14th of June, in order to stop the sale, paid the mortgagees 195*l.* for arrears of interest and costs. In September, 1864, he paid the mortgagees a further sum of 65*l.* for interest. The investigation of the title was not completed for some time, and the transfer of the mortgage was not executed until August, 1866, by which time further interest to the amount of 122*l.* had accrued due. The transfer deed recited that the

principal debt, the 122*l.* interest and 45*l.* costs, were due to the mortgagees, and by it they assigned to the transferee the principal debt and the last mentioned sums for interest and costs, and conveyed the property, subject to the equity of redemption. Contemporaneously with the transfer another deed was executed, by which the mortgagor purported to capitalise the arrears of interest and costs, and to charge the amount of them, with interest thereon, upon the estate. The title to the property gave notice to the transferee of the breach of trust which had been committed. A redemption suit having been instituted by the *cestuis que trust* against the transferee and the trustee, — *Held* (reversing a decision of HALL, V.C.), that the transferee was entitled to charge against the estate the sums which he had paid for interest and costs before the execution of the transfer. *Held also* (reversing the Vice-Chancellor's decision), that there was no ground for depriving the transferee of the costs of the suit. *Cottrell v. Finney*, 562

MORTMAIN—*legacy to charity payable out of realty and personalty: implication of power to devise lands*—A statute which in terms conferred upon a charity the power to acquire real estate by will, held by implication to empower testators to devise real estate to the charity, and the charity held entitled to have a legacy payable out of mixed realty and personalty paid in full, although the pure personalty was insufficient. *Perring v. Traill*, 775

NEGOTIABLE INSTRUMENT. See Bill of Lading.

NEXT FRIEND—*death and new next friend intervening: change of solicitors*—On the death of next friend of an infant plaintiff whose father and mother were dead, the infant's paternal uncle, by his solicitors (who were not the solicitors of the plaintiff on the record), obtained an order of course appointing them solicitors of the plaintiff in the suit, and another appointing the uncle next friend. On motion by the former solicitors of the plaintiff to discharge these orders, — *Held*, that they were properly obtained, and motion dismissed with costs. *Talbot v. Talbot*, 362

NEXT OF KIN. See Settlement.

NOTICE—Constructive notice. See Priority.

— Constructive notice of charge. See Equitable Mortgage.

PARTIES—*company: right of shareholder to sue: indemnity against breach of trust: charge of fraud: costs*—Where there is a corporate body capable of suing, that body only is the proper plaintiff in a suit for the recovery of property, whether from its officers or directors or from any

other person, and a bill for that purpose cannot be sustained by one shareholder on behalf of himself and all others except the defendants. The only exception to this rule is where the directors or majority of shareholders are doing something fraudulent against the minority, who are overwhelmed by them. *Gray v. Lewis*, and *Parker v. Lewis*, 281

Instance of a suit within the above-stated rule, and in which the whole scheme was held to be a sham, with regard to which no liability could arise, either at law or in equity, between the three companies who were parties to it. *Ibid.*

Where the decree in one of two suits was reversed, the bill in the second suit was dismissed, but without costs. *Ibid.*

— for payment of costs. See Trust and Trustee.

— See Administration of Estate—*Russell v. Morris*. Costs—*Laing v. Zeden*. Leases and Sales of Settled Estates Act. Partnership. Stakeholder.

PARTITION—*person of unsound mind not so found by inquisition*—A bill for partition of sale cannot be filed on behalf of a person of unsound mind not so found by inquisition. *Halfhyde v. Robinson*, 398

Where in the case of a small estate it is desired to deal with a lunatic's realty, without incurring the expense of an inquisition, the proper course is to proceed under the summary powers of section 120 of the Lunacy Regulation Act, 1853. *Ibid.*

— *infant's costs: sale of more than is required*—When real estate of an infant is ordered to be sold for payment of costs or any other special purpose, and more is sold than is required, the surplus proceeds of sale are converted into personal estate, and on the death of the infant go to his personal representatives—*Jerry v. Preston* (13 Sim. 356), and *Cooke v. Dealey* (22 Beav. 196) questioned. *Steed v. Preece*, 687

PARTNERS—*articles of partnership: arbitration clause: Common Law Procedure Act*—In this case two partners gave to a third partner a notice of dissolution of partnership, which alleged breaches of the partnership articles. The articles provided that any dispute or difference between the partners should be referred to arbitration. The two partners filed their bill for dissolution, and on the same day the third partner gave notice that he required all the matters in dispute to be submitted to arbitration:—*Held*, on the motion of the third partner, that he was entitled to an order staying proceedings in the suit, and to have the matters in dispute referred to arbitration. *Plews v. Baker*, 212

— *rights of representatives of deceased partner: agreement between surviving partners and executors and trustees of deceased partner*]

—The executors of a deceased partner are, as a general rule, entitled to have the subsisting contracts of the partnership carried out to completion, in order to ascertain their testator's share of the profits resulting therefrom, his estate being liable also to contribute ratably to the resulting loss, if any. *McClean v. Kennard*, 323

Five persons as partners entered into a contract for the construction of some public works. Before the contract was completed one of the partners died. By his will he appointed two executors and three trustees, and authorised his trustees to carry on any business in which any part of his trust property should for the time being be invested. Before the will was proved an agreement was drawn up, expressed to be made between the surviving partners and the executors and trustees of the testator, the names of the executors and trustees being left in blank. The agreement provided (*inter alia*) that the contract should be carried out on joint account of the co-contractors, who were to contribute in equal shares to the expenses, and that the executors and trustees of the testator should be sleeping partners, the acting partners being the four survivors. The agreement was executed by the four survivors. The next day the executors named in the will proved it. One of the three trustees disclaimed the trusts. The agreement was afterwards executed by the executors and acting trustees:—*Held* (on appeal), that the object of the agreement was merely to bind the testator's estate, and that it was sufficient that it was executed by the executors and acting trustees. *Ibid*.

— *constructive notice: joint occupation of land: title*—B. & C. carried on business together in partnership, under articles by which the real estate upon which their business was carried on, and of which they were seised as tenants in common in fee, was made partnership assets. B., to secure a separate debt, mortgaged his moiety of the estate to bankers, who were aware when they took the mortgage that the premises were in the occupation of the partners, and that they carried on their business thereon. B. absconded, leaving partnership debts which C. was obliged to pay:—*Held*, that the bankers had constructive notice that the property belonged to the partnership, and that C. was entitled to be paid out of the property what was due to him from the partnership in priority to the bankers' claim under their mortgage. *Cavander v. Bulteel*, 370

— *solicitors: joint and several liability of partners*—Where a client has entrusted a firm of solicitors with moneys for investment on his behalf, he is at liberty, in the event of their misapplication of the moneys, to sue all or any one or more of the members of the

firm, their liability being both joint and several. *Atkinson v. Mackreth* (35 Law J. Rep. (N.S.) Chanc. 624) observed upon. *Plumer v. Gregory*, 616

— *solicitor: advance by client to one partner: liability of other partner for misapplication of money*—In order to render one partner in a firm of solicitors liable for the misapplication of money entrusted by a client of the firm to the other partner, it must be shown that the money was received by that other partner in the ordinary course of business for the purpose of being invested on a specific security. A mere general statement to the client by the partner who receives the money that the money is to be lent on security to another client is not sufficient to bind the other partner; the receipt of money for the purpose of laying it out generally not being part of a solicitor's business, or within the scope of a solicitor partnership. *Plumer v. Gregory* (No. 2), 803

— *lunatic partner: suit for dissolution by next friend*—A partner who has become incurably insane may obtain a decree for dissolution of the partnership on this ground, and although he has not been found lunatic by inquisition, may institute a suit for dissolution by his next friend, alleging that the lunatic is incurably insane, and that the dissolution is for the benefit of the lunatic, the Court will entertain the suit, in order to protect the property of the lunatic. *Jones v. Lloyd*, 826

PATENT—*right of retiring partner to dispute validity of: threats of legal proceedings: injunction*—A. and B. entered into partnership for the purpose of working a patent taken out by B., the partnership deed providing that the patent rights should belong solely to B. During the continuance of the partnership the partners issued circulars asserting the validity of the patent, and warning the public against its infringement, although they had been advised that the patent was in fact void. The partnership, having continued for seven years, was dissolved by deed, and A. and B. each proceeded to manufacture the patented articles for himself; but shortly afterwards B. commenced issuing circulars to A.'s customers, asserting that A. was infringing his patent, and threatening them with legal proceedings in case they purchased from A. A. then moved for an injunction to restrain B. from issuing these circulars, contending that, the patent being void, he had an equal right with B. to manufacture the articles intended to be protected by it:—*Held*, that although A. had, during the continuance of the partnership, precluded himself from disputing the validity of the patent, yet, after the expiration of the partnership, he was as much at liberty as any other person to dispute its validity, and that B.'s proper course for asserting his claim to the patent was, instead of issuing the circulars com-

plained of, to have instituted proceedings against A. to establish its validity. On B. declining to undertake to institute any such proceedings, the Court granted the injunction—*Rollins v. Hinks* (41 Law J. Rep. (N.S.) Chanc. 358) followed. *Azmann v. Lund*, 655

PAYMENT INTO COURT—in “urgent cases”—In urgent cases, and especially in injunction suits, parties should now proceed under the Chancery Funds Act and Rules, 1872, rule 12, and thereby obviate all unnecessary delay in obtaining their orders. *Brand v. Blow*, 528

PAYMENT OUT OF COURT—to charity trustees—Purchase money paid into Court by a railway company for charity lands taken by them was ordered to be paid out to the trustees of the charity as persons absolutely entitled under section 78 of the Lands Clauses Act. *Re Spurstowe's Charity*, 512

PENALTY—forfeiture: contract for sale of land: proviso for re-entry on non-payment of purchase money—A company, incorporated by Act of Parliament for making a dock, agreed for the purposes of their undertaking to purchase certain land for 4,000*l.*, of which 2,000*l.* was to be paid at once, the balance at a future date. The agreement contained a proviso empowering the vendors, on default in the payment of the balance or any part of it by a day named, to re-enter and re-possess the land without any obligation to repay any portion of the purchase money received.—*Held*, that this was a penalty from which the Court would relieve the purchasers. *In re The Dagenham Thames Dock Company; Hulse's Claim*, 261

Semble, that if it was not a penalty, the agreement would be void as *ultra vires* of the company. *Ibid.*

PERPETUITY—tenant for life, and remainderman: direction to accumulate rents till all debts paid—Testator died in 1844, having by his will directed his trustees, out of the rents and profits of his real estates, to pay all his debts, including a sum of 8,000*l.* charged on part of his realty. Testator also directed that “no person to whom any estate for life or in tail was given by the will should be entitled to the rents and profits of the estate, or any part of them, until they were totally disencumbered and clear of debt.” The trustees were to invest the moneys to come to their hands under the trusts of the will until applied by them in any payment under it. All the debts had been paid except the 8,000*l.*, and there was stock enough in Court to meet that. The payment of the debts had been effected by a sale of part of the realty, under the orders of the Court, and a receiver had been appointed. In 1874 a summons was taken out by the tenant for life to discharge the receiver, and to be let into possession of the estates.—*Held*, that the receiver must be discharged, and the

tenant for life admitted to the estates. *Tewert v. Lawson*, 673

PORTIONS—satisfaction by advancement in lifetime of tenant for life: gift by will—A testator devised real estates in strict settlement, subject to a term for raising portions for younger children, and directed that if the tenant for life should during his life advance or pay any sum or sums of money to or for the use or benefit of any younger child for whom a portion was thereby intended to be provided, then, unless the contrary should be declared by the person making such advance by deed, the sum or sums of money so to be advanced should be taken to be in full or part satisfaction as the case might be of such child's portion. The tenant for life by will gave legacies and shares of residuary estate to some of the younger children.—*Held*, that such gifts were not to be taken in satisfaction *pro tanto* of the portions. *Rickman v. Morgan* (1 Bro. C.C. 63; s. c. 2 ib. 394); *Twisden v. Twisden* (9 Ves. 413); *Leake v. Leake* (10 ib. 476); and *Golding v. Haverfield* (M'Cle. 345; s. c. 13 Price, 593), observed upon. *Cooper v. Cooper*, 158

— See Costs—*Armstrong v. Armstrong*.

POWER—to raise money. See Costs—*Armstrong v. Armstrong*.

POWER OF APPOINTMENT—for life: general absolute bequest to object of the power—Testator, having a power to appoint the income of a fund to his wife for life, and no other power of appointment, by his will directed payment of his debts, and then, by a separate clause, devised all property, of whatever description, belonging to him, “or over which he might at his decease have any power, disposition or control,” to his wife, her heirs and legal representatives, in full property for ever absolutely.—*Held*, that the will operated as an exercise of the power.—*Clogstoun v. Walcott*, 13 Sim. 523, not followed. *In re Teape's Trusts*, 87

— appointable fund: legacies: residue—Testatrix, being entitled to exercise a non-exclusive testamentary power of appointment amongst her brother and four sisters, made a will giving her brother and two sisters *sl.* a-piece, and giving to her other two sisters all the residue of her property of whatever kind and wheresoever situate, and over which she had any power of appointment.—*Held*, that the effect of giving the residue of the appointable fund with testatrix's own property, was to make the legacies payable out of both rateably, and so make the power well exercised. *Gainsford v. Dunn*, 408

— excessive exercise of power: estate tail: term of years: cypres—Testator having

power to appoint an estate to any one or more of his children by will, gave it with other property of which he was owner in fee, to trustees for a term of 1,000 years, to raise portions for grandchildren (not objects of the power), with usual proviso for cesser in case the term should be incapable of taking effect, with remainder after the expiration of the term, and in the meantime, subject thereto, to G. K. Hall, one of his sons (an object of the power), for life, remainder to his issue in tail. The objects of the term were not satisfied:—*Held*, that the will operated as an execution of the power, and that G. K. Hall took under the *cypres* doctrine an estate tail. *Line v. Hall*, 107

— *diminished fund: "residue"*—A settlement made in 1822 contained a power for R. H. by deed or will to appoint a sum of 37,914*l.* 13*s.* 9*d.* consols, among his nephews and nieces, the children of his brothers and sisters named in the settlement. A sum of 800*l.* consols was afterwards added to the settled funds. In 1853, when plaintiffs were appointed trustees of the fund, and from that time to 1870, it consisted of 27,170*l.* 15*s.* 4*d.* consols, and 8,000*l.* on mortgage. Between 1850 and 1870, R. H. made various appointments of the fund, specifying it by its original description, all of which he revoked. In 1870 R. H., by deed appointed "the 37,914*l.* 13*s.* 9*d.* consols, and the 800*l.* consols," in trust after his death, as to five specified sums of consols, parts of the 37,914*l.* 13*s.* 9*d.* and 800*l.* consols, or other the securities of which the same might for the time being consist, for five of his said nephews and nieces (naming them). He appointed "the residue of the said two sums of 37,914*l.* 13*s.* 9*d.* and 800*l.* consols, or other the stocks, funds or securities of which the same might for the time being consist, or upon which the same might for the time being be invested," in trust for C. H., a daughter of one of his said brothers. The sums so appointed, less the residue, amounted to 37,000*l.* The appointor died in 1872. At that time the trust funds consisted only of the sum of 27,170*l.* 15*s.* 4*d.* consols, and the 8,000*l.* mortgage; and they were now represented by a fund in Court of 36,901*l.* 1*s.* 6*d.*, together with the January dividend thereon, viz., 546*l.* 11*s.* 11*d.* cash. On the question whether the appointees, prior to C. H., should abate so as to allow her to take a proportionate share of the diminished funds.—*Held*, that the funds must be distributed rateably between the appointees, exclusive of C. H. *De Lisle v. Hodges*, 385

— *reference back to instrument creating power: husband and wife: French law: community of goods: duties of trustees: costs*—Testator bequeathed his residuary estate to trustees, in trust for A. for life, and after her decease to pay the capital to such of the children of A. as might be living at her decease, in such shares

as she should appoint, and, in default of appointment, to such children equally. A. had four children, all of whom survived her, and one of whom, a daughter, C., became domiciled in France, and married a Frenchman, by whom she had one child. After his death A., in the exercise of her power, appointed one-fourth of the trust funds to C., "for her separate use," absolutely, and then died. Section 1401 of the Code Napoléon provides that all property belonging to the husband and wife at the time of their marriage, or coming to them by succession or donation during the marriage, shall fall into the "community of goods," and vest in them in equal moieties, "if the donor have not expressed himself to the contrary." C's daughter, therefore, according to the law of France, claimed to be entitled to a moiety of the appointed fund, contending that her mother had an interest or property in the fund at the time of her marriage. Upon bill filed by C. to compel the trustees to pay the whole of the appointed fund to herself,—*Held*, that C. was entitled to the whole fund, on the ground, first, that her right to it accrued at, and not before the date of the appointment, when, in consequence of her husband's death, there was no "community of goods;" and, secondly, that even assuming she had a property in the fund at the date of her marriage, the donor had, by appointing the fund to her "for her separate use," expressed an intention that the law of community should not attach to it. *De Serre v. Clarke*, 821

In re Vizard's Trusts (35 Law J. Rep. (N.S.) Chanc. 804) reluctantly followed. *Ibid*.

As the trustees ought to have paid the plaintiff at least the one moiety of the appointed fund to which she was in any case entitled, and might have paid the other moiety into Court, under the Trustee Relief Acts they were only allowed their costs of the suit as between party and party. *Ibid*.

POWER OF SALE—*selling surface and minerals separately*—The trustees of a will devising real estate in strict settlement had mere general powers of sale and exchange. Upon a petition presented by the trustees and the tenant for life under the Confirmation of Sales Act (25 & 26 Vict. c. 108), for authority to exercise the powers by selling the minerals and surface separately, the Court gave a general direction that the powers might be so exercised. *In re Wynn's Devised Estates*, 96

— See Bill of Lading. Railway. Trust and Trustees.

PRACTICE—*creditor's bill for administration: short cause: administration summons by another creditor returnable before hearing of cause: decrees on motion*—Where a cause for the administration of the real and personal estate of a testator has been instituted by one creditor, and a summons for the administration of the personal

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estate only has been taken out by another creditor which is returnable before the cause can be heard as a short cause, the Court will, with the consent of all parties to the cause, make an immediate administration decree on motion, without requiring the cause to be in the paper, and heard as a short cause. *Scaffold v. Hampton*, 137

Seemle, the rule is the same even if the summons is for the administration of the real as well as the personal estate. *Ibid*.

PRACTICE (continued):—next friend: suit on behalf of person of unsound mind: subsequent inquisition in lunacy: further proceedings void: liability of solicitors—A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in the status of the plaintiff. If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, and is thus placed under the protection of the Crown, the suit should be continued only with the sanction of the Court in Lunacy. *Beall v. Smith*, 245

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void and a contempt of the Court in Lunacy. *Ibid*.

Liability of solicitors to refund costs. *Ibid*.

—**dying witness: replication: affidavit filed before issue joined: taking off file**—A plaintiff filed an affidavit made by a dying witness, and offered an opportunity for cross-examination, and afterwards filed replication, and, having omitted to give notice of reading the affidavit within the prescribed time, took out a summons for leave to read the affidavit, which summons was adjourned to the hearing of the cause. Plaintiff printed the affidavit, with the others proposed to be read at the hearing, and thereupon defendant moved to take it off the file and expunge it from the printed affidavits:—*Held*, that this motion was irregular. *Lautour v. The Attorney-General*, 313

—**concurrent suits: same subject-matter: transfer: costs**—After a suit had been instituted by trustees for executing the trusts of a settlement, two of the *cestuis que trust*, who were defendants to the suit, filed their bill in another branch of the Court for a declaration that the settlement was void, or for its rectification, and so far as necessary, for the execution of the trusts thereof:—*Held*, that there was such common ground between the two suits as to bring them within the rule requiring a second bill relating to the same subject-matter as an existing suit to be instituted in that branch of the Court to which the first suit is attached, and that the second suit must be transferred accordingly, and the plaintiffs in that suit must pay the costs of the application for such transfer. *Sayers v. Corrie*; and *Corrie v. Sayers*, 337

—**service out of the jurisdiction: forum: shares in an English joint-stock company**—On an *ex parte* motion, founded on an affidavit that defendant was in Glasgow, leave was given to serve a copy of bill and interrogatories on defendant in Scotland "or elsewhere out of the jurisdiction." Service was effected in Glasgow. On motion to set aside the order for irregularity,—*Held*, that the order, though irregular in form, would not be set aside, but no costs were given to the respondent. *Phospho-Guano Company, Limited, v. Guild*, 360

A bill was filed by the P. Company, which had its registered office in England, against G., who was resident out of the jurisdiction, asking for a declaration that G. was a trustee of certain shares held by him in the company for the benefit of the company, and for incidental relief:—*Held*, that this Court was the proper forum in which to try the matter. *Ibid*.

—**unfiled affidavits: motion on affidavit of service**—Although unfiled affidavits may be read on an *ex parte* application, they cannot be read when the respondent has been served but does not appear, and the application is made on affidavit of service on him of the notice of motion. *Farrer v. Sykes*, 392

—**insufficient affidavit of documents by plaintiff: vexatious delay**—When a plaintiff has vexatiously delayed making a sufficient affidavit of documents in his possession relating to the matters in question in the suit, the Court will order the bill to be dismissed with costs, as against the defendant who has sought the discovery. *The Republic of Liberia v. The Imperial Bank*, 640

—**death of sole plaintiff after argument**—The death of a sole plaintiff, after argument and before judgment, does not prevent the delivery thereof, and it will be entered "nunc pro tunc," as of the date when the arguments were concluded. *Turner v. The London and South Western Rail. Co. and Ringwood, &c. Rail. Co.*, 430

—**enrolment of decrees: expiration of five years: "peculiar circumstances"**—A plaintiff after having allowed all but a few weeks of five years from the date of a decree dismissing his bill to elapse, obtained an order to enrol the decree. He was unable to complete the enrolment within the five years by reason of the necessity of reviving the suit in consequence of the death of a defendant of which he had not known when he obtained the order for enrolment. He then applied for liberty to enrol the decree notwithstanding the expiration of the five years. The application was refused. *Patch v. Ward*, 486

—**vacating enrolment: rehearing petition**—Sharp practice is no ground for vacating the

enrolment of an order. *Ollerenshaw v. Harrop*, 584

A petition which has been dismissed upon the merits in the Court below will not be reheard in the Appeal Court when the order dismissing it has been enrolled. *Ibid*.

— *chancery fund rules, 1872*—A., entitled for life to the dividends of a fund in Court, charged them by way of mortgage with the payment of an annuity to B. during the life of A. In 1827 an order was made for payment to B. during the life of A. of a sufficient part of the dividends to answer the annuity. The annuitant died in 1873, in the lifetime of the grantor:—*Held*, that the case was within Rule 22 of the Chancery Funds Rules of 1872, and that the executor of the annuitant was entitled to have the payment continued to him without any fresh order. *Chapman v. Chapman*, 600

— *respondent out of the jurisdiction: service*—Upon a petition under the Trustees Relief Act the Court has jurisdiction to order service on a respondent out of the jurisdiction, and also substituted service. *Re Bonell's Electric Telegraph Co.*—*Cook's Claim*, 720

— Change of Solicitors. See Next Friend.

— expenses of witness produced for cross-examination. See Witness.

— Irregularity. See Appeal. Leases and Sales of Settled Estates Act.

— Multifariousness. See Company.

— Service. See Lunatic.

— Time for moving to set aside an award. See Arbitration.

— See Costs. County Court. Parties. Revivor. Security for Costs.

PRECEDENTS. Not to be cited as authorities. See Settlement.

PRINCIPAL AND AGENT—*stockbroker: insolvency of principal: indemnity: actual losses and liabilities: agent compounding with his creditors*—In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent. *Lacey v. Hill*; *Crowley's Claim*, 551

C., broker for H., entered into contracts for purchase of stock for the next settling day, 15th of July, 1870. The contracts were in the usual form, subject to the "rules and usages of the Stock Exchange," and the broker's notes from

time to time sent to H., also had these words. When that day arrived C. by request of H., and relying on a promise of H. to settle on that day the amount then due to C. for brokerage and losses, "continued" the contracts till next settling day. H. did not settle his account on the 15th. On the 16th the Norwich Bank, in which he was partner, stopped payment, and H. became in fact insolvent. C. was thereupon declared defaulter on the Exchange. According to the rules, all his transactions were immediately closed. No loss accrued to the principal by the closing of the transactions before the next settling day. Subsequently C. was re-admitted to the Stock Exchange, on payment of a composition, but not the full amount of his debts. After such re-admission, members of the Stock Exchange were in effect forbidden by the rules of the Exchange to sue him for the balance of previous losses without the leave of the committee, which was rarely, if ever, granted, but no legal release was given to him. In a creditor's suit instituted for administering the estate of H., C. claimed for the whole amount shewn to be due to him for brokerage and losses, by an account made up on the footing of all transactions being closed on the day of the insolvency of H. the amount of claim being calculated on the full amount of the liabilities of C. in respect of the contracts for stocks, and not on the amount that he had actually paid on those contracts:—*Held*, first, that on the insolvency of H., the transactions might be closed according to the rules of the Stock Exchange, without affecting the right of C. to an indemnity from H. Secondly, that C. not having had a legal release from claims under the contracts, but being still liable in law for the full amount, was entitled to claim against the estate of H. for the full amount of losses on the contract, including not only what he had actually paid, but also the amount for which he was legally liable. *Ibid*.

— *account: insurance: negligence of agent: secret profit of agent*—Where a bill against an agent for an account alleges certain specific questions that have arisen as the ground for taking the account, and these questions are decided against the plaintiff, the bill will be dismissed. *The Great Western Insur. Co. (of New York) v. Cunliffe*, 741

The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its actual extent. *Ibid*.

A claim against an agent in the nature of damages for neglect of duty cannot be passed as an item in taking an account between principal and agent, but must be enforced in an action at law. *Ibid*.

— See Costs. Injunction.

PRINCIPAL AND SURETY. See Jurisdiction.

PRIORITY — trustee: mortgagee: fraud: legal estate: purchasers for value without notice: production and delivery up of title-deeds: estoppel: escrow—In 1856 H. & C., trustees of a settlement, lent 7,700*l.* on mortgage of freehold lands belonging to S. The mortgage was for three years certain. C. was a solicitor, and acted in the matter both for the trustees and S., and took possession of the title-deeds on behalf of the trustees, and paid the interest as it became due to the *cestui que trusts*. In 1859, before the three years had expired, S. sold parts of the property in mortgage to three purchasers. The mortgage was not disclosed, and S. purported to convey the legal estate to the respective purchasers in consideration, in the whole, of 3,080*l.*, C. again acting as solicitor to S. Such title-deeds as related only to the parts sold were handed to the respective purchasers. Between S. & C. there was a running account, and S. paid to C. the 3,080*l.*, C. giving to S. a receipt signed by him on behalf of himself and his co-trustee H., who he alleged was abroad. H. was in England, but knew nothing of these transactions. In 1870 S. contracted to sell another part of the property in mortgage to P. for 1,500*l.* He declined on this occasion to conceal the mortgage, and pressed C. to obtain for him a reconveyance of the parts already sold. C. then informed S. that he had appropriated the 3,080*l.* and lost it. C. then represented to H. that S. had sold different parts to purchasers for 3,080*l.* and 1,500*l.*, and obtained from H. a conveyance to P. of the part agreed to be sold to him, and a reconveyance to S. of the parts sold for 3,080*l.*, in order that S. might convey direct to these purchasers. The sale to P. was then completed, with the knowledge of S., and the reconveyance was handed to S. C. was to have paid the whole of the money to a joint account, but he failed to do so, and absconded, taking the title-deeds of the property with him. Before S. had conveyed the legal estate to the purchasers, H. filed his bill against C., S. and all the purchasers:—*Held*, that H. was entitled to have the reconveyance cancelled, and to an account of what was due on the mortgage security; and also to a decree that the amount found due should be paid by S., and upon default, and on the purchasers, except P. failing to pay such amount, that H. was entitled to realise his security by sale, except as to the parts sold to P. The purchasers were directed to produce the title-deeds in their possession for the purposes of the sale, and to deliver them up to the new purchasers. The bill was dismissed against P. *Heath v. Crealock*, 169

— **conflicting equities: legal estate: notice**—B., a builder, entitled to an agreement for a lease, sold a house to M., and subsequently obtained a lease from the ground landlord, which he deposited with Stohwasser, by way of equitable mortgage, to secure an advance from

Stohwasser. Stohwasser, at the time of the advance, had no notice of B.'s title. Stohwasser subsequently took a legal mortgage of the house from B., to secure his previous advance. At the time of taking such legal mortgage a tenant of M. was in occupation of the house:—*Held*, that the fact that a tenant of M. was in possession gave constructive notice to Stohwasser of M.'s title. *Mumford v. Stohwasser*, 694

Held, further, that Stohwasser obtained no priority over M. by taking the legal estate. *Ibid*.

Semble, that the result would have been the same if, at the time of taking the legal estate, he had had no notice of M.'s claim. *Ibid*.

Semble, that a person advancing money on an equitable security, subject to a prior equity, of which he has not notice, either actual or constructive, does not, by subsequently getting the legal estate, obtain priority, whether at the time he gets the legal estate he has or has not constructive notice of the prior equity. *Ibid*.

— See Administration of Estate—*Pinchard v. Fellows*. Mortgage. Registration.

PRISONER—discharge—An order of this Court is necessary, under the Debtors Act, 1869, for the discharge of a prisoner who has been in prison a year for contempt of Court. *Re Thompson's Estate—Nalty v. Aylett*, 721

PRIVILEGED COMMUNICATIONS. See Discovery. Injunction.

PROBATE DUTY. See Legacy.

PRODUCTION OF DOCUMENTS—affidavit of documents: order discretionary—It is within the discretion of the Court to make or refuse an order for production by a defendant upon oath of documents under the 18th section of 15 & 16 Vict. c. 86. And where a suit to administer the estate of an intestate was instituted by a person claiming to be her next-of-kin in a distant degree against the Solicitor to the Treasury, to whom administration had been granted, the Court declined to make the order until the plaintiff had made out a *prima facie* case. *Lane v. Gray*, 187

— **forgery: comparison of writings: plaintiff's right to production of documents, however numerous**—Plaintiff, in support of an alleged gift to her by a testator, relied on a writing in her possession purporting to have been signed by him. Defendant, however, disputed the genuineness of the document, and charged plaintiff with forgery. Defendant having made the usual affidavit of documents, plaintiff obtained an order in Chambers that defendant should make a further affidavit setting forth all cheques in his possession drawn by testator during a period of nine years, covering the date of the alleged gift. Defendant then by his further affidavit of documents set forth and consented to produce certain

cheques bearing testator's undoubted signature, but declined to set forth or produce others, which he alleged were forged. Upon a further summons to compel defendant to set forth and produce the latter cheques,—*Held*, that plaintiff's general right to the production of all documents relating to the matters in question in the suit ought not to be extended to the production of all documents signed by testator, however numerous, and that consequently, on technical grounds, the application must be refused, the Court at the same time intimating its opinion that, having regard to the charges against the plaintiff, defendant ought, in fairness, to have acceded to the application. *Wilson v. Thornbury*, 366

In a suit involving a question of disputed handwriting the hearing of a summons for production of documents is not the proper stage for ordering the production of writings for purposes of comparison, inasmuch as by the Common Law Procedure Act, 1854, s. 27, disputed writings may be compared only with writings "proved to the satisfaction of the Judge to be genuine," and this proof can only be furnished at the hearing. *Ibid*.

— See Discovery.

PROHIBITION. See Church Discipline Act.

PUBLIC IMPROVEMENTS. See Local Board of Health.

PUBLIC MONIES. See Suitors' Deposits.

PUBLIC SCHOOLS ACT—*power of governing body to dismiss head master*—The governing body of a school constituted under the Public Schools Act, 1868, has, under the 13th section of that Act, absolute power to dismiss the Head Master of the school "at their pleasure," that is, without assigning any reason; and so long as this power is fairly and honestly exercised the Court of Chancery cannot interfere. *Hayman v. The Governing Body of Rugby School*, 834

They may do so, moreover, although the Head Master received his appointment from a prior governing body in existence before the passing of the Act, whose powers of dismissal were subject to restrictions as to time and place of exercise. *Ibid*.

Semble—If the Governing Body gives reasons for the dismissal, the Court will look at the sufficiency of those reasons. *Ibid*.

RAILWAY COMPANY—*purchase: transfer of fund paid into court to credit of cause: costs*—After a fund which represents purchase money paid by a railway company has been invested and transferred to an account not entitled in the matter of the railway company, the liability of the company to pay costs ceases in respect of any subsequent investment or petition for payment of the fund. *Fisher v. Fisher*, 262

— *severed lands: communications: level crossing: right of way*—The authorities establishing the principle that a right of way cannot be increased by imposing an additional burden on the servient tenement, do not apply to lands taken by a railway company. *The United Land Company (Lim.) v. The Great Eastern Rail. Co.*, 363

A railway company bought lands, which at the time of the purchase were either waste or marsh lands or were used solely for agricultural purposes, subject to the obligation of making communications across their railway for the convenient occupation and enjoyment of the lands severed by it; and they contracted to make and maintain, and made and maintained, such communications by means of four level crossings, three of which were thirty feet, and the remaining one twenty feet in width. The severed lands afterwards passed into other hands and became building sites:—*Held*, that the enjoyment of the lands meant, not merely the use and enjoyment thereof for the purposes for which they were used at the time of the contract, but the use and enjoyment thereof in any manner that subsequent events might render expedient, consistent with the existence of the railway; and that the right of way being unrestricted as to purpose, the subsequent owners and their tenants and assigns of the houses built upon the lands were entitled to the unrestricted use of the level crossings for all purposes whatever, but so as not to obstruct the proper working of the railway. *Ibid*.

— "ordinary train": *meaning of in special act*—Trains having a special object, not being trains for the ordinary traffic and purposes of a branch line of railway; being also substantially faster than the other trains; stopping only at one of the two stations on the branch line; put on it to be in connection with fast trains on the main line of the London and South Western Railway, and so materially shortening the through journeys, are not "ordinary" trains within the 27th section of the above mentioned Act. *Turner v. The London and South Western Rail. Co., and the Ringwood, &c., Rail. Co.*, 430

— *superfluous lands: powers of leasing and mortgaging: power of sale by implication*—A railway company had the usual power of selling superfluous lands. By a subsequent extension Act, powers were given to the company of leasing and mortgaging, without limit as to time, such of these lands as were connected with the structure of the railway:—*Held*, that the extension Act did not take away the power of sale and substitute powers of leasing and mortgaging, but amplified the power of sale by removing some of the restrictions upon it. *Tomlin v. Budd*, 627

— *landowner: "lands delineated and described in plans, and book of reference"*:

land not included in notice to treat: costs—A Railway Company's Act empowered them to make their railway "in the line and upon the lands delineated on the said plans, and described in the said book of reference." The deposited plans had numbers placed on some of the pieces of land required by the company; but those pieces of land were shewn on the plans to be enclosed on three sides only (one of such three sides being the centre line of the railway) and not on all the four sides. Those pieces were mentioned in the notices to treat; but it was contended that they were not properly "delineated" and could not be taken by the company:—*Held*, first, that for the construction of the railway itself, lands within the limits of deviation, although not shewn to be bounded on all the four sides, might be taken by the company up to the line of deviation. Secondly, that as the plaintiffs (landowners) had notice that some portion of the same lands were outside the line of deviation, the company could take those portions. Thirdly, as to the words "delineated and described," that the word "delineated" does not mean "surrounded on every part by lines," but "sketched or represented or so shewn, that landowners would have notice that the land might be taken;" and fourthly, that where Parliament has not clearly defined the position of the centre line of a railway, the company are acting within their powers if they have taken the measurement for the purposes of their Act, from a point which competent engineers consider a proper one from which to find the centre of the line of railway. *Dowling v. The Pontypool, Caerleon and Newport Rail. Co.*, 761

Circumstances under which a piece of land, numbered in the deposited plans, but not included in the notices to treat, was considered to be well taken by the company. *Ibid*.

Special circumstances under which the plaintiffs' bill was dismissed with costs. *Ibid*.

— What is a railway company? See Winding up of Company.

— Rights of traffic of private persons over the line. See Injunction—*Powell Duffryn Steam Coal Co. v. Taff Vale Rail. Co.*

RECEIVER—*judgment creditor: legit: equitable life estate*—A judgment creditor who has sued out an *elegit*, and got a return from the sheriff that the debtor was entitled to a life estate in realty of the debtor's, and registered the writ, may file a bill in the Court of Chancery for a receiver of that estate. *Tillett v. Pearson*, 93

— See Perpetuity.

REGISTER—Rectification of. See Company.

REGISTRATION—*priority of mortgages: notice*—In a registered county a duly registered second

mortgage will take precedence of an unregistered further charge to the first mortgagees which was prior in date, and this, notwithstanding that the memorial registered of the first mortgage did not state the amount due under it, and that the second mortgage was given as security for a past debt. *Credland v. Potter*, 484

RELEASE—*of debt: declaration of intention*—A. borrowed 1,100*l.* from his step-mother, upon an agreement that the debt should be paid by deductions of 100*l.* from each quarterly payment which she made him for her board. After two deductions had been made she declared she would make no more, and thenceforward continued to pay the quarterly sums in full. She appointed him sole executor of her will which contained no disposition of her residuary estate:—*Held*, that, although in order to have an effectual release in equity of a debt, there must be an actual legal release or transfer of the property, that in this case the debt was satisfied on two grounds—First, because the appointment of the debtor as executor operated as a release at law, and all claim in equity to recover the debt was prevented by the intention of the testatrix to release it. Secondly, because the testatrix by making the full quarterly payments had actually completed the gift of the instalments she was entitled to retain. *Strong v. Bird*, 814

REVIVOR—*foreclosure suit: transfer of interest of plaintiff*—When a decree has been made in a foreclosure suit, and plaintiff has subsequently transferred his interest, the transferee may obtain an order of revivor under 15 & 16 Vict. c. 86. s. 52, whether the transfer took place before or after the chief clerk had made his certificate. *Bibby v. Naylor*, 405

SECURITY FOR COSTS—*officer in the army*—The bond of an officer in Her Majesty's service, whose regiment is stationed out of the jurisdiction of the Court, is a sufficient security for the costs of a plaintiff in a Chancery suit, resident out of the jurisdiction. *Miller v. Hales*, 446

— See Appeal.

SERVICE. See Practice.

SET-OFF—*Malins' Act, 20 & 21 Vict. c. 57: married woman: reversionary personality: husband's interest*—Testator by a codicil made in 1861 directed that after the death of his widow a legacy of 350*l.* should be paid to one of his daughters who was then a married woman. The daughter's husband being indebted to testator's estate, the daughter and her husband, during the widow's life, assigned the legacy to a purchaser for value by a deed executed under 20 and 21 Vict. c. 57. On the death of the widow, testator's executors claimed to set off the debt due from the husband against the legacy to his

wife:—*Held*, that under the Act, the purchaser got a good title clear from any set-off in respect of the husband's debt. *Sloper v. Oliver*, 101

Seem, if the husband had previously assigned his interest the case would have been different. *Ibid*.

SETTLEMENT—construction: precedents: legal personal representatives: next of kin—A fund was settled on A. for life, then on any husband she might leave for life, then on her children, and in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—*Held*, that legal personal representatives meant next of kin according to the Statutes of Distribution. *Robinson v. Evans*, 82

Seem, on points of construction precedents may not be cited as authorities, unless they explain the meaning of technical terms or lay down general principles. *Ibid*.

— **will: shifting clause: new estate under a re-settlement**—Testator devised estates in P. in trust for T., the second son of C., for life, with remainders to his first and other sons in tail with remainders over, and declared that if T. or his issue male should come into possession of estates in S. settled on the marriage of his father, the trusts of the P. estates in favour of T. and his issue male should cease, and the estates go over to the persons next entitled in remainder. The S. estates, which were settled on the marriage of T.'s father on the father for life, with remainder to his first and other sons successively in tail, were disentailed by the father and the eldest son, and a considerable portion of them, but not the whole, resettled to uses under which, on the death of the elder son without issue, T. and his father had an absolute joint power of appointment over them. The father afterwards died:—*Held*, that the event contemplated by the shifting clause had not occurred, the interest acquired by T. being under what was substantially a new title, and not a continuation of the old one. *Meyrick v. Mathias*; and *Meyrick v. Laws*, 521

— **after acquired property**—A lady was entitled under a marriage settlement to the whole of a [fund for her life. The fund in default of children was limited to the husband. There being no children the lady, on her husband's death, became entitled to one moiety of his residue beneficially. She was also his administratrix, and on her second marriage a settlement was made by which she and her intended husband covenanted to settle all property to which she or he in her right should become entitled during the coverture under the former settlement. The life interest was expressly settled. At the date of the second marriage the fund in question was the only fund outstanding under the first settlement:—

Held, that the covenant operated on her moiety. *Re Viant's Settlement*, 832

— **construction**—Under a limitation in a marriage settlement of the wife's property, in default of her appointment "to such person or persons as should be her personal representative or representatives," the wife's "administrators" are entitled. *Re Best's Settlement Trusts*, 545

— See Charge. Equitable Mortgage. Marriage Settlement. Portions. Voluntary Settlement.

SHARES—See Company.

SHIPPING. See Bill of Lading.

SOLICITOR AND CLIENT—interest on advances—The 33 & 34 Vict. c. 28. s. 17, authorising on taxation the allowance of interest on moneys disbursed by a solicitor for his client, only applies to costs between a solicitor and his own client, not to a case where costs are to be paid out of a fund in Court not belonging wholly to the client. *Hartland v. Murrell*, 94

— **infant: charge on fund in court for auxiliary costs**—A solicitor who claims a charge or lien for his costs on property which he has "recovered or preserved in any suit or proceeding" for an infant, cannot enforce that claim under the Attorneys and Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28; but must establish it on a bill filed under the general jurisdiction of the Court. If such claim be allowed, it may include other costs auxiliary to those incurred for the preservation or recovery of the infant's property. *Pritchard v. Roberts*, 129

— **authority: undertaking not to issue writ**—A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of *fiery facias* against the client's debtor, in consideration of the acceleration of payment of the debt. *Re The Commonwealth Land, Building, Estate and Auction Co. (Lim.)*; *Ex parte Hollington*, 99

A breach of such an undertaking, by the issue of writs against the debtor, was held to be contrary to good faith, and the solicitor was ordered to pay the expenses of issuing such writs, and of an application to recover them. *Ibid*.

— **charge on property recovered or preserved: suit relating to easement**—The 28th section of 23 & 24 Vict. c. 127, which empowers the Court to declare a solicitor entitled to a charge for his costs upon property recovered or preserved in a suit through his instrumentality, does not apply to a suit which relates merely to an easement. *Faxon v. Gascoigne*, 720

— Negligence. See Equitable Mortgage. And see Partners—*Plumer v. Gregory*. Practice.

SOLICITOR'S LIEN—right to retain documents—A solicitor, who has been employed in a suit for the administration of an estate, and is discharged during the course of the suit, cannot, on the ground of lien, retain documents belonging to the estate, so as to embarrass the proceedings in the suit. *Belancy v. French*, 312

SPECIFIC PERFORMANCE—of agreement to execute a mortgage—The Court will decree specific performance to execute a mortgage with immediate power of sale. *Herman v. Hodges*, 192

— **contract: misrepresentation: delay: acquiescence**—Misrepresentation whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it be not such a clear and direct misrepresentation as would afford a good ground for a suit to set the agreement aside or for an action for damages upon it. *Lamare v. Dixon* (H.L.), 203

If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of which the defendant entered into the agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Ibid.*

— **contract: sale of special article: marketable commodity**—Defendant entered into an agreement with plaintiff, of which the material clause was in the following words—“Sold R. F., Esq., M.P., the whole of the get of the No. 3 coal out of the Newbridge Colliery property for five years, the quantity not to be less than at present delivered to his Taff Vale works, unless the coal should fail, at 6s. a ton; payment as usual.” He afterwards sold some of the coal to other persons, and contracted to sell the colliery itself. On demurrer to a bill seeking to restrain him,—*Held*, that the agreement was, in effect, for the sale of a chattel, and that not one of specific value, but a marketable commodity; that plaintiff's remedy was at law for damages, and not in equity for specific performance; and that being so, the Court would not extend its jurisdiction in granting an injunction to restrain a breach of a portion of an agreement when it could not enforce the whole. *Fothergill v. Rowland*, 252

— **equitable right to be registered as shareholder: blank transfer: pledge of shares**—The Court has no jurisdiction under the 35th section of the Companies Act of 1862, to grant specific performance of an agreement to transfer shares or to enforce against the company

an equitable claim to be registered as a shareholder, but where an applicant has a legal title, the Court will compel the Company to enter his name on the register, although his title is disputed by the person registered as holder. In such case the Court has no jurisdiction to make such person disputing the title to pay the costs of the summons rendered necessary by his opposition. *In re The Tahiti Cotton and Coffee Plantation Co. (Lim.): ex parte Sargent*, 425

The pledgees of shares with transfers executed by the pledgor with the date and name of transferee in blank has, and also his transferee has, implied power to fill up the blanks. Such transfers, although executed as deeds by the original pledgor, will not operate as deeds, and if the regulations of the company require a deed will only confer an equitable interest and operate as contracts to transfer, but where the articles of association did not require a deed and the blanks had been filled up by the transferee of the pledgor,—*Held*, that they operated as valid transfers and conferred on him a right to be registered as a shareholder which the Court would enforce on summons under the 35th section. *Ibid.*

— **Statute of Frauds: sale by auction: particulars and memorandum: rescission**—On sale of real estate by auction the particulars stated that the property was put up for sale by “the proprietor.” No further description of the vendor was given in the particulars or conditions. The auctioneer signed a memorandum in his own name, by which he agreed “that the vendor on his part should in all respects fulfil the conditions of sale mentioned in the said particulars.” On bill for specific performance by the purchaser,—*Held*, that on the particulars and memorandum there was a sufficient description of the vendor within the 4th section of the Statute of Frauds. *Sale v. Lambert*, 470

Part of the property sold was in the occupation of a tenant under a lease, by which the vendor agreed to repair. The repairs not being done, the tenant instituted a suit against both vendor and purchaser. The purchaser sent in an objection and requisition in respect of the repairs not being done:—*Held*, that such an objection was not an objection to title in respect of which the vendor was entitled to rescind the contract under a condition applying to objections to the abstract. *Ibid.*

— **contract for sale: name of vendor omitted**—To satisfy the 4th section of the Statute of Frauds, both parties must be specified either nominally or by such a description that their identity cannot be fairly disputed. *Potter v. Duffield*, 472

A memorandum, signed on behalf of the vendor by the auctioneer without further specifying the vendor, is not a good contract within the statute. *Ibid.*

— *time of essence of contract: extension of time: waiver*—If it be of the essence of the contract that an act should be completed by a fixed date, an extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. *Barclay v. Messenger*, 449

M. and W., entitled to a lease under a building agreement, defeasible by notice in case they did not complete buildings by the 1st of January, 1874, in July, 1873, entered into an agreement to sell their interest to the plaintiffs for 2,000*l.*, 200*l.* of which was paid on signing the agreement, 800*l.* and 1,000*l.* to be paid at the times specified in the 5th clause, which was as follows: "If the purchaser shall fail to pay either the 800*l.* on the 14th of July, 1873, or the 1,000*l.* on the 31st of July, 1873, or as to the 1,000*l.* upon such deferred date as the parties might agree upon, all money paid previous to such default being made shall be absolutely forfeited and this contract become null and void." The 800*l.* was duly paid. The time for payment of the 1,000*l.* was extended to the 26th of August, 1873. The purchaser made default in payment at that date. The vendors gave notice to determine the agreement, and a suit for specific performance was instituted by the purchasers:—*Held*, that by the 5th clause time was made of the essence of the contract. That the extension of the time to the 26th of August did not operate as an absolute waiver of that condition, but merely substituted the 26th of August for the original date. *Ibid*.

Opinion of LORD ROMILLY in *Parker v. Thorold*, 16 Beav. 76, that after an extension of time, time cannot be taken to be of the essence of the contract, disapproved of. Bill dismissed with costs, without prejudice to any action at law to recover the 1,000*l.* *Ibid*.

— *agreement varied by parol stipulation: restrictive covenants*—G. T. agreed in writing to take an underlease of two houses, subject to existing tenancies, the covenants to be similar to those in the original lease. G. T. died before the underlease was executed, but there was some evidence to shew that he had seen and approved of a draft of the underlease which contained a covenant, not in the original lease, against carrying on the business of a grocer in either of the houses. The tenant of one of the houses had an agreement for a lease to contain the restrictive covenant. On bill filed against G. T.'s administrator for specific performance of the agreement, and a declaration that G. T. had accepted the underlease in the form of the draft,—*Held*, that the administrator could not be compelled to accept an underlease containing the restrictive covenant. *Snelling v. Thomas*, 506

— *contract to build a railway station: damages*—A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the

user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the Court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrong doers. *Wilson v. The Northampton and Banbury Junc. Rail. Co.*, 503

— *no title as to moiety: right of purchaser to take moiety*—Where vendors having agreed to sell the entirety of property could make a title to one moiety only, it was held that the purchaser was entitled to have such moiety conveyed to him on payment of one moiety of the purchase money. *Bailey v. Piper*, 704

— See Vendor and Purchaser.

SPORTING—rights of. See Injunction—*Pattison v. Guilford*.

STAKEHOLDER — *interpleader: parties: costs*—Stakeholders having a bill filed against them by one set of claimants, and an action brought by the others (the legal owners), who were only made parties to the first bill by amendment after the action was commenced, filed a bill to restrain the action, not however making the first claimants parties. The bill of the first claimants having been dismissed,—*Held* (reversing the decision of BACON, V.C.), that the bill of the stakeholders against the second claimants must be dismissed with costs, and an enquiry as to damages under their undertaking was directed. *Laing v. Zeden*, 626

The only way in which a person harassed by two claims can protect himself is by an interpleader proceeding. If he litigates with the parties separately, he will have to bear the costs of the party who is successful. *Ibid*.

— See Costs.

STATUTE—Construction of. See Injunction.

STAY OF PROCEEDINGS—*plaintiff in contempt: motion to dismiss bill*:—When plaintiff is in contempt for non-payment of costs of an interlocutory application, and defendant has obtained an order staying further proceedings on plaintiff's part until such costs are paid, a motion by defendant asking the Court to fix a time for payment of the costs, and in default to dismiss the bill, is irregular. *Gould v. Twine*, 381

— See Partners.

SUITORS' DEPOSITS—*chief clerk of Queen's Bench: abolition of office: right to retain deposits*—The chief clerk of the Court of King's Bench was the custodian of moneys deposited by the suitors to await the result of actions, and in-

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vested a portion of them in exchequer bills. When the late Lord Ellenborough succeeded to the office in 1811, he found a sum of 5,000*l.* so invested. He received for his own benefit the interest thereupon until the report of the committee of the House of Commons on sinecure offices in 1834, in deference to which he received no further dividends, but caused them to be carried by his bankers to a separate account. After his death a suit was instituted to administer his estate, and upon a summons taken out thereon, it was held, that the funds thus accumulated formed no part of his estate, but must be treated as public moneys, and that the Crown, in right of the public, was entitled to receive them. *Colchester v. Law*, 80

TAXATION OF COSTS—discretion of taxing master—The Court refused to entertain the question whether the taxing master had properly disallowed costs of separate answers. *Beattie v. Ebury*, 80

— *higher or lower scale*—In estimating the value of an estate of a testator for the purpose of ascertaining whether costs are to be paid on the higher or lower scale, the value of the estate at the death of testator is to be looked at, although the costs of a suit to get in part of the assets may reduce that amount. *Steward v. Nurse*, 384

— *higher or lower scale*—A building society made an advance on mortgage of 900*l.*, to be repaid with interest by 120 monthly payments. These payments, as well as the payment of certain fines, were, under the rules of the society, secured by the mortgage deed. A sum of 300*l.* became due to the society for such fines beyond the amount due for principal. The sum due to the society was found on taking the accounts to be about 517*l.* The taxing master allowed costs on the lower scale only, and Malins, V.C., refused to vary the certificate. Upon appeal, —*Held*, that the taxing master was right. *Cotterell v. Stratton*, 573

TENANT FOR LIFE—income: shares in the Sun Life Association Society and the Sun Fire Insurance Office: payment of "extraordinary" and "special" dividends after death of testator—Testator died on the 20th of December, 1870, having by his will bequeathed the residue of his personal estate to trustees to invest as therein mentioned, and then to permit and empower his wife to receive "the dividends, interest and income of his trust money, stocks, funds, shares and securities" for her life; and on her death to permit his brother to receive the residue (after the payment thereof of certain legacies) of the same "dividends, interest and income," for his life, with remainder to one of his brother's children and another legatee as therein mentioned. At his death testator had twenty-five shares in the Sun Life Assurance Society and fifty-two in the Sun Fire Insurance Office. The

trustees of the will paid his widow the dividends on those shares till 1873, when they withheld the January and July dividends on the respective shares, on the ground that it was doubtful whether the dividends were corpus, or income, of the estate. The question depended on the construction of the company's deed of settlement, and on the mode in which the company had declared the dividends, which were called "extraordinary" and "special." The resolutions under which the dividends were declared were not produced to the Court; but it was stated that they were identical in terms with the dividend warrants; and the warrants spoke of the money payable thereunder as "dividend paid out of profits." The trustees paid the money into Court; and testator's widow presented a petition praying payment of it out to her:—*Held*, on the construction of the company's deed of settlement, and the resolutions declaring the dividends, that the dividends were income and not corpus of the estate, and belonged to the petitioner. Costs were allowed out of the fund. *Re Hopkins's Trusts*, 732

— See Perpetuity. Waste.

TIMBER. See Waste.

TRADE MARK—imitation of labels: English adjective denoting quality—An English adjective merely descriptive of the quality of an article, such as "nourishing stout," is not by itself entitled to protection as a trademark. *Raggett v. Findlater*, 64

TRUST AND TRUSTEE—trust to invest in land: repairs: jurisdiction of Court—When personality is directed to be invested in land to be conveyed to the same uses as certain existing settled estates, the Court of Chancery cannot authorise the outlay of any of the personality in doing repairs on the existing settled estates. *Is re Lord Hotham's Trusts* (Law Rep. 12 Eq. 76) not followed. *Brunskill v. Caird*, 183

— *control of discretion of trustees by the Court after decree*—After a decree in a suit for administration of trust funds the Court will not without reason control a discretionary power given to the trustees by the instrument creating the trust. *Brophy v. Bellamy*, 183

— *discretion of trustees: investment: suspension of discretion*—When a decree for administration has been made all discretionary powers of management vested in the trustees are suspended, and whatever discretionary power of investment is given to the trustees, the Court will only authorise investments in securities in which funds under the control of the Court may be invested. *Bethel v. Abraham*, 180

Semble—In order to give trustees power to invest in securities not authorised by the Court, a clear

and express discretionary power must be given to them. *Ibid.*

— *appointment of tenant for life as new trustee*—Testator left real estate on trust for his wife for life, and, after her death, for his son for life, with further trusts, and made his wife and son executors, and appointed strangers trustees, giving the trustees a power of sale and power to appoint new trustees, the latter exercisable with the consent of the tenant for life for the time being. Shortly after his death the last remaining trustee appointed the wife and son to be trustees, and he and the wife died. The son then contracted to sell the estate under the power:—*Held*, that he could validly exercise the power of sale, for, though the Court will not appoint a tenant for life to be trustee, such an appointment out of Court is valid; and there was nothing in the will specially disqualifying the son from becoming trustee. *Forster v. Abraham*, 199

— *defaulting trustee: share in trust funds: assignee: mortgagee*—The principle which gives *cestui que trust* an equity against any interest in the trust funds belonging to the trustee who has committed the breach of trust, extends to any interest taken by the trustee as next-of-kin of a deceased *cestui que trust*. Such equity is prior to the interest of a mortgagee of the trustee, as the trustee is considered to have paid himself before the interest accrued. *Jacobs v. Rylands*, 280

— *constructive trustee: breach of trust: solicitor, responsibility of: parties made defendants for payment of costs*—Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actively participating in any fraudulent conduct of the trustee, to the injury of the *cestui que trust*, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions may be such as the Court would not approve of. *Barnes v. Addy*, 513

A solicitor acting for the sole survivor of three trustees, prepared, by his direction, a deed appointing the husband of the *cestui que trust* sole trustee in his place, and another solicitor, acting for the *cestui que trust* and her husband, perused and approved of the draft. The deed was executed, and the trust fund transferred to the husband as new trustee, and by him sold out and never replaced. There being no ground for imputing to either of the solicitors knowledge or suspicion of any improper design in the transaction.—*Held*, affirming the decision of WICKENS, V.C., that neither of them was liable for the loss occasioned by the breach of trust. *Ibid.*

The Court disapproves of the practice of making

solicitors or others, who are properly witnesses, and who are not primarily chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. *Ibid.*

— *appointment of new trustee*—Order made to appoint a *feme sole* a trustee; following in *re Campbell's Trust*, 31 Beav. 176. In *re Berkley*, 703

Part of a testator's estate consisted of shares upon which there was an unlimited liability. Upon a petition to appoint a new trustee, an order was made that one of the continuing trustees, in whose name the shares stood, should sell them, and invest the proceeds in the names of himself and the other trustees. *Ibid.*

— *unfounded claim by respondents to fund in Court*—Respondents who make an unfounded claim to a fund, and so occasion the payment of it into Court under the Trustees Relief Acts, will be ordered to pay the costs of getting the fund out of Court. In *re Benton's Policy Trusts*, 715

— *indemnity: executor: distribution of residue with notice of a contingent liability: refunding assets*—It is a general rule of equity that when a person accepts a trust at the request of another, and that other is a *cestui que trust*, the *cestui que trust* is liable personally to indemnify the trustee against all losses accruing in the due execution of the trust. *Jervis v. Wolvestan*, 809

Where the loss in respect of which such indemnity is sought occurs after the death of the *cestui que trust* the trustee is in the position of a creditor of the *cestui que trust*, and entitled to recover as a creditor from legatees to whom his estate has been paid. *Ibid.*

Distribution of the estate by an executor with notice of a contingent liability does not preclude him from recovering the estate from the legatees in case the contingent liability afterwards ripens into actual loss. *Ibid.*

An executor who compels a legatee to refund can only require repayment of the capital and not of any intermediate income. *Ibid.*

— Declaration of Trust. See Voluntary Assignment.

— Trust to accumulate rents. See Perpetuity.

— See Company. Limitations, Statute of. Priority.

UNDUE INFLUENCE — *confidential relationship: condonation of fraud: evidence in support of allegations of fraud*—There can be no confirmation of a fraudulent gift or bargain obtained through undue influence by a donee or bargainee standing in a confidential relationship towards the donor or bargainor unless there be full knowledge on the part of the latter of all the

facts and the rights arising out of them, and an absolute release from the undue influence by means of which the fraud was practised. *Moron v. Payne*, 240

M., a young man, interested in a certain business, under the advice of his family solicitor, entered into an arrangement relating to the business with P., who stood in a fiduciary position towards him, and at the same time unknown to his solicitor was induced by the influence of P. to enter into other agreements completely nullifying the effect of such arrangement. It was held that P. could not upon abandoning the fraudulent agreements set up the arrangement. *Ibid.*
A bill alleged that the defendant had formed the design of possessing himself of the plaintiffs' property, and in pursuance of this design had perpetrated a series of frauds; there was no evidence to sustain this allegation to the full extent of it, but there was substantial proof of fraud in respect of several transactions:—*Held*, that the plaintiffs were entitled to relief. *Ibid.*

UNDUE INFLUENCE (*continued*)—*setting aside security: confidential relation: stepfather: confirmation*]—In a transaction with a person who is known to be under the influence and control of a father or mother (in this case the relationship was that of stepfather and step-daughter), it is the duty of the person who is to reap the benefit of the transaction to see that everything that is done is fair and above board, and that full explanation is given to the person conferring the benefit; otherwise the transaction will not be upheld. *Kempson v. Ashbee*, 689

Where security for a debt is given, by a person who is under age, through undue influence, and is therefore invalid, a bond given some years afterwards in respect of the same debt will not amount to confirmation of the security. *Ibid.*

VENDOR AND PURCHASER—*sale by auction: misleading particulars: sale "subject to existing tenancies"*]—A public-house and premises put up for sale by auction were described in the particulars as in the occupation of certain persons at certain rents. The conditions stated that the property was sold "subject to existing tenancies." Defendants, who were brewers, by their agent became the purchasers of the property at the auction. Shortly afterwards they discovered that the property was in lease to another brewer for a term of years, of which about nine remained unexpired. Thereupon they refused to complete their contract. In a suit against them by the vendor for specific performance,—*Held*, that there was a mis-description of the property, which precluded the vendor from enforcing the agreement, and that the purchasers had not constructive notice of the lease. *James v. Lichfield*, 39 Law J. Rep. (N.S.) Chanc. 248, dissented from. *Caballero v. Henty*, 635

— **Purchaser for value without notice of fraud.**
 See **Priority**.

— See **Specific Performance**.

VOLUNTARY ASSIGNMENT—*imperfect conveyance: declaration of trust: words of present gift*]—A person entitled to a leasehold mill, with plant, machinery and stock-in-trade, endorsed on the lease a memorandum: "This deed and all thereto belonging I give to A. from this time forth, with all the stock-in-trade;" and he signed the memorandum and handed the deed to A.'s mother. After his death A. claimed the mill and appurtenances, on the ground that the memorandum amounted to a valid declaration of trust:—*Held*, that A.'s claim was bad, on the ground that words importing a present intention to give cannot be held to amount to an intention to retain as trustee. *Richards v. Delbridge*, 459

Mitroy v. Lord (81 Law J. Rep. (N.S.) Chanc. 798) followed and approved of; *Morgan v. Malleon* (39 Law J. Rep. (N.S.) Chanc. 680; and *Richardson v. Richardson* (36 Law J. Rep. (N.S.) Chanc. 653), disapproved of. *Ibid.*

VOLUNTARY PAYMENT—*by mistake: remedy*]—Where money has been voluntarily paid under a mistake the remedy is at law and not in equity. *Lamb v. Cranfield*, 408

VOLUNTARY SETTLEMENT—*false recital: nudum pactum: appointment by deed: transfer of shares*]—A married woman executed a voluntary settlement containing a recital that she had paid 2,000*l.* to the trustee, and declaring trusts of that sum. In point of fact she had not paid and never did pay any money to the trustee. The trustee also executed the deed:—*Held*, that neither the settlor nor the trustee incurred any obligation whatever in respect of the 2,000*l.* *Marler v. Thomas*, 73

Shares were settled on trust for such persons as A. might by deed or will appoint. A. took a transfer of the shares into her own name in the ordinary way, executing the transfer under hand and seal:—*Held*, that this amounted to an appointment by A. in her own favour. *Fletcher v. Green*, 33 Beav. 426 (1864), explained, *Ibid.*

WAIVER. See **Specific Performance**.

WASTE—*timber: thinning: timber estate: tenant for life*]—By the general law (which may however be varied by special custom), timber consists of oak, ash and elm of the age of twenty years and upwards, provided they are not so old as no longer to have a reasonable quantity of useable wood in them. *Honywood v. Honwood*, 662

Except in the case of a timber estate, a tenant for life, impeachable for waste, cannot fell timber. He can fell anything that is not timber, save trees planted for purposes of special utility or ornament, the germens of underwood, and trees which, though too young to be properly timber, would grow into timber. Some, however, even

of these last he may fell, if for the purpose of promoting the growth of other timber in the same wood. *Ibid.*

The property in timber, felled by a tenant for life, or any other person, or blown down by a storm, is in the owner of the first vested estate of inheritance, unless he has colluded with the tenant for life to induce him to fell it, in which case equity will not allow him to get the benefit of his own wrong. The property in trees not timber is in the tenant for life, and at law remains so though he may have committed waste by felling them wrongfully, and made himself liable for an action of waste, but *quære* if equity would allow him to take the property in trees felled thus. *Ibid.*

Where timber which is decaying or which for any special reason requires to be felled, is felled with the sanction of the Court, the proceeds are invested and the income is given to the successive owners of the estate, till the fund is taken away by the owner of the first absolute estate of inheritance. The same course is adopted in cases of equitable waste, where ornamental trees have been felled. *Ibid.*

WATER—Rights of canal company. See Injunction.

WAY—obstruction: *right to go extra viam*]—If the grantor of a right of way obstructs it, the grantee may go, *extra viam*, over the grantor's land; and the grantor or a purchaser with notice from him will not be allowed to obstruct the substituted mode of access so long as the original obstruction exists. *Silby v. Nettlefold*, 359

WILL—"children of my daughter by her present putative husband:" *illegitimate child*]—Testator bequeathed moneys in trust after the decease of his daughter for "all the children of his said daughter whether by her present putative husband or by any other person whom she might marry, who should attain the age of twenty-one years, their executors, administrators and assigns. But in case his said daughter should die leaving no issue either by her said putative husband or by any other person, who should attain the age of twenty-one years," then over. Testator at the date of his will knew that his daughter had an illegitimate son by J. B., with whom she was then living, and he recognised this son as his grandchild. After testator's death, his daughter married J. B., but had no other child:—*Held*, that the illegitimate child was sufficiently designated by the will, and he having acquired a vested interest on attaining twenty-one, and his mother being sixty-seven years of age, that they were entitled to have the fund transferred to them. *In re Brown's Trusts*, 84

—*money due at my decease: unliquidated damages*]—Bequest of "all and every sum or sums of money which may be due to me at my

decease":—*Held*, to pass a sum of money recovered by way of damages in an action by testator's executor for a breach of covenant committed by a lessee of testator in testator's lifetime. *Bide v. Harrison*, 86

—*construction: two codicils: identical gift in each: legacies cumulative or non-cumulative*]—Testator having executed his will in duplicate, subsequently executed on the same day two codicils, almost in identical words, giving by each a legacy of 5,000*l.* to D. for life, remainder to her children, with remainder over. He then deposited one codicil with D., the other with his solicitor. A short time afterwards he executed a further codicil, whereby he confirmed his will, "except so far as the same is altered by a codicil thereto, dated the 2nd day of April, 1868, which last mentioned codicil" he thereby confirmed. In 1871 he took away from his solicitor the codicil he had deposited with him and handed it to D., and, at his death, D. was in possession of both. Both were admitted to probate:—*Held*, that the codicils were merely duplicates of each other, and that D. was only entitled to one legacy of 5,000*l.* *Whyte v. Whyte*, 104

—*latent ambiguity: parol evidence: Christian name*]—Testatrix after making specific bequests to his niece Clara and "my niece Laura, second daughter of my brother, J. H. W.," bequeathed as follows: "to each of my nieces, K. G., H. M. T., H. B. and Laura W. the sum of 50*l.*" and further bequeathed "to each of my nieces C. W., Laura W., R. W., M. E. S. S., and E. G. S. the sum of 100*l.*" and gave the residue "in trust for the said M. E. S., Laura W., E. G. M. and R. W." It appeared that the testatrix had two nieces, one Laura W., a daughter of her brother J. H. W., and the other Laura Frances Tomkins W., a daughter of her brother William W. Parol evidence had been entered into to shew which Laura was intended:—*Held*, that in the first gift the person who was intended was accurately described; that there was no latent ambiguity and that parol evidence was not admissible; that the same Laura W. mentioned in the first gift took both the legacies of 50*l.* and 100*l.* and also the share of the residue. *Webber v. Corbett*, 164

—*residue: advances*]—M. on the marriage of his daughter covenanted to settle 8,500*l.*, and he advanced 2,000*l.* to purchase a share in a business for his son; by his will he gave the residue of his property equally between his daughter and son:—*Held*, that these advances were both *pro tanto* in satisfaction of the children's shares. *Stevenson v. Masson*, 134

—*made before the wills act: estate of trustees: rule in Shelley's Case: contingent remainder: res judicata*]—Testator, by will, dated in 1827, devised his estate to trustees

and their heirs upon trusts that they and their heirs should stand seized of the same during the life of W. C., and until the whole of testator's debts and the legacies were paid, upon trust, to set and let the same and apply rents and yearly profits and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts and legacies until they were paid, and from thenceforth to pay the rents to W. C. during his life; and after W. C.'s death, and payment of the debts and legacies and expenses, testator devised the estate to the heirs of the body of W. C., and for default of such issue, to his own right heirs. In 1830 the trustees by deed reciting that the debts and legacies were paid, conveyed the estates to W. C. for his life. W. C. shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to W. In 1861 W. C., the father, and W., his mortgagee, had filed a bill for a conveyance of the fee against the heir of the surviving trustee and W. C., the son (W. C.'s heir-apparent). W. C., the son, instead of asking to be dismissed as not being heir during his father's lifetime, put in an answer disputing plaintiff's title. In 1865 a decree was made for the conveyance of the fee to the plaintiff. W. C., the father, had since died. This suit was instituted in 1873 by W. C., the son, against W., the mortgagee:—*Held*, 1. That the trustees took a legal fee under the will, that the rule in *Shelley's Case* therefore applied, and that W. C. acquired a good equitable fee by the recovery. 2. That if they had only taken a life estate, their conveyance of it to W. C., the father, enabled him to suffer a recovery, and bar the contingent remainders at law and in equity, and was no breach of trust. 3. That W. C., the son, having chosen to answer in the former suit, was bound by the decree. 4. A general devise to trustees and their heirs *prima facie* gives the fee, and it lies on the parties alleging that they take a less estate to show what less estate they take. A trust to set and let, and a direction to sell timber, are grounds for not cutting down the estate. *Collier v. Walters*, 216

The decision on the same will in *Collier v. McBean* (34 Beav. 426; s.c. 34 Law J. Rep. (N.S.) Chanc. 555), that the trustees took a fee determinable when the debts were paid, disapproved of. *Ibid*.

WILL (continued)—illegitimate child born after date of will—A gift by will by a testator or testatrix to his or her illegitimate children by a particular person is good as well as to a child born after as before the date of the will, if the child obtains the reputation of being such a child before the death of the testator or testatrix. *In re Goodwin's Trusts*, 258

— **illegitimate children: bequest to two by name and a future class: child en ventre at date of will: public policy**—Under a bequest to testator's reputed children C. and E. and all other

the children which he might have or be reputed to have by M. L. (his deceased wife's sister, with whom he had gone through the ceremony of marriage), then born or thereafter to be born, a child *en ventre sa mère* at the date of the will, who was born and acquired in his lifetime a name by reputation as the testator's child by M. L.,—*Held* (LORD SELBORNE, L.C., *dissentiente*) entitled to share; and held by the LORDS JUSTICES that every child who on the will coming into operation had acquired such a name by reputation would be entitled to share in such bequest; and that a provision by will for a testator's future illegitimate children is not *contra bonos mores*. *Occleston v. Fullalove*, 297 The decision of WOOD, V.C., in *Howarth v. Mills* (Law Rep. 2 Eq. 389) disapproved of. Decision of WICKENS, V.C., reported 42 Law J. Rep. (N.S.) Chanc. 514, reversed. *Ibid*.

— **gift of residue without naming donee: intestacy**—D., by his will, gave all his property to his executor upon trust for the purposes of his will, and after gifts of 300*l.* to a daughter, and five shillings a week to his son, J. D., bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate and appoint my son, R. D., sole executor; but the testator omitted to say to whom he bequeathed the remainder:—*Held*, that testator had failed to express his intention, and that there was an intestacy as to the residuary real and personal estate. *Driver v. Driver*, 279

— **absolute gift subject to prior estates: gift over on death without issue: legatee surviving period of distribution**—Testator bequeathed funds to A. for life, with remainder to his two daughters in equal moieties for their respective lives, with remainder to their children, and in default of such children, with remainder to testator's two sons, with remainder in case his said sons should both die without issue to B. absolutely, and in case B. should die without issue then over. B. survived A. and all the testator's sons and daughters, who all died without issue, and finally died herself without issue:—*Held*, that B. took an absolute indefeasible interest in the funds, and that inasmuch as she survived the period of distribution, the divesting clause never took effect. *In re Heathcote's Trusts*, 259

— **devise: posthumous child: intermediate rents**—Testator devised land to the first son of J. M. in tail male, and after making other dispositions he gave the residue of his property to trustees upon certain trusts. J. M. had no son at testator's death, but one was born about four months afterwards. The trustees of the residue received the intermediate rents:—*Held*, that these rents formed part of the residue of testator's estate, the infant son being only entitled to the rents from his birth. *In re Mowlem*, 353

— “survivor” read “other”: tenant in tail: payment out of Court without disentailing deed]—Testator devised freeholds in moieties to the use of A. and B. respectively for life, with remainder to the use of their respective children equally as tenants in common in tail, and in default of issue of either A. or B., then to the same uses in favour of the “survivor of them” and her issue as thereinbefore declared concerning their original shares; remainders over. A. died leaving a child, who thereupon became tenant in tail of A.’s moiety. Subsequently B. died without issue:—*Held*, that A.’s child then became tenant in tail of B.’s moiety, “survivor” being read “other.” *In re Row’s Estate*, 347

Fund in Court exceeding 400*l.* paid to tenant in tail without a disentailing deed having been executed. *Ibid*.

— specific bequests: “in or about house and premises”: purchase by testator in transitu]—Testator bequeathed his leasehold mill to trustees upon certain trusts, and all the corn and other articles which at his decease should be in or about his dwelling-house, mill or premises, he gave to his two sons absolutely:—*Held*, that a cargo of wheat consigned to the testator, and in course of transit on the day of his death, passed to the executors and not to the sons. *Lane v. Sewell*, 378

— forfeiture of life interest: general words: bankruptcy]—Testator gave the income of property to one of his trustees for life, or till bankruptcy, or till he should do or suffer anything to deprive himself of the enjoyment of the income. He was adjudicated bankrupt, the bankruptcy was annulled, and ultimately his property revested in himself. The trustees managed the property so that there was no income payable to him in the meantime:—*Held*, that he had not forfeited his life interest. *Robins v. Rose*, 334

— married woman: separate estate: savings: balance at bankers: intestacy]—A married woman with separate estate over which she had power of disposition notwithstanding coverture, gave by will the whole of the funds constituting such separate estate upon trust for her nephews and nieces, and also bequeathed all funds purchased out of the savings of her separate estate upon the same trusts. She died, leaving a large balance on her current account at her bankers:—*Held*, that the testatrix had not purchased any funds out of the savings at her bankers, and that such savings were undisposed of, and passed to her husband as administrator. *Askew v. Rooth*, 368

— prior invalid bequest: gift of surplus: charity]—S. bequeathed 600*l.* arising from such part of his estate as should not be secured upon mortgages or chattels real, to apply the income

to keep in good repair the tombstones of himself and several of his relatives, and directed the surplus income to be given away on his birthday in charity:—*Held*, that the prior gift to keep the tombstones in repair being void, the whole fund went to the charity. *Dawson v. Small*, 406

— gift to “our children”: illegitimate children and subsequent marriages with mother]—Testator having two illegitimate children by M., married her, and by his will, executed the day after his marriage, gave all his property “to my wife M.” for life, with liberty to direct the disposal of the property amongst “our children by will,” in default to be divided “equally between my children by her.” Testator in his lifetime acknowledged the two illegitimate children to be, and treated them as, his children, and died without having had any other children by M., leaving her and the two illegitimate children surviving:—*Held*, in a suit instituted by M. to administer the estate of testator, that the two illegitimate children were the objects of the power of appointment given to M., and would take in default as the children of testator by her. Further that they were not precluded from taking by the fact that the testator might have had future legitimate children by M., for such children would have taken as a class with the existing illegitimate children. *Dorin v. Dorin*, 462

Wilkinson v. Adam (1 Ves. & B. 422), *Beachcroft v. Beachcroft* (1 Madd. 430), and other authorities considered. *Ibid*.

— devise of lands: leaseholds: contrary intention: strict settlement]—The object of the 26th section of the Wills Act (1 Vict. c. 26) was to abrogate a merely technical rule tending in many cases to defeat the intention of a testator using language in a natural sense, and not to establish instead of that another technical rule, which in particular cases might have a like effect in a contrary direction. The section merely shifts the *onus probandi* in accordance with the natural *prima facie* use of language, and throws it on those who deny that in a will the word “lands” is meant to include customary copyhold and leasehold estates. *Prescott v. Barker*, 498
The effect of limitations in strict settlement upon such question of construction considered. *Ibid*.

— “presuming and believing”: conditional gift founded on belief of certain facts]—Testator having by his will given 4,000*l.* to certain charitable institutions, made a codicil as follows: “Presuming and believing that the rental of my estate will produce 16,000*l.* a year, I give those institutions 4,000*l.* more.” The income of the testator’s estate, however, was at his death much less than 16,000*l.* a year:—*Held*, that the testator’s reason for the gift of the second 4,000*l.*, being the supposed increase of his property, and the fact of such increase being incorrect, the gift of this 4,000*l.* failed. *Thomas v. Howell*, 511

Gifts founded on reasons applicable on the one hand to the legatee, and on the other to the testator's property, distinguished.—*The Attorney-General v. Lloyd* (3 Atk. 551) observed upon. *Ibid.*

WILL. (continued)—*absolute interest: money remaining after death of legatee: repugnant bequest*—Testator gave all his real and personal estate to trustees upon trust to pay the residue of his personal estate to his wife for her own absolute use and benefit, and after several other devises he gave all the money, if any, that should be remaining after payment of his wife's just debts, &c., to legatees named:—*Held*, that the widow took an absolute interest in the residuary personal estate. *Perry v. Merritt*, 608

—*made before the Wills Act: after acquired estate: adverse possession by trustee: Statute of Limitations*—Testator by his will, dated in 1824, devised all his real estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to trustees, one of whom was his wife, upon trust to pay the rents to his wife for life, with remainders over. After the date of his will testator purchased a freehold estate. On his death, his widow became sole trustee of the will and entered into possession of testator's after-acquired real estate as well as the devised estate, under the belief that the whole of testator's real estate passed by his will. After having been in possession for upwards of twenty years, she was informed that she had acquired a good title to the after-acquired estate by adverse possession, whereupon she sold it to a purchaser for value:—Bill filed by a remainderman under the will to oust the purchaser, dismissed. *Paine v. Jones*, 787

—*charitable bequest*—A bequest of 200l. "to each of ten poor clergymen of the Church of England, to be selected by A." is not a charitable bequest. *Thomas v. Howell*, 799

—*trust for sale and conversion of real and personal estate: gift of share in proceeds: condition in restraint of marriage*—H. B. by his will devised and bequeathed his residuary real and personal estate to his two sons, H. W. B. and C. B., in trust for sale and conversion, and for investment on various securities; and he directed his trustees to divide the annual income of the trust fund, after certain deductions, among his seven other children, during their lives, in specified shares, of which his two daughters, L. P. B. and N. M. S. B., were to have ten each; and he further directed that after the death of the survivor of his said seven children, the trust fund should be divisible between his two sons, H. W. B. and C. B., and their respective executors, administrators and assigns, in equal shares. By a codicil to his will H. B. declared that on the marriage of either of his daughters, L. P. B. and N. M. S. B.,

the bequests of shares made to them by his will should be void; and in lieu of the same he gave to such one of them as should have married four shares only for her separate use; and he gave such one of them as should remain unmarried thirteen of the same shares, and directed that on one of his said daughters being married the three overplus shares, and in case of both his said daughters marrying, the twelve overplus shares should fall into and form part of his residuary estate, and be divided as in his will was mentioned. L. P. B. married after the death of H. B.:—*Held*, that the condition reducing her shares in case of marriage was void, and that she was, although married, entitled to the ten shares of the income of the trust fund during her life. *Bellairs v. Bellairs*, 669

—*nephews and nieces: husband's sister's children*—Testatrix by will made this bequest: "I give to my niece A. B. my large china dish and basin and three china plates." A. B. was not the niece by blood of testatrix, but of her husband. The will contained other specific bequests to nephews and nieces who were testatrix's nieces by blood. Testatrix also bequeathed a sum of 600l. to two trustees upon trusts for investment and for payment of the income to her sister E. B. for life, and after her decease she bequeathed the capital equally amongst the whole of her nephews and nieces who should be living at her decease, declaring that in case any nephew or niece should have died before the period of distribution leaving issue, the share of such nephew or niece was to go to such issue; and testatrix directed her trustees to divide the residue of her household furniture and effects amongst, and gave and bequeathed all the residue of her personal estate and effects to, all her nephews and nieces who should be living at the time of her decease in equal shares. Testatrix died, leaving eleven nephews and nieces by blood, seven being the children of a sister and four the children of a brother. At the date of the will, and death of testatrix, there were nine nephews and nieces by blood of her husband living, eight of them (including A. B.) being children of one and one being a child of another of testatrix's husband's sisters:—*Held*, that neither A. B. nor the other children of testatrix's husband's sisters were entitled to share in the household furniture or residuary estate. *Wells v. Wells*, 681

—*gift of annuity to trustee: determination of trusts and cesser of annuity*—An annuity was given by will to A. B., one of the trustees of the testatrix, "so long as he should continue to execute the office of trustee under her will:—*Held*, that the annuity ceased when the estate was handed over to a *cestui que trust* absolutely entitled. *Hull v. Christian*, 861

—*particular residue: ademption: misdescription: gift cum onere*—Testator gave a fund to

particular trustees, upon trust to invest on freehold mortgage enough to provide for certain annuities, and gave the residue of that fund to his nephew, J. A. The will contained a general residuary bequest. Some of the gifts of annuities, being charitable, were void:—*Held*, that J. A. took the whole of the particular residue. *Aston v. Wood*, 715

A gift of a balance due to testator from his partnership at a particular date was held to be adeemed, *pro tanto*, by drawings made before his death and partly before the date of the will. *Ibid*.

Shares in a company were given, together with other property, and were onerous:—*Held*, that the legatees could repudiate the shares, and take the rest of the gift. *Ibid*.

— appointable fund. See Power.

— See Ademption. Charge. Charitable Legacy. Legacy. Portions. Mortmain.

WINDING UP OF COMPANY—*amalgamation ultra vires: void shares: return of purchase money: interest: acquiescence: alteration of articles of association*—In 1864 an agreement was entered into between the H. Company and the I. Company, for an amalgamation and transfer of the property and business of the I. Company to the H. Company, and special resolutions were passed and approved of, and confirmed at general meetings of the H. Company, pursuant to the 50th and 51st sections of the Companies Act, 1862, for the increase of their capital by the issue of new shares to the shareholders of the I. Company. A. was a shareholder in the I. Company, and applied for and was allotted shares in the H. Company, and paid 150*l.* for deposit and on account of premium thereon; but the shares were afterwards declared forfeited for non-payment of calls. In December, 1866, the H. Company was ordered to be wound up. In May, 1868, at the hearing of a cause instituted by shareholders in the I. Company, who dissented from the amalgamation, for the purpose of setting it aside, one of the Vice-Chancellors held the amalgamation to be *ultra vires*. No decree was drawn up, compromises were effected with the dissentient shareholders, and all proceedings in the suit stayed, and the H. Company retained possession of the assets of the I. Company, which had been handed over to them under the agreement. An action at law was commenced against A. for the unpaid calls upon his shares, and upon a special case, in which it was incorrectly stated that a decree had been made in the Chancery suit, and no mention was made of the subsequent compromise, it was held by the Court of Common Pleas, and affirmed in the Exchequer Chamber, that the amalgamation being void A. never was a shareholder in the H. Company. A. then took out a summons in the winding-up of the H. Company for repayment of the money paid by him in respect of the shares:

—*Held* (by the full Court of Appeal), affirming the decision of the Court below, that he was entitled to recover the money paid for deposit and on account of premium, with interest at 5*l.* per cent. from the date of the summons. *In re The Bank of Hindustan, China and Japan (Limited)*—*Campbell's Case; Hippeley's Case; and Alison's Case*, 1

C. and H. were original shareholders in the I. Company, and they also accepted and had allotted to them shares in the H. Company upon the terms of the amalgamation, and paid the deposit, premiums and calls upon them. Upon summonses taken out by C. and H.,—*Held*, reversing the decision of one of the Vice-Chancellors, that the Court was not bound by the decision of the Court of law pronounced in A.'s case upon a case erroneously stated, and that C. and H. having entered voluntarily into the contracts of which they had had the full benefit, and which had become binding on the company before anything was done to avoid them, were not now entitled to be relieved therefrom. *Ibid*.

Held also that the increase of capital was well effected by the resolutions without altering the articles of association. *Ibid*.

— *amalgamation: sanction by liquidators to transfer upon terms*—In May, 1866, resolutions were passed for amalgamating the F. Company with the O. Bank, and to wind up the F. Company voluntarily for enabling the amalgamation to be carried out. The two plaintiffs, who had recently purchased shares in the F. Company (the one the day before the resolutions for amalgamation were confirmed, the other shortly after) in the same month of May contracted to sell their shares and executed transfers thereof. On the 2nd of June following, and before the transfers were sent in for registration, the liquidators under the voluntary winding up passed a resolution that they would not register any more transfers, except upon the terms of the transferees executing a deed by which they should guarantee the payment of all calls by their transferees. The plaintiffs not being able to obtain transfers otherwise executed the deeds in April, 1866. In 1866 the voluntary winding up was superseded by a compulsory winding up. In July, 1868, actions were commenced against the plaintiffs on their deeds to recover the amounts due from them for calls and for damages, and thereupon the plaintiffs filed bills, alleging that the liquidation was invalid, and that the deeds were obtained from them without consideration, by misrepresentation and concealment, and praying that they might be cancelled, and the actions stayed. In another suit against the same company it had been decided, and confirmed on appeal, that the amalgamation was *ultra vires* and void:—*Held*, that the liquidation proceedings were valid and could not be set aside, because the amalgamation, for which they had been instituted, had been declared void. Also that there was ample consideration

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for the deeds, and that there was no evidence of misrepresentation or concealment, and that the liquidators were justified in refusing to sanction the transfers except upon such terms as they thought were for the benefit of the company. *Cleeve v. The Financial Corporation*; and *Williams v. The Same*, 54

It is not the effect of a compulsory winding up order to nullify proceedings which have been taken under a previous voluntary winding up. *Ibid.*

WINDING-UP OF COMPANY (continued)—*Companies Act, 1862: exception in section 199 of "railway company": dock company with power to make branch railway: receiver: plea of illegality of debentures: costs*—A "dock company" incorporated by a special Act, with power to construct a short subsidiary "branch railway," is not a "railway company" within the exception in section 199 of the Companies Act, 1862. *In re The Exmouth Docks Company*, 110

A company cannot, on a winding-up petition presented by a debenture-holder, plead informality on the part of their directors in issuing the debentures as a valid objection to a winding-up order. *Ibid.*

Where a company is empowered by its special Act to raise money by debentures, and the Act provides that the debenture-holders may enforce payment of their debts by the appointment of a receiver, the Court will not make a winding-up order on a petition by a debenture-holder who has not first tried the remedy provided by the special Act. *Ibid.*

Observations as to costs of opposing winding-up petitions. *Ibid.*

—*creditor's petition: right to winding up order: petition to stand over*—A creditor of a company who cannot get paid without a winding up, is entitled *ex debito justitiae* to an order for winding up. *In re The Western of Canada Oil, Lands and Works Co.* 184

The 91st section of the Companies Act, 1862, is applicable when a petition for winding up is before the Court, and does not necessarily presuppose a winding up order. *Ibid.*

Where it appears that there is a reasonable chance of a creditor getting paid without a winding up order sooner than if an order was made, the Court may order a creditor's petition to stand over, although the creditor has, under section 80 of the Companies Act, served on the company a formal demand for payment, and not been paid within the three weeks. *Ibid.*

—*one of the subscribers of memorandum an infant*—A company which had been registered as a limited company carried on business for a short time with more than seven shareholders. On its being wound up under a supervision order it was discovered that one of the subscribers of the memorandum was an infant, thereupon a petition for winding up

the company under the 199th section was presented by a creditor and an order made. *In re The Hertfordshire Brewery Co.*, 358

—*no creditors or contributories: sale of company's property: liability to winding-up order: calling meetings under Companies Act, 1862*

—A company had been in existence for four years without carrying on any business; all its shares were registered as fully paid up, and there were no creditors. An agreement having been entered into for the sale of its property, a shareholder presented a petition for winding up the company with a view to the property being sold under the direction of the Court, other shareholders, however, opposing the petition on the ground that the sale could be better effected without the intervention of the Court, and that there being no creditors or contributories a winding-up order would be useless. Winding-up order granted on two grounds. First, that the company being registered under the Companies Act, 1862, the liability to a winding-up order existed, independently of the question whether any advantage might result from such an order. Secondly, that as the property appeared to be of some value, and the shareholders were unable to agree as to the mode of sale, the sale could be more advantageously effected under the direction of the Court. *In re The Tumacacori Mining and Land Co.*, 417

The Court will not direct meetings of creditors or contributories to be called under section 91 of the Companies Act, 1862, except where the company is a going concern. *Ibid.*

—*refusal of creditors claim: action: staying execution*—A creditor made a claim in a voluntary winding-up, but the liquidator refused to take out a summons to consider it. The creditor then brought an action, and, the company not appearing, he recovered judgment for the full amount. On motion by the company.—*Held*, that the Court would restrain execution on the terms of the creditor being allowed to prove for his judgment, costs at law, and costs of motion. *Re The Poole Fire Brick and Blue Clay Co.*, 447

—*informal advertisement*—The advertisements of a winding-up petition must be strictly in accordance with the first rule of General Orders of 21st of March, 1868. *In re The Marezzo Marble Co. (Lim.)*, 544

—*costs of liquidator on appeal*—When a liquidator is brought before the Court of Appeal as a neutral party, his costs should as a rule be allowed out of the estate, but the Court of Appeal will make no order on the subject, but will leave the matter to the discretion of the Court below. *In re The Wheal Vyvyan Mining Co.*, 599

—*additional capital: old shareholders: new shareholders: fully paid-up shares: shares*

partly paid-up: division of surplus—A company having spent its capital, raised additional capital by the issue of new shares, providing that if the company were wound up before the new shares should be fully paid-up no call should be made on them, except for payment of debts remaining after realisation of all the assets, and no call should be made on them for repayment to the old shareholders. In the winding up of the company more was called up from and paid by the new shareholders than was necessary to pay the debts, but the new shares were still not fully paid-up:—*Held*, first, that though the surplus had arisen from the payments of the new shareholders, yet that, in the absence of any contract to that effect, they were not entitled to have it returned to them, but that it must be divided rateably among all the shareholders, old as well as new. Secondly, that the old shareholders were not, under the circumstances, entitled to have the amount which they had paid up on their shares equalised with the amount paid by the new shareholders on theirs by the return of the excess before division of the surplus, but that the surplus was divisible according to the amounts paid on each set of shares. *In Re The Eclipse Gold Mining Co.*, 637

— *payment to petitioner: protected transaction*—A creditor filed a petition to wind up a limited company, but delayed his proceedings on payment of part of his debt with a promise of payment of the remainder. No further payment was made, and ultimately a winding up was ordered on his and other petitions:—*Held*, that the payment to him was not a transaction that ought to be protected by the Court under section 153 of the Companies Act, 1862 (which avoids all payments after the petition, unless the Court otherwise directs), and that the money must be refunded. *In Re Liverpool Civil Service Association; ex parte Greenwood*, 609

— *mutual acceptances: realisation of security: creditor's right to retain proceeds and prove*—A bank, carrying on business in Bombay and London, sold to "C. & Sons," of Bombay, their acceptances for 25,000*l.*, payable in London three and four months after sight. In payment, "C. & Sons" gave the bank bills for 20,000*l.*, drawn on C. & Co., payable six months after sight, and 5,000*l.* in cash, together with a further sum, by way of discount, in respect of the difference of times when the bills became due. "C. & Co." accepted the bills drawn on them, and "C. & Sons" indorsed to "C. & Co." the bank's acceptances for 25,000*l.* The bank being unable to meet some of their acceptances, gave "C. & Co." a security for payment thereof. Subsequently the bank became insolvent, and was ordered to be wound up. Both "C. & Co." and "C. & Sons" executed assignments for benefit of their creditors. All the acceptances of "C. & Co." had been dealt with by the bank, and were in the hands of

third parties, but "C. & Co." were the holders of the bank's acceptances to the extent of 19,000*l.* The representatives of "C. & Co.," acting on the erroneous assumption that the bank held their acceptances for 20,000*l.*, sent in a claim in the winding up of the bank for 5,000*l.* only. Subsequently, upon discovering the fact that the bank had parted with all their acceptances, they claimed to be admitted to prove to the full amount of 19,000*l.* They had in the meantime realised their security:—*Held*, that the representatives of "C. & Co.," as indorsees for value, were entitled to prove against the bank in respect of the acceptances held by them; and that since the claim for 5,000*l.* had been made on an assumption of facts shewn to be erroneous by the affidavit made in support of it, the case should be treated as if the claim for the whole 19,000*l.* had been made at the time when the original claim for 5,000*l.* was carried in, and that being before "C. & Co." had realised their security, they were entitled to retain the amount so realised as well as to prove for the whole amount in the winding up. *In re The London, Bombay and Mediterranean Bank*, 683

— *in England: jurisdiction: foreign judgment and execution*—A company registered in England under the Companies Act, 1862, with an office in London, but carrying on business and having property in India, was ordered to be wound up compulsorily by an order of the Court in England. Another English company, also carrying on business in India, had, prior to the winding up order, obtained in India a judgment against the first-mentioned company in respect of a debt, and subsequently to the winding up order issued execution upon the judgment against the property in India of the debtor company. The property was subsequently sold under an order of the Court here, and a portion of the proceeds was paid to the creditor company on account of their debt, on their undertaking to refund the same if they were not entitled thereto:—*Held*, that the creditor company were not entitled to retain the proceeds, but must hand over the same to the official liquidator of the debtor company, for equal distribution among the creditors. *In re The Oriental Inland Steam Co. (Lim.)* 690

— right to prove. See Bill of Exchange.

WITNESS — *cross-examination: expenses*—The party called upon to produce his witness for cross-examination by the opposite party in the cause, must, in the first instance, pay the expenses of the witness's production. *Richards v. Goddard*, 144

— *answer: cross-examination*—The answer of a defendant who was unable to be cross-examined on account of illness was not allowed to

- be read as evidence on his behalf. *Parker v. M'Kenna*, 802
- Witness (continued)—*Companies Act*, 1862: *Scotland: creditor*—When a witness in Scotland, summoned under section 127 of the Companies Act, 1862, objects to be examined, the proper course is to move the Court of Chancery in England that he be ordered to attend for examination before the sheriff of his county, at his own expense. *Re Tyne Chemical Co. (Lim.)*, 354
- A creditor of a company may be summoned to ascertain whether the company has an alleged counter-claim against him. *Ibid.*
- See Company. Contributory.
- Words—"Cash under the control of the Court," 191
- "Delineated," 761
- "Exhausted," 75
- "Lands," 498
- "Making Complaint," 748
- "Nephews and Nieces," 681
- "Offence," 705
- "Order and disposition," 52
- "Ordinary train," 430 .
- "Our Children," 462
- "Residue," 385
- "Survivor," 347



TABLE OF CASES.

CHANCERY.—NEW SERIES, VOL. XLIII.

- Accidental Death Insur. Co.; in re Allin's Case (L.C.), 116
 Adanson Fibre Co. in re; Miles's Claim (L.J.), 732
 Appletreewick Lead Mining Co. (Lim.) (V.C. M.), 793
 Armstrong v. Armstrong (M.R.), 719
 Ashley v. The Earl of Essex (M.R.), 817
 Askew v. Rooth (V.C. B.), 368
 Aston v. Wood (V.C. B.), 715
 Attorney-General v. Ray (L.J.), 478
 Attorney-General and National Debt Com. v. Ray (V.C. H.), 321
 Axmann v. Lund (V.C. M.), 655
 Aynsley v. Glover (M.R.), 777

 Bailey v. Piper (V.C. H.), 704
 Bank of Hindustan, China, and Japan (Lim.); in re Alison's Case, Campbell's Case, and Hippeesley's Case (L.C. & L.J.), 1
 Barclay v. Messenger (M.R.), 449
 Barnes v. Addy (L.C. & L.J.), 613
 Beall v. Smith (L.J.), 245
 Beattie v. Ebury (V.C. B.), 80
 Belaney v. French (L.J.), 312
 Bellairs v. Bellairs (M.R.), 669
 Benton's Policy Trusts; in re (V.C. H.), 715
 Berkley, in re (L.J.), 703
 Best's Settlement Trusts, re (V.C. H.), 545
 Bethel v. Abraham (M.R.), 180
 Bibby v. Naylor (M.R.), 405
 Bide v. Harrison (V.C. M.), 86
 Binns v. Fisher (V.C. H.), 188
 Bird v. Bird's Patent Sewage Co. (L.J.), 399
 Blakeney Ordnance Co. (Lim.); in re Brett's Case (L.C. & L.J.), 47
 Bloomer v. Union Coal and Iron Co. (V.C. B.), 96
 Boatwright v. Boatwright (M.R.), 12
 Bonelli's Electric Telegraph Co., re; Cook's Claim (V.C. B.), 720
 Brand v. Blow (V.C. H.), 528
 Brophy v. Bellamy (L.C. & L.J.), 183
 Brown's Trusts; in re (V.C. M.), 84
 — v. Rye (M.R.), 228
 Brunskill v. Caud (L.C.), 163
 Burnham National Schools, re (M.R.), 340
 Burton v. Gray (L.J.), 229

 Caballero v. Henty (L.J.), 635
 Capron v. Capron (V.C. M.), 677
 Cavander v. Bulteel (L.J.), 370

 Chapman v. Chapman (M.R.), 600
 Citizens' Bank, Louisiana, v. First National Bank, New Orleans (H.L.), 269
 City of London Brewery Co. v. Tennant (L.C. & L.J.), 457
 Clark v. School Board for London (L.C. & L.J.), 421
 Cleve v. Financial Corporation (V.C. B.), 54
 Clover v. Royden (V.C. M.), 665
 Colchester v. Law (V.C. M.), 80
 Collier v. Walters (M.R.), 216
 Colquhoun v. Courtenay (V.C. B.), 338
 Commercial Union Insur. Co. v. Lister (M.R.), 601
 Commonwealth Land Building, &c., Co., in re; Hollington, ex parte (V.C. H.), 99
 Cook v. Fowler (H.L.), 855
 Cooper v. Cooper (L.C. & L.J.), 158
 Corrie v. Sayers (L.J.), 337
 Cotterell v. Stratton (L.J.), 573
 Cottrell v. Finney (L.J.), 562
 County Palatine Loan, &c., Co., in re; Cartmell's Case (L.J.), 588
 — Teasdale's Case (L.J.), 578
 Credland v. Potter (V.C. B.), 484
 Crossley v. Maycock (M.R.), 379

 Dagenham Thames Dock Co.; Hulse's Claim (L.J.), 261
 Davies v. Fowler (V.C. M.), 90
 Dawson v. Small (V.C. B.), 406
 De Lisle v. Hodges (V.C. H.), 385
 De Rozas v. Rich (V.C. H.), 440
 De Serre v. Clarke (V.C. M.), 821
 Dorin v. Dorin (V.C. M.), 462
 Dowling v. Pontypool, Caerleon and Newport Rail. Co. (V.C. H.), 761
 Driver v. Driver (V.C. B.), 279
 Droitwich Salt Co. (Lim.), in re (V.C. H.), 581

 Eclipse Gold Mining Co., in re (V.C. M.), 637
 Edwards, ex parte (L.C. & L.J.), 350
 — in re (L.J.), 265
 — v. Warden (L.J.), 644
 Ellis's Trusts, re (M.R.), 444
 Elmer v. Creasy (L.C. & L.J.), 166
 Elway v. Davis (V.C. M.), 75
 Exmouth Dock Co.; in re (V.C. M.), 110

 Farrer v. Sykes (M.R.), 392
 Finch v. Prescott (V.C. B.), 728
 Fisher v. Fisher (M.R.), 262

- Forster v. Abraham (M.R.), 199
 Fothergill v. Rowland (M.R.), 252
 Foxon v. Gascoigne (L.J.), 729
 Freehold and General Investment Co. (Lim.), re;
 Green's Case (V.C. B.), 629
 Gainsford v. Dunn (M.R.), 403
 Gall v. Fenwick (M.R.), 178
 Goodson v. Richardson (L.C. & L.J.), 790
 Goodwin's Trusts, in re (M.R.), 258
 Gould v. Twine (M.R.), 381
 Gravely v. Barnard (M.R.), 659
 Gray v. Lewis (L.J.), 281
 Great Western Colliery Co. v. Tucker (L.J.), 518
 Great Western Insur. Co. of New York v. Cunliffe
 (L.J.), 741
 Greenwood v. Wadsworth (V.C. M.), 78
 Halfhyde v. Robinson (L.J.), 398
 Harbroe v. Combes (V.C. M.), 336
 Harris v. Rich (V.C. H.), 440
 Hartland v. Murrell (L.C.), 94
 Harvey v. Hall (V.C. B.), 95
 Hastings, Mayor, &c. v. Ivall (L.J.), 728
 Hathesing v. Laing (V.C. B.), 233
 Hatton v. Haywood (V.C. M. & L.C.), 372
 Hayman v. Rugby School Governors (V.C. M.),
 834
 Heath v. Crealock (V.C. B.), 169
 Heathcote's Trusts, in re (L.J.), 259
 Hemsley's Settled Estates, in re (V.C. M.), 72
 Herman v. Hodges (L.C.), 192
 Hertfordshire Brewery Co.; in re (M.R.), 358
 Hill v. South Staffordshire Rail. Co. (V.C. H.),
 556
 Hogg v. Scott (V.C. H.), 705
 Hoghton's Estates; in re (V.C. M.), 758
 — v. Fiddy (V.C. M.), 758
 Honeywood v. Honeywood (M.R.), 652
 Hopkins's Trusts, re (V.C. H.), 722
 Howard v. Earl of Shrewsbury (M.R.), 495
 Hoylake Rail. Co., in re; Littledale's Case (L.J.),
 529
 Huddersfield Corporation and Jacomb (V.C. M.),
 748
 Hull v. Christian (V.C. M.), 861
 Imperial Rubber Co. (Lim.) in re; Bush's Case
 (L.J.), 772
 Jacobs v. Rylance (M.R.), 280
 James v. The Queen (V.C. M.), 754
 Jeph's v. Knight (V.C. H.), 611
 Jervis v. Wolferstan (M.R.), 809
 Jones v. Lloyd (M.R.), 826
 Kempson v. Ashbee (V.C. B.), 689
 Kitchin v. Ibbetson (V.C. M.), 52
 Knight v. Knight (V.C. H.), 611
 Lacy v. Hill; Crowley's Claim (M.R.), 551
 Laing v. Zeden (V.C. B.), 239; (L.J.), 626
 Lamare v. Dixon (H.L.), 203
 Lamb v. Cranfield (M.R.), 408
 Lambert v. Lambert (V.C. B.), 106
 Lancefield v. Iggulden (V.C. B.), 570
 Land v. Land (M.R.), 311
 Lane v. Gray (V.C. M.), 187
 — v. Sewell (V.C. H.), 378
 Latham v. Chartered Bank of India, China and
 Australia (V.C. B.), 612
 Lautour v. Attorney-General (M.R.), 313
 Leech v. Schweder (M.R.), 232; (L.J.), 487
 Leese v. Martin (V.C. H.), 193
 Leighton v. Leighton (V.C. H.), 594
 Limehouse Works Co. (Lim.), in re (L.J.), 483
 — Coates' Case (V.C. M.), 538
 Line v. Hall (M.R.), 107
 Liverpool Civil Service Asso., in re; Greenwood,
 ex parte (L.J.), 609
 London, Bombay and Mediterranean Bank; in re
 (L.J.), 683
 London, Brighton and South Coast Railway Act,
 in re (L.J.), 265
 London Provincial Marine Insur. Co. v. Seymour
 (V.C. B.), 120
 M'Clean v. Kennard (L.J.), 323
 Marezzo Marble Co. (Lim.), in re (M.R.), 544
 Marler v. Tommas (M.R.), 73
 Marzials v. Gibbons (L.J.), 774
 Matlock Old Bath Hydropathic Co. (Lim.) re;
 Maynard's Case (V.C. B., L.C. & L.J.), 146
 Matthaei v. Galitzin (V.C. M.), 536
 Maxfield v. Burton (M.R.), 46
 Maynard v. Eaton (L.C. & L.J.), 641
 Menier v. Hooper's Telegraph Works Co. (L.J.),
 330
 Merchant Banking Co. v. Maund (V.C. B.), 861
 Metropolitan Public Carriage, &c., Co. (Lim.) re;
 Brown's Case (L.C. & L.J.), 153
 Meyrick v. Laws (L.C. & L.J.), 521
 — v. Mathias (L.C. & L.J.), 521
 Miles v. Harrison (L.C. & L.J.), 585
 Miller v. Hales (V.C. B.), 446
 Moore v. Moore (V.C. H.), 617
 Mowlem, in re (M.R.), 353
 Moxon v. Payne (L.J.), 240
 Mumford v. Stohwasser (M.R.), 694
 Nalty v. Aylett (V.C. H.), 721
 Neate v. Denman (V.C. H.), 409
 Neath and Brecon Rail. Co., ex parte (L.J.), 277
 Newman's Settled Estates; in re (L.J.), 702
 Nokes v. Gandy (V.C. M.), 276
 Occleston v. Fullalove (L.C. & L.J.), 297
 Ollerenshaw v. Harrop (L.J.), 584
 Oriental Commercial Bank (Lim.); in re Morris's
 Case (L.C. & L.J.), 47
 Oriental Inland Steam Co. (Lim.), in re (L.J.), 699
 Paget v. Ede (V.C. B.), 571
 — v. Marquis of Anglesea; Watkins's Claim
 (M.R.), 437
 Paine v. Jones (V.C. M.), 787
 Palmer v. Jones (M.R.), 349
 Paragassu Steam Tramroad Co.; Ferrao's Case
 (V.C. B.), 264; (L.J.), 482
 Parker v. Lewis (L.J.), 281

Parker v. McKenna (V.O. B.), 802
 Patch v. Ward (L.J.), 486
 Pattison v. Gilsford (M.R.), 524
 Peek v. Gurney (H.L.), 19
 Perring v. Trail (V.C. M.), 775
 Perry v. Merritt (V.C. H.), 608
 Phospho-Guano Co. v. Guild (V.C. B.), 360
 Pinchard v. Fellows (V.O. B.), 227
 Plews v. Baker (V.C. B.), 212
 Plumer v. Gregory (V.C. M.), 616
 — v. — (No. 2), (V.C. M.), 804
 Poole Fire Brick and Blue Clay Co., re (M.R.), 447
 Potter v. Duffield (M.R.), 472
 Powell Duffryn Steam Coal Co. v. Taff Vale Rail. Co. (L.J.), 575
 Prescott v. Barker (L.C. & L.J.), 498
 Price v. Mayo (V.C. H.), 402
 Pritchard v. Roberts (V.C. H.), 129

Quinton v. Bristol, Mayor, &c. of (V.O. M.), 783

Raggett v. Findlater (V.C. M.), 64
 Raine v. Wilson (V.C. B.), 469
 Republic of Liberia v. The Imperial Bank (L.J.), 640
 Reuter's Telegram Co. v. Byron (M.R.), 661
 Richards v. Delbridge (M.R.), 459
 — v. Goddard (V.C. H.), 144
 Robins v. Rose (V.C. B.), 334
 Robinson v. Evans (M.R.), 82
 Row's Estate, in re (V.C. M.), 347
 Rowsell v. Morris (M.R.), 97
 Ruby Consolidated Mining Co. (Lim.), in re;
 Askew's Case (L.J.), 633

Sackville v. Smyth (M.R.), 494
 Sale v. Lambert (M.R.), 470
 Saul v. Browne (L.J.), 568
 Sayers v. Corrie (L.J.), 337
 Scaffold v. Hampton (V.O. M.), 137
 Selby v. Nettlefold (L.C. & L.J.), 359
 Shand v. Du Buisson (V.C. B.), 508
 Sidney v. Sidney (M.R.), 15
 Simmons v. Pitt (L.J.), 267
 Sloper v. Oliver (L.C.), 101
 Snelling v. Thomas (V.C. B.), 506
 South, in re (L.J.), 441
 Spurstowe's Charity, re (V.C. M.), 512
 Stead v. Preece (M.R.), 687
 Stevenson v. Masson (V.C. B.), 134
 Steward v. Nurse (M.R.), 384
 Stranton Iron and Steel Co., re (V.C. B.), 215
 Strong v. Bird (M.R.), 814
 Strutt's Trusts; in re (V.O. M.), 69

Taddy's Settled Estates; in re (V.C. M.), 191

Tahiti Cotton and Coffee Plantation Co. (Lim.),
 in re; Sargent, ex parte (M.R.), 425
 Talbot v. Talbot (M.R.), 352
 Tamacacori Mining and Land Co., in re (V.C. M.), 417
 Taylor v. Taylor (V.C. H.), 314
 Teape's Trusts; in re (L.C.), 87
 Tewart v. Lawson (V.C. H.), 673
 Thomas v. Howell (V.C. M.), 511, 709
 Thompson's Estate, re (V.C. H.), 721
 Thomson v. Flinn (V.C. M.), 256
 Tillett v. Pearson (M.R.), 93
 Tomlin v. Budd (V.C. H.), 627
 Turner v. Buck (M.R.), 583
 — v. London and South Western Rail. Co. and
 the Ringwood, Christchurch and Bournemouth
 Rail. Co. (V.C. H.), 430
 Turton v. Barber (V.C. H.), 468
 Tyne Chemical Co., re (M.R.), 354

United Land Co. v. Great Eastern Rail. Co. (V.C. M.), 363

United Ports Co., in re; Beck's Case (L.J.), 531
 — Wynne's Case (L.J.), 138

Viant's Settlement, re (V.C. B.), 832
 Victoria Palace Theatre Syndicate; in re (V.C. B.)
 751

Ward v. Sittingbourne Rail. Co. (L.J.), 533
 Warne v. Routledge (M.R.), 604
 Watson v. Row (V.C. H.), 664
 Watts v. Watts (V.C. H.), 77
 Webber v. Corbett (V.O. M.), 164
 Wells v. Wells (M.R.), 681
 Western of Canada Oil, &c., Co.; in re (L.C.), 184
 Weston v. Arnold (L.J.), 123
 Wheal Vyvyan Mine Co. (L.J.), 599
 Whyte v. Whyte (V.C. M.), 104
 Wight's Mortgage Trusts; in re (V.C. M.), 66
 Williams v. Aylesbury, &c. Rail. Co. (L.J.), 825
 — v. Financial Corporation (V.C. B.), 64
 Williamson v. Williamson (V.C. B.), 382; (L.J.), 738
 Wills v. Bourne (L.C.), 89
 Wilson v. Northampton and Banbury Junction
 Rail. Co. (L.C. & L.J.), 503
 — v. Thornbury (V.C. M.), 356
 Wilts and Berks Canal, &c., Co. v. Swindon
 Waterworks Co. (L.J.), 393
 Wolverhampton and Walsall Rail. Co. v. London
 and N. W. Rail. Co. (L.C.), 131
 Wynn's Devised Estates; in re (V.C. M.), 95

Ystalyfera Iron Co. v. Neath and Brecon Rail.
 Co. (M.R.), 476

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THE
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FOR
THE YEAR 1874:

Cases in Bankruptcy,
BEFORE THE
Chief Judge in Bankruptcy,
AND IN
The Court of Appeal in Chancery.

REPORTED BY

GEORGE HARRIS LEA, ESQ., BARRISTER-AT-LAW.

AND ON APPEAL BY

CHARLES EDWARD HAWKINS, ESQ.,
EDWARD THURSTAN HOLLAND, ESQ., AND CHARLES T. MITCHELL, ESQ.,
BARRISTERS-AT-LAW.

MICHAELMAS TERM, 1873, TO MICHAELMAS TERM, 1874.

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REPORTS OF CASES

IN

Bankruptcy,

DECIDED BY THE CHIEF JUDGE IN BANKRUPTCY,

AND,

ON APPEAL, BY THE COURT OF APPEAL IN CHANCERY
AND BY THE HOUSE OF LORDS.

VOL. XLIII. (NEW SERIES), COMMENCING WITH

MICHAELMAS TERM, 37 VICTORIÆ.

BACON, C.J. }
1873. }
Nov. 10. }

Ex parte JEFFERY;
Re HAWES.

Bankruptcy Rules, 1870, r. 292—Bankruptcy pending Liquidation—Costs of Liquidation Proceedings—Composition—Receiver.

Where bankruptcy occurs pending proceedings for liquidation, the costs of the liquidation proceedings must be paid out of the estate, unless it can be proved that they were instituted from some corrupt or fraudulent motive.

This was an appeal from an order made by the County Court judge at Oxford.

Henry Mullinex Hawes, the debtor, was a wine merchant at Abingdon. He commenced business in January, 1872, and in the course of a few months became indebted to Messrs. Lemon, Hart & Son for upwards of 450*l.*, for goods supplied to him in the course of business. Hawes gave acceptances for these goods, but having failed to meet the acceptances which first became due, he, on the 1st of November, 1872, gave to Messrs. Lemon, Hart & Son a bill of sale of the whole of his stock in trade and effects.

On the 5th of November, 1872, Messrs. Lemon, Hart & Son took stock of the debtor's effects, and shortly after, without giving notice to the debtor, called a meeting of the creditors, and offered to take the estate into their own hands, and to pay the creditors a dividend of 6*s.* 8*d.*

NEW SERIES 43.—BANKR.

in the pound. The debtor was not present at this meeting, and was for two months after unable, through illness, to attend to his affairs. During this time Lemon, Hart & Son took possession of his estate, and proceeded to dispose of it. In January, 1873, the debtor was able to leave the Oxford infirmary, and attend to his affairs again; and, having instituted enquiries into the dealings of Lemon, Hart & Son with his estate, he became dissatisfied with what they had done.

On the 31st of January, 1873, the debtor, under the advice of his solicitor, Mr. Jeffery, filed a petition for liquidation by arrangement, and immediately after obtained the appointment of a receiver of his stock in trade and effects. The first meeting of creditors was held on the 28th of February, but the creditors refused to pass any resolutions in favour of liquidation by arrangement or composition, alleging that they preferred to accept the offer of 6*s.* 8*d.* in the pound made to them by Lemon, Hart & Son.

The following day Hawes filed a declaration of insolvency, in the form required by the statute, and was at once adjudicated bankrupt on the petition of one of his creditors, the act of bankruptcy alleged being the statutory declaration, and not the declaration of inability to pay contained in the liquidation petition. Mr. Howell, the representative of Lemon, Hart & Son, was appointed trustee under the bankruptcy. The costs of the attorney, receiver and accountant, under the

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liquidation, were taxed by the registrar of the Court, and amounted to 97l. 11s. 6d., but Mr. Howell refused to pay this sum, on the ground that the liquidation proceedings were wholly unnecessary, and without benefit to the estate.

On the 24th of June, 1873, an application to the County Court at Oxford, that the taxed costs under the liquidation might be paid by the trustee out of the estate was ordered to be dismissed.

From this order Jeffrey now appealed.

The question mainly turned on the construction of rule 292 of the Bankruptcy Rules, 1870, which is as follows—

“When bankruptcy occurs pending proceedings for or towards liquidation by arrangement or composition with creditors, the proper costs incurred in relation to such proceedings shall be paid by the trustee under the bankruptcy out of the debtor's estate, unless the Court shall otherwise order.”

Mr. Finlay Knight, for the appellant.—The construction to be placed on rule 292 is that the costs of the liquidation are to be paid, unless there is some special reason to the contrary. In this case all the proceedings were properly conducted, and there is nothing in the facts of the case to prevent costs being given—

Ex parte Page, re Springall, 25 Law Times Rep. N.S. 716;

Roche and Hazlitt's Law of Bankruptcy, 500.

Mr. De Gez and Mr. Bond Cox, for the trustee.—The matter was in the discretion of the County Court judge, and he has exercised his discretion by refusing to order these costs to be paid.

After the first meeting of creditors had failed to come to any resolution, the liquidation proceedings were no longer “pending,” within the meaning of rule 292—

Ex parte Cobb, re Sedley, 42 Law J. Rep. (N.S.) Bankr. 63; s. c. Law Rep. 8 Chanc. 727.

On the evidence, it is clear that the creditors were desirous of accepting the composition offered by Lemon, Hart & Son, and the debtor was not justified in putting his estate to the expense of liquidation against their wish.

BACON, C.J., said—The circumstances of this case are of great importance, and probably of frequent occurrence.

The 292nd rule is plain, and it is that the costs shall be paid out of the estate, unless a reason exists to the contrary. There may have been fraud in the institution of proceedings, in which case the Court will refuse to give costs; but that is not so in this case. It is true Messrs. Lemon, Hart & Son's solicitor has made an affidavit, in which he has imputed mean motives to the debtor, but I cannot find any trace of fraud in the circumstances of this case, and such an imputation ought not to have been made.

It is said that the only reason the debtor had for filing his petition for liquidation was to give costs to his solicitor, but there is nothing to support this allegation, and I think that, having regard to the fact that Messrs. Lemon, Hart & Son had at the time power to deal with the property as they thought fit, the debtor simply did his duty in acting as he did. Moreover, I do not see what motive the debtor could have had except to preserve his property for the general body of his creditors. Then, directly the debtor had signed his petition for liquidation, a receiver was appointed; but this, too, was quite right, because the property was at the time in the possession of one of the creditors, and the officer of the Court stepped in, and held it for the benefit of all. It is true, the creditors subsequently agreed to accept a composition, but that has no bearing upon this appeal.

I think this case comes clearly within the rule cited. Unless a corrupt and fraudulent motive can be proved the costs must be paid; in this case no such motive has been proved, on the contrary, the proceedings were right and lawful. The order made in the County Court must be discharged, and the appellant is entitled to his costs of the motion in the Court below.

Order discharged.

Solicitors—Messrs. Phelps & Sidgwick, agents for Mr. A. J. Jeffery, Northampton, for appellant; Mr. Charles Mallam, agent for Messrs. T. & G. Mallam, Oxford, for trustee.

BACON, C.J. } *Ex parte SHELLARD* ;
 1873. } *Re ADAMS.*
 Nov. 29. }

Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 16, 48, 53, 54—Unstamped Order to pay Money out of a Particular Fund—Bill of Exchange—Equitable Assignment—Instrument Receivable in Evidence—Liquidation.

A document was given by A. to S., which was, in fact, an order for the payment of money at a future date out of moneys payable at a future time to A. by third persons. The document was not stamped:—Held (affirming the decision of the County Court Judge), that the document ought to have been stamped as a bill of exchange, and that, not having been stamped at the time, it could not be received in evidence.

Diplock v. Hammond (5 De Gex, M. & G. 320; s. c. 2 Sm. & G. 141; s. c. 28 Law J. Rep. (N.S.) Chanc. 550), distinguished.

This was an appeal from an order made by the Judge of the County Court for Gloucestershire, holden at Bristol.

The two debtors, Adams & Kirby, carried on business as contractors at Bristol. In the year 1872 they had a contract with the Bristol United Gas Company, to execute certain work on that company's premises in St. George's Road. For this work they required a large quantity of lime, which they obtained from time to time from Mr. Joseph Shellard, who was a lime merchant, trading under the firm of Messrs. Shellard & Sons.

Shellard, not being satisfied with the security, did not send down the lime as quickly as it was required, and, after some negotiation, and to obtain the delivery of the lime, Adams & Kirby gave to Shellard as security an order on the Gas Company, which was in these terms—"We shall be obliged by your paying to Mr. Joseph Shellard, of Keynsham, the sum of 200*l.*, out of moneys payable to us on the completion of our contract for certain buildings now being built by us for your Company at Canons Marsh, and his receipt shall be a discharge for the same." This order was dated the 24th of August, 1872. It was delivered at once to the

Gas Company, but was not stamped. The Gas Company received the order, but declined to acknowledge that it was a binding order upon them, and stated this to the person who delivered it.

On the 18th of November, 1872, the debtors filed a petition for liquidation by arrangement or composition, and on the 19th of December following a special resolution was passed in favour of liquidation by arrangement, and James Milne was appointed trustee.

At the time the debtors stopped payment they owed Shellard 314*l.*, and at the same time they were entitled to a balance of 413*l.* from the Gas Company. The company were, however, entitled to retain the latter sum till February, 1873, to secure them from loss if the work done was not good.

On the 11th of July Milne moved in the County Court for an order declaring void, as against him, as trustee, the order for payment of the 24th of August, 1872. The Judge, on the hearing of the motion, refused to admit as evidence the order of the 24th of August, 1872, because it was not stamped as a bill of exchange; and, notwithstanding that Shellard offered at the hearing to affix the stamp and pay the penalty, he made the order asked for by the trustee. From this order Shellard appealed.

Mr. Winslow, for the appellant.—The trustee has, by his affidavit, proved our case, and acknowledged that the debtor gave the order to the Gas Company, and then he objects to the evidence he has himself adduced because it is not properly stamped. It is sufficiently proved, as it is admitted by the trustee.

The document is an equitable assignment of the debt, and as such we are entitled to prove it, on paying the stamp and the penalty—

Diplock v. Hammond (ubi supra);

McGowan v. Smith, 26 Law J. Rep. (N.S.) Chanc. 8.

[BACON, C.J.—The latter case does not apply, because there the document was not produced in the Court below.]

The only difference between the two cases is that the position of parties is changed, and the *onus* of proof reversed.

The Stamp Act of 1870, section 16,

shews that we are entitled to have the assignment stamped on payment of the penalty.

Mr. De Gez and Mr. Bagley, for the trustee.—The present case is excepted out of the judgment in the case of

Diplock v. Hammond (ubi supra).

The cases both at law and in equity are uniform in shewing that an authority to pay money must be stamped at the time as a bill of exchange—

Butts v. Swann, 2 Brod. & B. 78;

Emly v. Collins, 6 M. & S. 144;

Firbank v. Bell, 1 B. & Ad. 36;

Parsons v. Middleton, 6 Hare, 261;

Braybrooke v. Meredith, 13 Sim.

271; s. c. 12 Law. J. Rep. (N.S.)

Chanc. 289.

The object of the Stamp Act of 1870, as it differed from previous Acts, was to insist on the stamps being affixed at once—sections 48 and 54.

The document cannot be stamped by the appellant, because it is not in his possession, but is held by the Gas Company.

Mr. Winslow, in reply.

BACON, C.J.—The distinction between assignments and bills of exchange and orders for payment, is one which has been known for many years, and has been frequently the subject of decision. *Diplock v. Hammond (ubi supra)* was a case in which a document was held to be an assignment of the whole of a fund. The Court declined to force the construction of that document by holding that it was only a bill of exchange. I have no inclination to find fault with the decision in that case, but, in my opinion, it does not govern the present case. The present is a pure case of an order for payment of money out of particular funds at some future day not then fixed, and, as such, it is liable to be stamped as a bill of exchange, and is an order for payment (even if not strictly a bill of exchange), within the meaning of the Stamp Act. It has no stamp, and the Judge of the County Court could not do otherwise than he did, viz., to declare that it had no validity. When it is said that the trustee has himself furnished the requisite evidence, and that he has brought it into Court and proved it, it is impossible for me to attend to that with any seriousness. He brought

it into Court for the purpose of obtaining the decision of the Court that it was worthless, and he has succeeded in that contention. That it would be directly against the policy of the Stamp Act to hold this document valid, nobody can for a moment doubt, who has attended either to the statute or to the law which was in existence long before either of the Stamp Acts was passed. In my opinion the handing of this paper to the Gas Company, and the manner in which it was dealt with by them, and the intimation given by them that they could pay no regard to it, and that the person who delivered it must take his chance, all tend to shew that the appellant was apprised at the time that the company did not recognise his claim; so that to say there has been an acceptance of the order, as there was in *Diplock v. Hammond (ubi supra)*, is wholly out of the question here. Upon reading the Act, and attending to the evidence which the appellant has adduced, it is quite clear that the document was meant to be, as in fact it is, an order for payment of money, and being such, it was wrong, in the view of the Stamp Act, for the appellant to accept it in that form without a stamp. It is of no validity in his hand, because it wants the stamp the law requires. In my opinion the appeal fails, and must be dismissed with costs.

Solicitors—Messrs. Gregory & Rowcliffe, agents for Messrs. Benson & Thomas, of Bristol, for appellant; Messrs. Walter Moojen & Son, agents for Messrs. Beckingham, of Bristol, for trustee.

BACON, C.J. } *Ex parte THE RADCLIFFE IN-*
1873. } *VESTMENT COMPANY;*
Dec. 15. } *Re GLOVER.*

Composition—Power of Creditors to reduce—Dissentient Creditors—Restraining Actions at Law—Bankruptcy Act, 1869, s. 126, clauses 1, 6, 7.

Creditors have power by means of an extraordinary resolution to reduce the amount payable under a composition; and creditors who had agreed to the original resolution, but dissented from the resolution for the reduction, are nevertheless bound by the latter resolution when duly passed.

The word "persons" in the 126th section of the Bankruptcy Act, 1869, does not include creditors.

This was an appeal from an order made in the County Court at Manchester.

The debtors, Messrs. W. H. Glover & Co., carried on business as towel manufacturers at London, Manchester and Ashton-under-Lyne.

On the 9th of November, 1872, Messrs. Glover drew a bill of exchange for 763*l.* at four months on Messrs. Child, Hornby & Co. On the 28th of November Glover & Co. drew another bill of exchange for 782*l.* at four months on Messrs. John Wille & Sons. Both these bills were discounted by the appellants, the Radcliffe Investment Company. In consequence of the failure of the acceptors of both these bills, Glover & Co. on the 22nd of January, 1873, filed their petition for liquidation by arrangement or composition.

At the first meeting of the creditors it was resolved that a composition of 1*l.* in the pound should be accepted in satisfaction of the debts due to the creditors. This resolution was confirmed at the second general meeting. The composition was to be paid as follows—5*s.* in the pound at the end of four months, 3*s.* 6*d.* in the pound at the end of seven months, and 2*s.* 6*d.* at the end of nine months, the time to be reckoned from the date of the second general meeting. All these instalments were secured by promissory notes signed by each of the debtors. The first instalment of this composition was duly paid. Just at that time, however, questions had arisen as to the liability of Messrs. Glover on certain bills of exchange as to which they had been advised that they were not liable, and which they had not included in their statement of liabilities. This claim was advanced by Mr. James Halliday, the trustee in the liquidation of the estate of Messrs. Child, Hornby & Co., and being brought before the Judge of the County Court at Manchester, it was decided that Halliday was entitled to prove against the estate of the debtors for 7,881*l.*, and payment was ordered to be made to Halliday of the first instalment of the composition. In consequence of this decision the debtors found it would be impossible to pay the second instalment

of the composition. Not having time to summon a special meeting of the creditors, they on the 20th of September, 1873, issued a circular to call a private meeting on the 23rd of September to decide on the best course to be taken. This circular was not sent to the Radcliffe Investment Company, the omission having been made by mistake, but on the 23rd of September, immediately after the meeting, a letter was written to the company stating that the creditors had at the private meeting resolved to accept 2*s.* in the pound in payment of the second instalment, instead of 3*s.* 6*d.* They were willing to make this arrangement on the understanding that Halliday would accept 2,000*l.* in discharge of all his claims against the debtors' estate.

On the 27th of September, 1873, actions were commenced at the suit of the Radcliffe Investment Company on each of the two bills of exchange for 763*l.* and 782*l.*

On the 8th of October a statutory general meeting of the creditors was held, in pursuance of notice duly given to all the creditors, and at this meeting it was unanimously resolved that the second instalment of the composition should be reduced from 3*s.* 6*d.* in the pound to 2*s.*, and that such reduced instalment should be payable on the 24th of November instead of on the 24th of October. The Radcliffe Investment Company did not attend this meeting, but notice of the resolution was sent to them.

On the 9th of October an order was made in the County Court restraining the two actions commenced by the Radcliffe Investment Company.

Against this order the company now appealed.

The chief question turned upon the construction of the Bankruptcy Act, 1869, s. 126, clause 6, which is as follows—

"The creditors may by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them, without prejudice to any *persons* taking interests under such provisions who do not assent to such addition or variation; and any such extraordinary resolution shall be presented to the registrar in the same manner and with the same consequences as the extraordinary

resolution by which the composition was accepted in the first instance."

Mr. Little and Mr. Bagley, for the appellants.—We did not assent to the resolution of the 8th of October, and when the debtor did not pay the instalment due on the 24th of September we were at once entitled to adopt the course, which we did in fact take, and sue for the original debts—

Edwards v. Coombe, 41 Law J. Rep. (N.S.) C.P. 202; s. c. Law Rep. 7 O.P. 519.

The true meaning of the 6th clause of the 126th section is that the creditors may vary the "provisions"—that is the details—of the composition, but the section does not give them leave to vary the amount of the composition.

Third parties may have acquired rights under the composition, and their interests ought not to be affected by any subsequent variation.

Mr. Benjamin and Mr. Alfred Barratt, for the respondents.—Any doubtful point in the Act of 1869 ought to be construed by the help of the Bankruptcy Act, 1849, and section 220 of that Act says, the creditors may "confirm, alter or annul the whole or any part of" a resolution.

The amount of money to be paid is clearly one of the "provisions" of the composition.

The word "persons" must be construed as meaning third persons, and the meaning of the section is that creditors shall be bound but that third persons shall not. If creditors are not to be bound what is the use of the meeting at all? Clearly then the composition is valid for all, or is valid for none—

Ex parte Härtel; re Thorpe, 42 Law J. Rep. (N.S.) Bankr. 34; s. c. Law Rep. 8 Chanc. 743;

In re Hatton, 42 Law J. Rep. (N.S.) Bankr. 12; s. c. Law Rep. 7 Chanc. 723;

Ex parte The Paper Staining Company; re Bishop, Law Rep. 8 Chanc. 595.

Mr. Little, in reply.—That there is a great distinction to be drawn between this Act and former Acts is shewn by the judgment of Kelly, C.B., in

Slater v. Jones, 42 Law J. Rep. (N.S.) Exch. 122; s. c. Law Rep. 8 Exch. 186.

BACON, C.J.—This case is no doubt one of great importance, and not without difficulty, because the whole ground of the appeal is upon the terms of the 126th section, and the construction to be put upon the 126th section is the matter I am most concerned with at present.

The Act of 1849 has been referred to. That Act has been repealed and is no longer law, but it has been considered that it ought to be taken in illustration in construing the existing law. I think I am not only entitled, but I am bound to have regard to the provisions of that statute for the purpose of ascertaining what the existing statute says and means. Under the 220th section of that Act certain powers were given to the Court. [His Lordship then read this section.] Now the existing statute has made this striking and marked difference in the law of bankruptcy—that all or nearly all the powers and authority which were given to the Court under former statutes are now transferred to the creditors. They are made the administrators and judges of their own affairs and they are, under the terms of the statute, bound by the votes of the majority of the creditors at a meeting duly convened. One of the things contemplated by the existing statute is to regard only the interests of creditors, and it is in their interest alone that the law provides that it shall be in their power to prefer the acceptance of a composition to the issuing of proceedings in bankruptcy against their debtor, or to resorting to any other legal remedy they may possess. The 126th section gives powers to the creditors, by an "extraordinary resolution" at any meeting under the first paragraph of that section, "to resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor." The section further requires that the debtor at the meeting which shall be held shall produce "a statement shewing the whole of his assets and debts"—those being the material and the necessary ingredients for the consideration which the creditors are invited to bestow upon the subject then submitted to them. There is no question here that those requisitions of the statute were duly complied with. The creditors agreed to accept the composition which

has been mentioned in the course of the discussion, and by three instalments, the first of which has been paid. Then the statement of assets and debts which had been laid before the creditors when they assembled and resolved to accept the composition, was entirely altered by a debt, the existence of which had been denied by the debtors, and which was only established against them after litigation and discussion. That alters altogether the basis on which the original resolution had been passed, and then (without giving throughout the words of the Lords Justices which have been quoted) a state of things arose inconsistent (no matter how) with the object of the creditors at that meeting. It need not be directly inconsistent. The Act of Parliament does not mean that, by contemplating the existence of any such accident, for so I must read the 6th paragraph of the 126th section. [His Lordship, after reading this paragraph, continued.] It is upon the words of that clause and that alone that the case of the appellants rests. Although many other topics have been referred to in the course of the discussion, my attention is fixed and my decision must be guided upon the construction which I have to put upon that section, and, as I have said, I must draw what this Act means from the law as it existed before this Act of Parliament was passed. That I may do so, I must consider what was the general policy, and what the scope and the general provisions of the law establishing the administration in bankruptcy, and above all, I am bound to guide myself against contravening the policy of the law, or frustrating those provisions, by any merely verbal construction which can be put upon some words contained in the section I have referred to. Now no doubt, in one way, the words, "without prejudice to any persons," may be made to be read "any creditors." That I conceive is not the meaning of this clause. The creditors for all purposes of majority and minority were bound by the first resolution. Their obligations are not ended by the passing of the resolution. The statute has said, that in certain cases the new resolution, or the addition to the resolution already passed, shall have the same consequences, both to the debtor

and the creditors, as would have ensued if it had been the original resolution, but it provides that the new resolution shall be "without prejudice to any persons taking interests under such provisions who do not assent to any such addition or variation." Now, does the word "persons" there mean "creditors"? I conceive not, according to the true construction of the law. I conceive that having the word "creditors," which has a significance which cannot be mistaken, and they being the persons who are to be bound, and the persons who are to receive all the consequences of their resolution, the same as the original resolution, it can be only doing violence to the meaning of the law if I were to read the word "persons" as meaning "creditors," unless it be impossible to suggest any other meaning. Is it then impossible to suggest any other meaning, for there may be, and there very often are, provisions in composition deeds which affect the interests (I do not say bind them) of persons who are not creditors, and who are not concerned in the statement of assets and of debts? There may be many such persons, but I find in this Act of Parliament, and in every other Act of Parliament in which compositions are mentioned, that creditors are spoken of by the name of "creditors." It is apparent that "creditors" only are the persons intended to be bound, for the next clause provides that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all creditors whose names and addresses, and the amounts of the debts due to whom, are shewn in the statement of the debtor, produced to the meetings at which the resolution was passed, but shall not affect or prejudice the rights of any other creditors." The meaning of that clause is, in my opinion, perfectly obvious and consistent with the policy, and consistent with the law as it ever stood before, and as it is enacted by this statute. The explanation given by the trustee was a perfectly satisfactory one. No bad faith is imputed to anybody in the omission of the debt to Messrs. Childs, Hornby & Co. No doubt is thrown upon the veracity of that explanation, and I have no reason to doubt that the excuse offered for not in-

serting their names in the list of creditors is a perfectly true and valid excuse. So that at once I am furnished with the name of a "person" who is not to be prejudiced by any "addition or variation." Messrs. Childs & Co. are "persons," or the representative of Messrs. Childs & Co. is a "person" who, in the very words of the statute, is not to be "prejudiced" by the "withholding of his assent." The creditors at the second meeting are satisfied that the statement of debts differs from that upon which they had agreed to accept a certain amount of composition, and they then assembled, the present appellants having notice of that meeting, and having the power of attending and saying or doing anything they thought fit at that meeting, and, I am told perfectly unanimously, agreed to accept a modified composition. If that is not within the power of creditors, then this Act of Parliament would be passed in vain, for, as we all know very well, a variety of accidents may happen in such cases, so that the state of things may be changed from time to time, and changed either to the prejudice or advantage of the creditors.

Now see what mischief and injustice I should do to the interests of the creditors, with whose interests the appellants' interests are closely bound up by the original resolution, and who being in the minority are bound by the resolution. I should frustrate and violate the provisions of the Act of Parliament if I suffered the appellants now, by reason of the accident that has happened after the extraordinary resolution was passed, to continue the action at law which they undoubtedly had a right to commence when the 24th of September had come and gone. Of course I do not intend to question the validity or the soundness of the two decisions which have been mainly referred to, viz., *Edwards v. Coombe* and *re Thorpe (ubi supra)*. They have taken a view of the subject at variance with that which I happened to take, and they must be held to be right and I held to be wrong. I would guard myself accordingly from expressing any opinion that would contravene or in the slightest degree infringe the principles which the learned Judges

of those two tribunals have laid down in those cases. The appellants had at law a right to bring an action, and they have exercised that right by issuing a writ, but they cannot escape from the first resolution by which they were bound, subject to the subsequent resolution of the extraordinary meeting. The extraordinary meeting has been held, and the creditors have determined to accept a smaller composition, and by that resolution the appellants were as much bound as by the original resolution.

I think the course the learned registrar took in the first instance was the just and proper course. When he was asked to restrain the actions he could not do so at that moment, for there was only one set of resolutions in existence under which provision was made for the composition, and it had not been performed. There was, therefore, a right of action, but I think the Registrar would have mistaken the duties of his office if he had not postponed his decision until he saw what was the result of the extraordinary general meeting afterwards to be held, and the result of that meeting was that the creditors there present unanimously resolved to accept a smaller composition. In my opinion the appellants were then bound under the very terms of the Act of Parliament, and they could no longer proceed with the actions at law, which, but for the extraordinary resolutions they would, under the authority of the cases that have been referred to, have been well entitled to prosecute. The consequence of permitting them to do so now would be to neutralise these resolutions, and I do not see any way to do this in aid of a party who was bound by the first resolutions. I am bound to take it that the law enables the creditors to vary or to add to the provisions of the composition. I think they have done so lawfully, and there is no ground whatever for this appeal, which must therefore be dismissed with costs.

Solicitors—Messrs. Shaw & Tremellen, agents for Messrs. P. & J. Watson, Bury, for appellants; Messrs. Merriman & Pike, agents for Messrs. Parkington & Allen, Manchester, for respondents.

SELBORNE, L.C. }
 MELLISH, L.J. }
 1873.
 Nov. 7, 14. }

Ex parte PIERCY;
In re PIERCY.

Inspectorship Deed—Estate and Effects of Debtor—Expectant Interest not enforceable—After acquired Property.

By a deed of inspectorship, registered under the Bankruptcy Act, 1861, s. 192, it was provided that all the estate and effects of P., the debtor, should be administered in accordance with the bankrupt law. At the date of the deed there was in existence an agreement between railway companies, to which P. was no party, by which it was agreed that the contract for the execution of the works therein referred to should be let to P. or his nominee. P. afterwards and during the continuance of the inspectorship nominated contractors, and received from them a sum of 3,500l. for so doing:—Held, that this sum was no part of the estate and effects of the debtor at the date of the deed; also, that upon the construction of the deed, after acquired property was not included therein.

This was an appeal from an order made by Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy, whereby Mr. Piercy, the debtor, was ordered to pay over to the inspector, under an inspectorship deed executed by him for the benefit of his creditors, a sum of 3,500l., which had been paid to him under the following circumstances—

By an agreement entered into in the month of June, 1866, between the Manchester, Sheffield and Lincolnshire Railway Company, the Great Northern Railway Company, and the Midland Railway Company of the one part, and the Chester and West Cheshire Junction Railway Company of the other part, it was, amongst other things, agreed that if a bill then before Parliament for authorising the Chester and West Cheshire Company to transfer to the other three companies their undertaking and powers of raising capital should become law, those three companies would within a month after the passing of the Act, pay to the Chester and West Cheshire Company, or to Mr. Piercy as their

nominee, 7,500l., to cover the costs and expenses preliminary and in relation to the promotion, obtaining and passing of the Chester and West Cheshire Railway Act, 1865 (28 & 29 Vict. c. cxxii.), and that the contract for the construction of the railway should be let to Mr. Piercy, who was the engineer and promoter of the Chester and West Cheshire Company, or to his nominees, upon terms to be settled by arbitration in case of difference.

Mr. Piercy was no party to this agreement, but he took an active part in the preparation of it, and in promoting the Act authorising the transfer of the undertaking and powers to the three companies, which was passed in 1866 (29 & 30 Vict. c. cccli.).

On the 15th of March, 1867, Mr. Piercy executed an inspectorship deed, by which it was provided that the debtor's estate and effects should be administered in bankruptcy, and be wound up under inspection, and this deed was duly registered under the Bankruptcy Act, 1862, s. 192. The material clauses of this deed are set out at length in the Lord Chancellor's judgment.

In 1871 Mr. Piercy, with the approval of the three companies, nominated Messrs. Rose & Knight, of Manchester, contractors for the execution of the works, and received from them as the consideration for the nomination 3,500l. This sum, on the application of the inspectors, the registrar ordered Mr. Piercy to pay over to them. Mr. Piercy appealed from the order.

Mr. Roxburgh and Mr. Locock Webb, for the appellant, contended that the debtor's expectation of some benefit to accrue to him under the agreement between the railway companies, to which he was no party, and which he could not enforce, was no part of the estate and effects of the debtor within the meaning of the inspectorship deed, nor did the deed relate to after acquired property. All that the inspectors could claim was whatever would have passed to his assignees if he had been made bankrupt.

Mr. De Gez, Mr. Beresford and Mr. Brough, for the respondents, contended that the debtor's expectations under the agreement passed by the deed, and the

fact that he could not have filed a bill to enforce the contract was immaterial, the deed passed whatever interest he had. But even taking the money to be after acquired property, it was bound by the inspectorship deed so long as the inspectorship continued, in the same way as all property acquired by a bankrupt during the continuance of the bankruptcy, passed to the assignees—

The Bankruptcy Act, 1869, sec. 15. sub-sec. 3;

The Bankrupt Law Consolidation Act, 1849, sec. 141.

A reply was not called for.

THE LORD CHANCELLOR.—We have no doubt whatever in this case. The first point argued was that at the time of the inspectorship deed, dated in March, 1867, Mr. Piercy, the debtor, was entitled, as part of his estate, within the meaning of that deed, to some right against the three railway companies which have been mentioned, which right is, in effect, represented at the present time by a sum of 3,500*l.*, obtained by him by the sale of the alleged right to somebody else in July, 1871.

Now the so-called right accrued, if at all, in this manner. It appears that Mr. Piercy had been engineer and promoter of a railway company, which, as far as we can judge, never made any railway, and which parted with its *status* and whatever it had to part with to other companies, by an agreement which was made in the month of June, 1866. It seems that in the negotiation of that agreement Mr. Piercy, who was a creditor to the amount of 7,500*l.* of the original Cheshire Company, acted as the agent of that company, and was therefore perfectly cognizant of what took place. He also acted as their agent in promoting a bill in Parliament which was necessary for the purpose of effecting the agreement between the companies. That agreement is made between the companies, sealed with their seals and one to which Mr. Piercy is no party. It consists entirely of certain mutual agreements between the four companies, of which the Cheshire Company, for which he had been acting as engineer, and as promoter and agent, was one. One of the clauses in that agreement dealt as be-

tween the companies with the debt of 7,500*l.* due to him from his own company in this way. It provided that the debt should be assumed by the purchasing companies, and should be paid by them to the selling company, which was the debtor, or to Mr. Piercy as their nominee. Clearly that was not an agreement with Piercy in any way whatever, direct or indirect. It was an agreement between the two companies which would have been satisfied by the payment of that money to the selling company; and if the money had not been paid, Piercy would have had no claim whatever against the purchasing companies. With regard to the matter now in question, it stands thus: The provision was that in contemplation of the future making of the lines, for which the selling company had been originally constituted, by the purchasing companies (who, I think, were to have a long lease equivalent to an interest in perpetuity), those companies agreed to let the contract to Mr. Piercy upon certain terms. Mr. Piercy is no party to the deed: Mr. Piercy, in no shape, manner or form whatever, entered into any agreement upon that occasion: he is as free as if no such agreement had ever been made, and it is not with him that this arrangement is made. In my opinion, Piercy is a mere and entire stranger to that contract. The contracting companies were complete masters of it from that time until the year 1871, when something was actually done upon the footing of it with their concurrence, when they entered into the contract with Knight & Rose. At the time when Mr. Piercy executed the deed of inspectorship in March, 1867, the contract vested in him no property at law or in equity—no right of action or suit at law or in equity, in his own name or in any other person's name, nor any power which he could exercise for his own benefit. That being so, the registrar's order cannot be sustained, unless the second argument which has been addressed to us prevail, viz., that this deed of inspectorship practically passed, or bound at all events, all property whatsoever which Mr. Piercy might acquire until one of the two events contemplated happened, one of them being the payment of 20*s.* in the pound to all the creditors,

and the other being the granting of a certain certificate founded upon the assignment of the then existing property. The argument is that until one or other of those events had happened, all property which he might acquire would pass in the same manner as in bankruptcy. That is, in my judgment, a mere question of the construction of the deed. Neither of those events has happened. He has not paid 20s. in the pound, and he has not assigned, though he has been called upon to assign, his remaining estate, and he has not received his certificate which would be equivalent to a discharge. If, therefore, the large construction suggested, that his future property would pass, can be maintained, it would appear that the 3,500*l.* was obtained by him in the year 1871, by selling such power of recommendation as he might *de facto* then possess, and that money having come into his pocket which, though not an interest at law or in equity, or property in any sense, yet as a mere fact the contract was the means of bringing into his pocket in 1871, of course when it did come into his pocket, it would be bound by the deed. But is that the construction, the sound construction, of the deed? I think not. It depends upon the language of the instrument which, in my judgment, is not controlled as to its construction by anything in any Act of Parliament. The material parts, which it seems to me necessary to mention for the purposes of my decision, are found in the preamble on page 1, and in section 21 of the document itself. The preamble at page 1 says this: "And whereas it has been proposed to the creditors, that all the estate and effects of the debtor, subject to the provision hereinafter contained, whether separate or joint with any other person or persons, shall be got in, realised and administered, under such inspection as hereinafter mentioned, and the creditors have assented to the said proposal. And whereas the estate and effects last aforesaid is and are (according as the context may require) included in the expression hereinafter used, 'the said estate.'" In my judgment, according to the natural meaning of the words, "the estate and effects of the debtor," not mentioning anything not then in exist-

ence, would extend only to his then existing estate and effects, unless words were elsewhere found in the deed to shew an intention to give them a larger operation; because, first of all, "the estate and effects of the debtor," naturally refer to that which at the date of the contract was so described; secondly, they are to be got in, realised and administered, and the words, "whether separate or joint with any other person or persons," confirm that construction. Now, we have both of us carefully looked through the deed, and we find nothing whatever in the context of any part of it, which tends to support the view that those words were meant to apply to after acquired property. Indeed, it seems, that the 2nd and 21st clauses rather tend to a contrary conclusion. The 2nd clause is in these words: "That it shall be lawful for the inspectors, in their or his discretion, to direct and authorise the debtor, and his heirs, executors and administrators, as occasion may require, under their or his discretion and control, to carry on and conduct for the purpose of winding-up, and to wind-up, the said businesses, trades and occupations, and the affairs and transactions thereof, and to collect, get in and realise the said estate under the provisions of these presents"—Now, it is to be observed, that so far as the "heirs, executors or administrators," are concerned, it is manifest that that could only apply to specific property that is bound by the deed, and not to the uncertainty of future acquisitions, and "the businesses, trades and occupations, and the affairs and transactions thereof," could only apply to the existing businesses, and could not contemplate the entering into any new transactions. Then the sentence proceeds thus: "and for the purposes aforesaid to manage and realise the said estate, and the assets invested therein, or otherwise belonging thereto, and particularly to deal with all contracts entered into by the debtor, either separately or jointly as aforesaid, in such way and manner as the inspectors shall think expedient or desirable." That *prima facie* relates to existing contracts, contracts "entered into either separately or jointly," and not future contracts. And, lastly, the clause

concludes in this way, that all this engagement to do these things under the direction of the inspectors for the purposes of the deed is subject to this provision : " but not so as to interfere with the discharge by the debtor of his duties as an engineer, whether consulting or in chief or otherwise." It contemplates therefore that from and after the date of the deed there would be certain things which he would be at liberty to do on his own account, independently of and notwithstanding his engagements under the deed. But the argument on the other side comes to this, that if he did those things, every shilling which he realised by acting as consulting engineer, or as engineer in chief, must be brought within the focus of the deed itself. Then the 21st clause, to which I will refer, is this : " That at any time before the whole of the said estate shall have been duly administered "—looking very much as if it were a definite thing which would run off in the natural course of events—" or before dividends to the amount in the whole of 20s. in the pound shall have been paid to, or realised and provided for all the said creditors," shewing distinctly that the administration of the whole estate was contemplated, which might have happened though 20s. in the pound should not have been paid, the said debtor shall, if the said inspectors or inspector require the same, effectually convey, assure or assign all his said estate then remaining outstanding, or not theretofore dealt with under the powers herein contained." Those words, to say the least, must naturally refer to the case of the assignment of the estate, of which the *quantum* was ascertained at the date of the deed, which might be afterwards diminished by dealings under the deed, and of which a definite part would at any time subsequent to those dealings be remaining outstanding.

I will add that, as far as I can judge, it would be an unreasonable thing, having regard to the nature, purposes and objects of such deed, to so extend its operation as the respondents contend that it should be extended. For these reasons, I am of opinion that the order of the Registrar cannot be sustained, and that the appeal must be allowed.

MELLISH, L.J.—I am of the same opinion. With respect to the first point, it appears to me that in order that this sum might come within the scope of the deed, there ought to have been evidence that there was a contract between Mr. Piercy and the original Cheshire Company, that for a valuable consideration moving from Mr. Piercy, he should have the benefit of the contract into which the Cheshire Company was to enter with the other three companies for the employment of Mr. Piercy, or else it must be proved that there were such facts in the case as would, in a Court of Equity, make the Cheshire Company a trustee for Mr. Piercy with reference to that covenant, so as to entitle Mr. Piercy to use the name of the Cheshire Company in suing the other three companies, if they refused to give him the benefit of the covenant.

Now, the actual facts appear to be these: Mr. Piercy was the promoter and engineer of the Cheshire Company. Being the promoter and engineer of the company, if the company sold their lines to the other three companies, Mr. Piercy had a very reasonable expectation that he would have the benefit of any contract that might be made for the making of those lines. They probably would either make a contract with him or else would make a contract with somebody whom he would appoint to be contractor, but he had no legal right to it. If they had chosen to quarrel with him, and to give the contract to some other person, he would have had no remedy at law or in equity. He merely had that sort of expectation. Then he, having that expectation, is employed by the selling company as their agent to negotiate the sale of their lines to the other three companies; and then, I dare say, with the consent of the directors of the Cheshire Company, he puts in a clause for his own benefit, by which the other three companies are made to covenant with the Cheshire Company that they will employ Mr. Piercy. But then he gave no consideration for that. It was simply the case of a company wishing to benefit a person who had been their promoter and engineer, by providing that he should have the benefit of the contract when they sold their lines to

other companies. In my opinion, if the Cheshire Company had happened to quarrel with him for any reason whatever after that contract had been made, they might have released the other three companies from that covenant, or might have refused to act upon it. He had a sort of moral claim to get the contract; a sort of probable expectation that he would get the benefit of it, but he had no right that he could enforce either at law or in equity. In my opinion, the benefit of the probability that he would get the contract would not pass to his assignee in case he were made bankrupt.

Then, with respect to the second point, the Lord Chancellor has called attention to the material clauses of the deed, and I do not think it necessary to go through them again; but I would observe this, which in fact I undertood to be admitted in argument, that if you suppose a general case of assignment of all a man's estate and effects for the benefit of all his creditors, unless it refers in terms to his future estate, beyond all question that future estate will not pass. In my opinion there is no substantial difference between an assignment for the benefit of creditors and a deed for winding-up under inspection. The real essential difference between the two is this, that whereas the assignment for the benefit of the creditors, under the operation of the Act of 1861, passes all the debtor's estate and effects, and his *chooses in action* to the trustees, so as to give the trustees the right to sue at law, an inspectorship deed is only in fact an assignment in equity, leaving the legal estate still in the debtor's hands. It is an assignment in equity, and there always is or has been, in most deeds that I have seen, in order to give security to the creditors if the debtor should abuse the powers that he has from having the legal estate remaining in him, power given to the inspectors to call upon the debtor at any time to assign, and that power is contained in this deed; and that assignment, if executed, would be an assignment of his then estate and effects. There are no words in the deed which could possibly pass his future property, and I cannot think that a deed for winding-up under inspection was intended to relate to any-

thing more than an assignment would relate to.

Directly after the debtor had executed this deed, if in some way he had abused his powers under the deed, the inspectors would at once have called upon him to execute an assignment, and such an assignment would not have passed his future estate and effects.

Therefore I am of opinion that the right to this sum never passed to the inspectors, and that the order of the Registrar must be discharged.

Solicitors—Messrs. Lawrance, Plews, Boyer & Co., for appellant; Mr. H. Skynner, for respondents.

SELBORNE, L.C.
MELLISH, L.J.
1873.
Dec. 5, 19.

*Ex parte JAMES;
In re O'REARDON.*

Partnership—Separate and Joint Adjudication—Priority—Convenience—Bankruptcy Act, 1869, ss. 72, 74.

R., carrying on business in London, in partnership with M. in Dublin, committed an act of bankruptcy by executing an assignment of all his estate and effects to trustees for the benefit of his creditors. He was afterwards adjudicated bankrupt, and property belonging to the firm having been sold by order of the trustees of the deed of assignment, the purchase money was by the London Court of Bankruptcy ordered to be placed to a deposit account in the bank in certain names. In the meantime a separate adjudication was made against M. in Ireland, and was followed by a joint adjudication in Ireland against R. and M., the assignees under M.'s separate adjudication being also assignees under the joint adjudication. Upon the application of the assignees under the Irish bankruptcies for an order directing payment to them of the money produced by the sale,—Held, that the separate adjudication in England not having been either superseded or impounded, the joint assets were vested in the English trustee under R.'s separate bankruptcy, and the Irish assignees under M.'s

separate bankruptcy as tenants in common; that the Irish assignees had no better title to the joint assets by reason of the joint adjudication, and it being more convenient that the assets should be distributed in England, the order was refused.

Daniel O'Reardon and Maria Murphy carried on business as hide and skin merchants in England and Ireland, O'Reardon managing the business in London and Mrs. Murphy in Dublin. In November, 1870, O'Reardon committed an act of bankruptcy by executing an assignment of all his estate and effects to Richard Dixon and James Pudney, to be equally divided amongst all his creditors. On the 22nd of November a petition was presented against him in the London Court of Bankruptcy, and on the 28th of December he was adjudicated a bankrupt, and Samuel Barrow was appointed trustee.

On the 23rd of December, 1872, Messrs. Bevington & Morris, auctioneers, sold by order of the trustees of the deed of assignment a large quantity of skins belonging to the firm, and realised from the sale the sum of 4,227l. 9s.

On the 1st of February, 1873, Mrs. Murphy was adjudicated bankrupt in Ireland, and on the 10th of the same month O'Reardon, being then in Ireland, he and Mrs. Murphy were jointly adjudicated bankrupts, the assignees under Mrs. Murphy's bankruptcy being also assignees under the joint bankruptcy.

On the 25th of February the London Court of Bankruptcy, on the application of Messrs. Bevington & Morris, ordered the sum of 4,227l. 9s., produced by the sale, to be placed to a deposit account in the London & Westminster Bank, in the names of Samuel Bevington, Richard Dixon, James Pudney, and Samuel Barrow. Dixon and Pudney, the trustees of the deed of assignment, were not parties to this order, but they had notice given to them that the money was placed in their names jointly with others, and Mrs. Murphy was served with notice of the application, but did not appear.

In July, 1873, the assignees under the joint bankruptcy in Ireland applied to the London Court of Bankruptcy for

an order declaring that the 4,227l. 9s. so deposited formed part of the joint estate, and that all necessary persons might be directed to pay the same to the applicants.

Mr. Registrar Brougham, before whom, sitting as Chief Judge, the application came, considered that he had no jurisdiction to make the order, upon the ground that Mr. Dixon, one of the trustees of the deed of assignment, and one of the persons in whose names the money was deposited, refused to submit to the jurisdiction of the Court, and the Court had no power to make a compulsory order against him in favour of the Irish assignees. He therefore refused the application.

The assignees under the Irish bankruptcy appealed from this decision.

Mr. Winslow, with whom was *Mr. The-siger*, for the appellants.—The money being joint assets, it will be most conveniently distributed by the joint assignees; and where there are joint and separate adjudications at the same time, the joint adjudication alone will be supported—

Ex parte Rawson, 1 Ves. & B. 160; and this, notwithstanding the joint adjudication may be the later one in point of date—

Ex parte Digby, 1 Deac. 341; s. c. 2 Mont. & A. 733;

Ex parte Pemberton, 1 M.D. & D. 190;

The Bankruptcy Act, 1869, ss. 72, 73, 74.

Mr. De Gez and *Mr. Warmington*, for the trustee in O'Reardon's separate bankruptcy.—It is a matter entirely in the discretion of the Court whether the joint or the separate adjudication shall be proceeded with, and the Court will support that which allows most complete justice to be done—

Lindley on Partnership, 1142 (3rd edit.);

Ex parte Crew, 16 Ves. 236;

Ex parte Brown, 1 Ves. & B. 60;

Ex parte Rowlandson, 1 Rose 416.

Mr. Henriques, for Messrs. Dixon and Pudney, the trustees of the deed of assignment, cited

The Royal Bank of Scotland v. Guthbert, 1 Rose, App. 462.

Mr. Gill, for Messrs. Bevington & Morris, the auctioneers.

Mr. Winslow, in reply, cited

Morgan v. Knight, 15 Com. B. Rep. N.S. 669; s. c. 33 Law J. Rep. (N.S.) C.P. 168.

The judgment of the Court was (on Dec. 19) delivered by—

LORD JUSTICE MELLISH.—After stating the facts of the case to the effect above set forth, his Lordship proceeded as follows—

I will first consider in whom the legal right to sue for the 4,227l. 9s. is vested. It is clear that by the adjudication against O'Reardon the trustees of O'Reardon and Mrs. Murphy became tenants in common of the joint assets. When Mrs. Murphy was adjudicated a bankrupt, and the appellants were appointed her assignees, the joint assets were vested in the English trustee and the Irish assignees as tenants in common, and we are of opinion that the subsequent joint adjudication against O'Reardon and Murphy could not affect the title of the English trustee, and that the joint assets remained vested in the English trustee and the Irish assignees as tenants in common. Now the main question to be determined is whether the 4,227l. 9s. ought to be divided among the joint creditors by the English trustee or by the Irish assignees. If the English trustee is the proper person to distribute the money, we think the Court has power under the 72nd section of the Bankruptcy Act, 1869, to order the money to be handed over to the English trustee, and if the money ought to be distributed by the Irish assignees we think that the Court would have jurisdiction under the 74th section to order the money to be handed over to them, provided a proper order of the Irish Court was made asking the aid of the English Court. It is, however, unnecessary to consider whether a sufficient order has been made by the Irish Court unless the Irish assignees are the proper persons to distribute the fund, and therefore that question must first be considered. There is great difficulty in determining what is the effect of a joint adjudication against several partners issued after a separate commission against one of them. In the time of Lord

Hardwicke, as Lord Eldon says in several judgments, joint and several commissions were worked together, but since the time of Lord Eldon, if not before, the practice has been to supersede or at least to impound one of the two commissions. The ordinary practice has been to supersede or impound the separate commission on the ground that the joint assets could be best distributed under the joint commission, and in *Ex parte Pemberton* (*ubi supra*) such an order was said to be quite of course. The practice of superseding or impounding the separate commission seems to prove that as long as the separate commission remained in full force the joint commission could not be worked. The joint assets were not vested in the joint assignees. If the joint commission was not wholly void, at any rate the joint assignees and the separate assignees were tenants in common of the joint estate. In *Ex parte Oridland* (1) Lord Eldon refused to supersede a joint commission on account of a previous separate commission in Ireland against one of the bankrupts, but he gives no positive opinion as to the effect of or as to the validity of the joint commission. He says: "It is too much for me to supersede the commission; the bankrupt may try it, and due attention will be given to the difficulties with which the question is surrounded." Now, in the present case it seems impossible either to supersede or to impound the separate adjudication in England, and indeed we are not asked to do so. The separate creditors of O'Reardon are plainly entitled to have the proceedings against him continued in the ordinary way. Then if the separate adjudication against O'Reardon cannot be superseded, the consequence is that the Irish assignees, notwithstanding the joint adjudication, have no better title to the joint assets than the English trustees. Any action or suit to recover the joint assets, whether in England or Ireland, ought to be brought by them both. The case, indeed, seems to be the same as if there had been no joint adjudication in Ireland, but only a separate adjudication against Mrs. Murphy. On the simple

(1) 2 Rose 164.

ground of convenience there is certainly no more reason why the English joint assets should be sent to Ireland than that the Irish joint assets should be sent to England. The English adjudication was first; the greater number of the joint creditors live in England, and there are considerable assets ready for distribution in England. On the whole we are of opinion that the order of the Registrar should be confirmed, but we think that this is not a case for costs.

Appeal accordingly dismissed without costs.

Solicitors—Messrs. Linklater, Hackwood, Addison & Brown, for the appellants; Messrs. Lewis, Munns & Longden, for Messrs. Bevington & Morris; Mr. A. G. Ditton, for the respondents.

BACON, C.J. }
1873. } *Ex parte BOLLAND; re CLINT.*
Dec. 8. }

Marriage Settlement—Covenant by Husband—After acquired Property—Bankruptcy—Shares registered in Name of Bankrupt.

O. by a settlement made before his marriage assigned a policy and some furniture to trustees for the benefit of his wife and the children of the marriage, and also covenanted that all other real or personal estate of which he should become seized, possessed or entitled during the coverture, should be transferred to the trustees upon trusts thereby declared. No trusts of the after acquired property were declared in the settlement. After the marriage and when O. was still solvent he purchased some shares; the shares were registered in his name and he held the certificates. Subsequently he filed a petition for liquidation, and the trustee in the liquidation claimed these shares, as against the trustees of the settlement:—Held (reversing the decision of the County Court Judge), that O. could not be allowed in this way to withdraw the whole of his property from his creditors, and that the shares must be handed to the trustee in the liquidation.

Hardey v. Green (12 Beav. 182; s. c. 18 Law J. Rep. (N.S.) Chanc. 480), and *Lewis v. Madocks* (8 Ves. 150 and 17 Ves. 48), considered.

This was an appeal from an order made by the County Court Judge at Liverpool.

In 1868 Henry Clint and a Mr. Morton had been for ten years in partnership at Birkenhead as ship chandlers and sail makers.

In April, 1868, on the occasion of his second marriage, Clint, who was then solvent, executed a settlement in which, after reciting that he was possessed of a policy of assurance on his life for 1,000*l.* and some furniture, and that it had been agreed that the policy and the furniture, "and also all and singular the real and personal estate to which the said Henry Clint shall, at any time or times during the said intended coverture, become seized, possessed or entitled, shall be released, transferred to or vested in" the trustees upon the trusts thereafter declared, it was witnessed that the policy and the furniture were assigned to the trustees upon the trusts thereafter declared. And Clint further covenanted "that all future real and personal estate which the said Henry Clint shall, at any time during the said intended coverture, be possessed of or entitled to, or shall otherwise acquire, by devolution, gift, devise, bequest, purchase, accumulation or otherwise whatsoever, shall be conveyed, assured and assigned unto" the said trustees to be held by them upon the trusts thereby declared. The settlement then proceeded to declare the trusts of the policy and the furniture, but did not declare any trusts of the property after to be acquired.

In April, 1870, Clint purchased twenty-five shares in the Lancashire Ship Owners' Company and paid for them 76*l.* He stated that he obtained the money for this purchase from his brother, with whom he had a private account current in respect of interest in shares of ships, of which his brother was the managing owner. He also stated that on the day he purchased these shares he met one of the trustees of his marriage settlement and informed him of the purchase, and said he in-

tended the shares for his wife and children and that they would belong to the settlement, and he made a similar statement to his wife. Clint continued however to hold the certificates of these shares, and it appeared on cross-examination that they were in his possession till after he filed his petition for liquidation, when he handed them for safe keeping to his father-in-law. His name was still on the register of the company as the owner.

The partnership continued solvent till its dissolution in 1873.

In February, 1873, Clint presented his petition for liquidation by arrangement, and Henry Bolland was appointed the trustee.

On the 11th of July, 1873, Bolland applied to the County Court for a declaration that the twenty-five shares belonged to him as trustee, as part of the property of the bankrupt, but the County Court Judge dismissed the application, on the ground that the settlement was executed in consideration of marriage, at a time when the settlor was solvent, and that the marriage was entered into in good faith, and that no case was cited in which such a settlement, executed before the 91st section of the Bankruptcy Act, 1869, had been set aside.

From this order the trustee appealed.

Mr. Little and *Mr. Bingham*, for the appellant, contended that the twenty-five shares in question ought to be handed to the trustee in the liquidation—first, because there was no declaration of trust of after acquired property in the settlement; and secondly, because the settlement was an assignment of the whole of the future property of the debtor who was a trader, and therefore could not be upheld against creditors. At this point they were stopped by the Judge.

Mr. De Gex and *Mr. Butler*, for the trustees of the settlement.—This is a *bona fide* settlement in consideration of marriage, and being so, there is abundant authority to shew that it cannot be set aside—

Hardey v. Green (ubi supra);

Lewis v. Madocks (ubi supra);

Fyfe v. Arbuthnot, 1 De Gex & J. 406;

3 Sm. & G. 547; s. c. 26 Law J. Rep. (N.S.) Chanc. 646.

NEW SERIES, 43.—BANKR.

The present case cannot be distinguished from those we have cited except on the ground that here the debtor was a trader; but had Lord Eldon thought there was any difference in the cases of a trader and non-trader, he would have been sure to mention the distinction in

Lewis v. Madocks (ubi supra).

There was no power to rip up the settlement before the Bankruptcy Act, 1869, and the 91st section of that Act is not retrospective.

BACON, C.J., after reading from the settlement the recital and the covenant as to after acquired property, and stating that the first contention of the appellants that no trusts were declared of the things comprised in the recital or the covenant was entitled to great consideration, but that if that had stood alone he should have considered the question of little doubt, continued—

But the other point is one for the most serious doubt. I am not aware of any case in which any such settlement as this has been held to be binding. I do not think *Hardey v. Green (ubi supra)* is in point, for none of the reasons which strike at the root of such settlements as this were in question in that case. That was decided on a claim by the assignees in the insolvency, and the resistance was by the husband and wife. It has no resemblance to the case before me, and does not apply to the question here raised. I think *Lewis v. Madocks (ubi supra)* has as little application. Indeed, if properly examined, I think it is adverse to the present respondent's claim, for I find there the main question was, whether the husband having borrowed a sum of money, and laid it out with other moneys in the purchase of an estate, the money borrowed was included in his covenant to settle his personal estate. That seems to have engaged Lord Eldon's attention, and he no doubt decided that the money borrowed became personal estate, and that if it had been laid out in the purchase of real estate, it nevertheless was subject to the engagement contained in the bond. But Lord Eldon seems to have guarded against the possibility that the person claiming this personal estate, might be claiming it

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in competition with creditors, and (I do not say that he decided it on that ground) in coming to the conclusion to which he did, he must have considered that the creditors of the intestate were entitled to payment first out of the personal estate, because he directed an enquiry as to the amount of the debts, and he did not decide, until on the second occasion it was ascertained there were no debts, that the claim of the plaintiffs could be allowed. He had before cleared away all that was difficult in the case by deciding that money laid out in the purchase of real estate, was nevertheless personal estate which should be considered as charged on and payable out of the estate so acquired; but he carefully prevented the possibility of persons making that claim coming in competition with, or claiming in preference to, creditors. Nothing can be more distinctly opposed to the plain reason, and justice and policy of the law, than that a man, whether in fraud or not, should undertake on his marriage that whatever fragment of property, down to the smallest particular, his horse, and even his boots, should be subject to the trusts which are supposed to be declared, of this settlement. There are many cases in which such settlements have been set aside. And there are many cases in which the policy of the law has been declared to be that a man cannot withdraw from his creditors, even in consideration of marriage, future property he may acquire, if at the time other persons, viz., his creditors, have the right to be paid out of the property. I cannot fail to come to the conclusion that, as against the trustee, this delivering over of the scrip of the company was in violation of the debtor's duty to his creditors, and that it cannot be sustained.

The order of the Court below must be reversed, but there will be no order as to costs.

Solicitors—Mr. W. W. Wynne, agent for Messrs. T. & T. Martin, Liverpool, for appellant; Messrs. Chester & Urquhart, agents for Messrs. Wright, Stockley & Co., Liverpool, for respondent.

BACON, C.J. }
1873. } *Ex parte BARRY; re FOX.*
Nov. 29. }

Order and Disposition—Chose in Action—Declaration of Trust of Shares—Bankruptcy Act, 1869, s. 15. sub-s. 5.

F. became indebted to B. in 1,690l., and gave him a letter in which he promised to hold some shares in trust for him, subject, however, to a debt for which they were pledged to the Bank of Ireland. The shares were registered in the name of an officer of the bank. F. filed a liquidation petition:—Held (reversing the decision in the County Court), that the interest in the shares was a thing in action, and that the order and disposition clause did not apply. B. was therefore entitled to the security, subject to the interest of the bank.

Ex parte The Union Bank of Manchester (40 Law J. Rep. (N.S.) Bankr. 57), distinguished.

This was an appeal from a decision of the Registrar in the County Court of Carnarvonshire holden at Bangor.

On the 21st of September, 1868, the appellant, Mr. Andrew Barry, of Dublin, instructed Edward Fox to purchase for him thirty shares of the National Bank of Ireland, and, having received the certificates, paid Fox 1,690l. as the purchase money for these shares. Fox neither procured a transfer of these shares nor repaid Barry the purchase money. Being pressed by Barry for one or the other, Fox said he was unable to procure the transfer, but promised as security for this debt to hold for Barry 1,671 preference shares in the Cork and Bandon Railway Company, subject however to the repayment of a debt to the Bank of Ireland which they were already pledged to secure. In May, 1869, Barry, at the request of Fox, paid a further sum of 400l. to prevent these shares from being sold. On the 20th of April, 1870, Fox gave to Barry a letter, in which he stated that he held the 1,671 shares for Barry's account and at his disposal, subject to the repayment of the loan to the bank. In July, 1870, Barry paid a further sum of 95l. 16s. 8d. to the bank as interest on the amount owing to them. Barry made no attempt to realise his in-

terest in these shares, because for a long time their value was much depreciated. These shares were throughout registered in the name of an officer of the bank. On the 5th of November, 1872, Fox filed his petition for liquidation, and a Mr. William Graham Craig was appointed trustee. Fox, on the same day, informed Barry that he need not pay any attention to the liquidation, as he had taken measures to secure his interest in the shares. On the 25th of November Barry gave to the Bank of Ireland notice of his claim, and on the 27th of November offered to pay the bank the amount due from Fox on the shares, and requested the bank to transfer the shares to him. The bank however, acting under advice, declined to do so except in compliance with an order of the Court of Bankruptcy.

On the 9th of May, 1873, Barry applied to the County Court at Bangor, within the jurisdiction of which court Fox was then residing, for a declaration that the shares were, subject to the debt to the Bank of Ireland, the property of Barry, as against the trustee appointed by the creditors in the liquidation, and on the 30th of July following this application was dismissed by the registrar.

Against this decision Barry appealed.

Mr. Joseph Walton appeared for the appellant.—The interest which the appellant claims in these shares is a thing in action within the meaning of the Bankruptcy Act, 1869, s. 15. sub-s. 5, and therefore the order and disposition clause did not apply. The case is distinguishable from that of

Ex parte The Union Bank of Manchester, re Jackson, 40 Law J. Rep. (N.S.) Bankr. 57; s. c. Law Rep. 12 Eq. 354,

because the appellant does not claim the shares, but only the debtor's equity in them.

The debtor had declared himself a trustee of his interest in the shares for the appellant. He was therefore the true owner as well as the reputed owner of such interest, and for this reason also the order and disposition clause did not apply—

Joy v. Campbell, 1 Sch. & Lef. 328;
Ex parte Geaves, in re Strahan, 8 De

Gex, M. & G. 291; s. c. 25 Law J. Rep. (N.S.) Bankr. 53;

Re Bankhead's Trusts, 2 Kay & J. 560.

Mr. Johnson, solicitor (a member of the firm of Johnson & Coote), appeared for the trustee, and submitted the question to the Court.

BACON, C.J., held that the interest in the shares claimed by the appellant was a thing in action, and that therefore the order and disposition clause did not apply. He was also of opinion that the debtor had constituted himself a trustee for the appellant. Subject to the claim of the Bank of Ireland, the appellant was entitled to the 1,671 shares as a security for his debt. The order of the registrar was reversed, but without costs.

Solicitors—Messrs. Vizard, Crowder & Co., agents for Mr. J. J. Yates, of Liverpool, for the appellant; Messrs. Johnson & Coote, for the trustee.

SELBORNE, L.C. }
MELLISH, L.J. }
1873.
Nov. 7.

Ex parte COTE;
In re DEVEZE.

Stoppage in Transitu—Posted Letter—Delivery—Regulations of Foreign Post-Office—Reclamation of Letter from Post Office.

O., a banker at Lyons, posted a letter containing bills of exchange to D. in London, but before the departure of the mail he received a telegram from D., telling him to remit nothing. O. accordingly sent to the Post Office to reclaim his letter which by the regulation of the French Post Office he was entitled to do on complying with certain formalities. By mistake the formalities were not observed and the letter was forwarded to its destination. In the meantime D. had filed a petition for liquidation:—Held, that the property in the bills did not pass to the trustee.

This was an appeal by Mr. Marius Cote, a banker at Lyons, in the republic of France, from a decision of Mr. Registrar Murray, sitting for the Chief Judge in Bankruptcy.

The debtor, M. Jean Louis Deveze, carried on business in London as a general merchant under the firm of Heitz & Deveze, and he also carried on business at Lyons as a banker, but he had no partner in either business. For some time he had transactions with M. Cote, the course of business being this. The firm of Heitz & Deveze were in the habit of remitting to M. Cote bills of exchange drawn by them upon persons or firms carrying on business in France or Italy, and M. Cote in exchange for the same used to remit him drafts on persons or firms carrying on business in England. For the sake of convenience separate accounts were kept, one with the Lyons firm and one with the London firm, the two accounts being always kept distinct. The house at Lyons handed to M. Cote their bills and drafts as they received them, and took from him in exchange money as they required it. The course of business with the London firm being as already stated.

On the 11th of January, 1873, M. Deveze wrote a letter to M. Cote, enclosing two bills of exchange of that date at three months, one drawn upon Messrs. Montague of Milan, for 26,732 lire 80 cents., and the other on Messrs. Chabran, of Avignon, for 2,100 f. 95 cents. and requesting him to furnish them with 1,000*l*. M. Cote received this letter with the enclosures on the 13th of January, and on the 14th he put into the post at Lyons a letter to Deveze enclosing five bills of exchange on London for sums amounting to 592*l*. 15*s*. After the posting of this letter, but before the departure of the mail, M. Cote received from M. Deveze's father who managed the business, of the Lyons house a note to this effect—"Our house in London announces to us by telegraph as follows—'Montague refuses to accept bills, tell Cote to hold bills of Montague and remit nothing.'" Immediately on the receipt of this letter M. Cote sent his clerk to the Post Office to reclaim his letter containing the bills of exchange, which, by the regulations of the French Post Office, a person is entitled to do, provided he is known at the Post Office and produces a facsimile of the letter required. M. Cote's clerk handed to the

Post Office clerk the facsimile and was informed by him that the letter should be retained and taken care of and given to M. Cote. Owing, however, to a misunderstanding between M. Cote's clerk and the clerk at the Post Office, the letter was not called for again that evening, and the next day on applying for it at the Post Office M. Cote was informed that it had been despatched to its destination. On the same day, the 14th of January, the London firm of Heitz & Deveze stopped payment and on the 17th M. Deveze presented his petition for liquidation by arrangement. In the meantime the bills enclosed in M. Cote's letter arrived and were received by the trustee in the liquidation.

M. Cote then applied to the Court of Bankruptcy for an order upon the trustee for delivery to him of the five bills of exchange or payment of the sum of 593*l*. 13*s*. 5*d*. being the proceeds thereof, and the application came on to be heard before Mr. Registrar Murray, who being of opinion that the case did not fall within the principle of stoppages *in transitu*, and thus the remittance having come to the debtor and being in his possession and under his control at the date of the liquidation belonged to and formed part of his general estate, refused the application but without costs.

M. Cote appealed from this decision.

Mr. De Gee and *Mr. Winslow*, for the appellant.—M. Cote made a *bona fide* reclamation of his letter, as by the rule of the French Post Office he was entitled to do, and there was, therefore, a good stoppage *in transitu* and the property never vested in the bankrupt, although owing to a mistake M. Cote did not actually gain possession of it—

Heinekey v. Earle, 28 Law J. Rep.

(N.S.) Q.B. 79; s. c. 8 E. & B. 410;

Sadler v. Belcher, 2 Moo. & R. 489;

Nicholson v. Bower, 1 E. & E. 172;

s. c. 28 Law J. Rep. (N.S.) Q.B. 97;

Salte v. Field, 5 Term Rep. 211;

Richardson v. Goss, 3 Bos. & P. 119;

Smith v. Bowles, 2 Esp. 578;

Litt v. Cowley, 7 Taunt. 169.

Mr. Davey and *Mr. Finlay Knight*, for the trustee, supported the Registrar's decision.

THE LORD CHANCELLOR said that he would assume that if the telegram had not been sent by M. Deveze, and no steps had been taken to stop the letter at the Post Office, the property in the bills would have passed to Deveze on the posting of the letter. But all the circumstances of the case tended to shew that it was consistent with honesty and good faith on both sides that the remittance of the bills should be stopped if it could, because though, as his Lordship thought, the evidence showed that the remittance was made on a general account, and not for a special purpose, yet it was clear that it would never have been made except on the faith that the bill on Montague would be honoured. When the telegram was received, Cote was authorised by Deveze to stop the remittance, if he could; and, according to the rules of the French Post Office, the sender of a letter could reclaim it after it had been posted. M. Cote made a *bona fide* reclamation of the letter, and it was not, in fact, delivered back to him, only because his clerk did not understand what the Post Office clerk said to him, as to the necessary formalities. He did not understand that the redelivery was conditional on something further to be done, but he understood that the letter would be redelivered to him the next morning. The evidence shewed that there was a power to reclaim the letter, a *bona fide* intention on Cote's part to exercise the power, and that he did all which he supposed to be necessary for that purpose. The intention of the parties was a much more material thing than the precise form in which it was expressed. The appeal must be allowed.

LORD JUSTICE MELLISH was of the same opinion. The real question was whether the bills were ever indorsed and delivered to Deveze, and if so whether they were ever legally returned. To change the property in the bills it was not enough for the indorser to write the name of the indorsee on the bill; he must also deliver the bill so indorsed to the indorsee or his agent. If he had done this he could not recall the bills. Then the question arose—of which party was the Post Office the agent? In this country, where a letter could not be got back by the sender after

he had posted it, if the arrangement between the parties was that bills should be sent from the one to the other by the post, as soon as the letter containing them was posted they became the property of the indorsee. But the result of the rule of the French Post Office was that the Post Office remained the agent of the sender of a letter until it was despatched from the office, and the property in bills contained in the letter would not pass to the indorsee till they left the town where it was posted. There was abundant evidence here that Cote, with the assent of Deveze, intended to reclaim the letter, and attempted to do so, and it would be wrong to hold that the mistake of the clerk had the effect of making the property in the bills pass contrary to the intention of both indorser and indorsee. But, even if the property in the bills passed on the posting of the letter, there was evidence that both parties assented to a revocation of the indorsement, and the mere fact that through a mistake manual possession of the bills was not obtained by Cote ought not to make the property pass contrary to the intention of the parties.

Solicitors—Messrs. Michael Abraham and Roffey, for appellant; Mr. W. A. Crump, for the trustee.

SELBORNE, L.C. }
JAMES, L.J. }
1873. }
Dec. 9, 12. }

*Ex parte NYHOLM ;
In re CHILD.*

*Charter-party — Freight — Lien for—
Voyage not commenced.*

It was provided by a charter-party that 250l., part of the freight, should be advanced in cash on signing bills of lading and clearing at the Custom-house, and that for the security and payment of all freight, dead freight, demurrage and other charges, the master or owners should have an absolute lien and charge on the cargo. The ship was loaded and cleared at the Custom-house, but the 250l. was not paid, and consequently the captain did not sign bills of lading, and the ship never started on her voyage. The charterer having become insolvent, his trustee

in liquidation gave notice to the owner that he disclaimed all interest under the charter-party. The owner claimed a lien on the cargo for the 250l. as freight, but it was held, affirming the decision of the Chief Judge in Bankruptcy, that the ship never having earned or commenced to earn freight, no lien arose.

Appeal from the decision of the Chief Judge in Bankruptcy, affirming the decision of the Judge of the Manchester County Court. The facts were as follows—

In November, 1872, Messrs. Child, Mills & Co., merchants, of Manchester, chartered the Danish ship *Vaering*, belonging to Mr. H. C. Nyholm, and then on her way to Liverpool, to take, after the delivery of her inward cargo, a cargo of salt and other merchandise to Lagos, on the west coast of Africa, and return with African produce; the freight to be at certain specified rates, and the payment thereof to become due and be made as follows: 250l. to be advanced in cash on signing bills of lading and clearing at the Custom-house, Liverpool, and the remainder on a true and faithful delivery of the cargo at the port of discharge; and it was agreed that for the security and payment of all freight, dead freight, demurrage and other charges, the master or owners should have an absolute lien and charge on the cargo.

The loading of the ship was completed on the 4th of December, and the mate's receipts for the goods handed over by the shippers to the agents of Messrs. Child, Mills & Co., and the ship was cleared at the Custom-house, and the captain was ready and willing to sign the bills of lading in exchange for the 250l., which, however, was not forthcoming, and the bills were consequently not signed, and the ship never started on her voyage.

On the 13th of December Messrs. Child, Mills & Co. filed their petition for liquidation. On the 31st of January, 1873, the trustee in the liquidation gave notice to Nyholm that he disclaimed all interest under the charter-party, and at the same time demanded that the goods of Child, Mills & Co. on board the ship should be given up to him. Nyholm claimed a lien

on the cargo for freight and demurrage, but the Judge of the County Court held, and the Chief Judge affirmed the decision, that he was not entitled to any lien.

Mr. Nyholm appealed.

Mr. Cohen and Mr. F. Thompson, for the appellant, cited—

Paynter v. James, Law Rep. 2 C.P. 348;

Black v. Rose, 2 Moo. P.C. N.S. 277;

Small v. Moates, 9 Bing. 574; s. c. 2 Moo. & Sc. 674;

Kirchner v. Venus, 12 Moo. P.C. 361;

Gilkison v. Middleton, 2 Com. B. Rep. N.S. 134; s. c. 26 Law J. Rep. (N.S.) C.P. 209;

Byrne v. Schiller, 40 Law J. Rep. (N.S.) Exch. 40; s. c. Law Rep. 6 Exch. 319;

Hicks v. Shield, 7 E. & B. 633; s. c. 26 Law J. Rep. (N.S.) Q.B. 205;

Tindall v. Taylor, 4 E. & B. 219; s. c. 24 Law J. Rep. (N.S.) Q.B. 12.

Mr. Swanston and Mr. Winslow, for the respondent, were not called upon to support the decision.

LORD JUSTICE JAMES delivered the following written judgment of the Court.—This is an appeal from the decision of the Chief Judge in Bankruptcy, affirming the decision of the County Court Judge of Manchester. The circumstances are shortly these—The appellant is the owner of the vessel called the *Vaering*. The bankrupts, or quasi-bankrupts, entered into an agreement with him for the chartering of his vessel. The particular language of the charter-party relied on I shall refer to later. One of the terms of the charter-party was, that 250l. should be paid in advance on account of freight when the bills of lading were signed and the ship cleared. The cargo was put on board, and the mate's receipts given for it. The ship was cleared at the Custom-house, and the captain was ready and willing to sign the bills of lading in exchange for the 250l. The 250l. was not, however, forthcoming, and the bills were consequently not signed. The allegation in the affidavit avers that no bills of lading had been tendered to him for signature. The charterer became insolvent. The

trustee gave notice that he abandoned all interest under the charter-party. Conflicting claims were made to the cargo, and an order was made by the County Court Judge for taking it from the ship, and selling it, and bringing the proceeds into Court, except some parts that were given over to some owners, and an issue was directed by the County Court Judge as follows—"Whether H. C. Nyholm had on the 10th of April or the 25th of April, 1873, being the date of the final discharge of the cargo and goods laden on board the Danish brig *Vaering*, under a charter-party dated the 6th of November, 1872, and made between H. C. Nyholm and the above-named debtors, a complete or some lien and charge on the cargo and goods so laden on board the vessel, or some part thereof, for damages, freight, demurrage, detention, and other charges, or some of them." The learned Judge of the County Court decided that issue in the negative. That decision was affirmed, and from that affirmation the appeal has been brought before us. It was admitted in the argument that the claim must be confined to the 250*l.* It was not contended that there was any such lien by the ordinary mercantile law. It was also admitted that the ship had not commenced her voyage, and had, in fact, elected to free herself from the charter-party by reason of the insolvency and default of the charterers, and therefore that no freight, properly so called, had been earned or commenced to be earned, and consequently that there was nothing in respect of which the ordinary mercantile lien for freight would arise. But the claim was raised on what was alleged to be the peculiar language of the instrument. The clauses referred to for that purpose are the clauses for payment—"In consideration whereof and of everything hereinbefore mentioned, the said Child, Mills & Co., of Manchester, do hereby promise and agree to load and receive," and so on, "and pay or cause to be paid as freight for the use and hire of the vessel in respect of the said voyage out and home, at and after the rate of 77*s.* 6*d.* per ton of 20 cwt.," if she went to some particular port, and something different if she went to any other port, "the payment of which is to become due and be made as follows—

250*l.* to be advanced in cash on signing bills of lading and clearing at the Custom-house, Liverpool, less five per cent. for all charges, insurance thereon included. Such money as the master may require for the ordinary disbursements of the vessel at Lagos, on the west coast of Africa, to be advanced free of interest and commission or other charge, and the remainder on a true and faithful delivery of the cargo at the said port of discharge." Then there is another clause—"It being agreed that for the security and payment of all freight, dead freight, demurrage, and other charges, the said masters or owners shall have an absolute lien and charge on the said cargo, or goods laden on board."

It was contended first, on the principle of the cases as to concurrent acts, that the 250*l.* became payable as a sum certain under the contract as soon as the captain was ready and willing to sign the bills of lading, and that such sum, therefore, constituted a sum certain immediately and still recoverable as such, notwithstanding that the whole contract was determined and the voyage put an end to. If it were necessary to decide that point, there would be very great difficulty in applying the principle of the cases referred to to the case of the payment in advance, or at a particular stage, of an instalment of one entire consideration for one complete voyage or other service, where the complete voyage or other service had never been performed, and was on the non-payment entirely given up. But, assuming even that it were so, how does it become freight for which the nautical lien arises? It was admitted that it would not be ordinarily so, but it was contended that the lien was created by the express clause of lien. The express clause is, however, for freight, dead freight, demurrage, and other charges. It is not dead freight nor demurrage nor other charge, and it is not freight in the ordinary sense of the word. But the contention was that the word "freight" here was not to be read in the ordinary sense, but that the clause was to be read in connection with the previous clause as to the payment of freight. The 250*l.*, it is said, is there expressly stated to be payable as part of the freight, and the freight is to

be paid as follows—250*l.* in advance. Therefore it was contended that the clause of lien was to be read thus—“for freight, which word is to include the 250*l.* hereinbefore made payable in advance, and hereinbefore spoken of as a part payment of freight.” There is some ingenuity, but, in our judgment, no substance, in this contention. It would be an unwarranted thing to lay hold of a particular form of expression in one part of a charter-party or other instrument, in order to give to plain unequivocal language in another part of the instrument a meaning different from its ordinary meaning. The ship never earned freight, and never began to earn freight. That it was prevented from doing so by the default of the other party entitles the owner to full compensation for all the loss sustained thereby; but the compensation is not freight, and the nautical lien for freight does not extend to such compensation. The order of the Chief Judge is right, and the appeal will therefore be dismissed with costs.

The LORD CHANCELLOR concurred.

Appeal dismissed with costs.

Solicitors—Messrs. Field, Roscoe & Co., agents for Messrs. Bateson & Co., Liverpool, for appellant; Messrs. Phelps & Sidgwick, for respondent.

BACON, C.J. }
1873. } *Ex parte* POWIS;
Dec. 15. } *Re* BOWEN.

Bankruptcy Act, 1869, s. 32, sub-s. 2—Wages and Salaries of Workmen—Trustee's Costs of Investigating Debtor's Affairs.

*Under the liquidation of B. five workmen claimed debts of less than 50*l.* each. The County Court judge, after several adjournments, ordered the trustee to pay these debts. The trustee appealed on the ground that if he paid the debts he should have no funds to enable him to investigate the affairs of the debtor:—Held (dismissing the appeal), that the claimants were entitled to have their debts paid at once in full.*

This was an appeal from the County Court of Worcestershire, holden at Stourbridge.

On the 4th of November, 1872, Samuel Bowen, who was a glass master, filed his petition for liquidation or composition. At the first meeting of the creditors on the 26th of November, a resolution was passed in favour of liquidation, and Powis was appointed trustee. Five men employed by the debtor proved debts under 50*l.* each, and amounting in the whole to 101*l.*, and their claims were made in respect of wages and salaries due to them previous to the liquidation.

On the 4th of July the County Court Judge ordered the trustee to retain 120*l.* to meet these claims and the costs. The matter was from time to time adjourned to enable the trustee to examine these claims, but on the 27th of September the Judge ordered the trustee to pay the sums due to the five men who had proved, and their respective costs. From this order the trustee appealed. It was alleged by the trustee that he had only a balance of 220*l.* in his hands to pay his costs, that he desired to investigate further the accounts of the debtor, and, if necessary, to take proceedings against him under the Debtors Act, 1869, and that if he paid these claims he should not have sufficient funds to enable him to do so.

Mr. Bagley, for the appellant.—The first claim upon the estate of a debtor is that his affairs shall be properly investigated, and this claim takes precedence of the preferential debts mentioned in the Act of 1869, s. 32.

Mr. Winslow, for the respondents, was not called upon.

BACON, C.J.—I can see no reason for this appeal. The law clearly says that the workmen shall have priority over all other debts, and the County Court Judge has made an order that these claims ought to be paid. Could anything be more unreasonable than that these men, whom the law has put first, should have to wait till the affairs of the debtor are investigated. The appeal must be dismissed with one set of costs.

Solicitors—Messrs. Combe & Wainwright, for the appellant; Messrs. Gregory & Co., agents for Messrs. Bernard & King, of Stourbridge, for the respondents.

LORDS JUSTICES. }
1874. } *Ex parte WATERER;*
Jan. 21. } *Re TAYLOR.*

Composition—Tender—Mistake of Trustee in Composition—Injunction to stay Action.

When under a composition arrangement a trustee is appointed by the creditors, the debtor is not liable for any default of the trustee in paying the composition.

A creditor holding a security of uncertain value, was inserted in the debtor's statement for an estimated balance. The trustee did not pay or tender the composition on the amount, but (wrongly) required the creditor to prove his debt. The creditor having commenced an action for his original debt against the debtor,—Held, that it ought to be restrained.

The trustee under a composition is not bound to tender the composition, semble.

This was an appeal from a decision of Mr. Registrar Roche, sitting as Chief Judge.

The debtor, G. A. Taylor, presented his petition in liquidation in July, 1872, and H. H. Ashworth was shortly afterwards appointed receiver, and took possession of all his property. At the first meeting of creditors resolutions were passed which were afterwards duly confirmed: First, to accept a composition of 2s. 6d. in the pound; Second, that the composition should be payable by two equal instalments on the 1st of October and the 1st of November, 1872; Third, that it should be secured to the satisfaction of a solicitor named, and that H. H. Ashworth be appointed "trustee in the matter."

In his statement, the debtor inserted the present applicant, Michael Waterer, for a debt of 210*l.* 12*s.* 4*d.*, from which he deducted 20*l.* which he "estimated" as the value of the creditor's security (a policy of insurance on the debtor's life), leaving a balance of 190*l.* 12*s.* 4*d.*

On this estimated balance nothing was paid or tendered, and on the 7th of November, 1872, after the day fixed for payment of the second instalment, the trustee wrote to Mr. Waterer as follows—

"I beg to inform you that I am now paying the composition of 2s. 6d. in the pound to those creditors of the above

named debtor who have proved their claims, and shall feel obliged by your furnishing me with the statutory proof of your claim without delay, in order that I may disburse the amount due to you."

An answer was sent by Waterer's solicitor asking whether the trustee had received "any and what composition or instalment of composition from Mr. Taylor in respect of the debt shewn to be due to Mr. Waterer from Mr. Taylor in the statement produced at the meetings at which the resolutions for composition were passed, and also the dates and times when you received the same."

In answer the trustee enclosed a statement—

"Debts collected by receiver and applicable to payment of composition, say

£70 0 0

"October 22nd, cash from

G. A. Taylor . . . 50 0 0

"November 7th, do. do. 100 0 0

£220 0 0

This did not appear to satisfy Mr. Waterer's solicitors, who continued the correspondence by asking whether the trustee had received a composition on Mr. Waterer's debt—the trustee in reply stating that the sums placed in his hands were estimated to be equal to the payment of 2s. 6d. in the pound on the whole of the debts, but asking for proof of the debt.

The last letter of this correspondence was written on the 26th of November, 1872, and nearly a year after, Mr. Waterer commenced an action at law against the debtor, for the whole debt and interest. Hereupon the debtor applied for an injunction to restrain the action, and on the 18th of November, 1873, the Registrar made an order restraining the action, and giving the debtor liberty still to pay the composition.

From this order the creditor appealed.

Mr. De Gez (with him Mr. Doria), for the appellant.—The case exactly resembles *Ex parte Peacock, re Duffield*, 42 Law J. Rep. (N.S.) Bankr. 78; s. c. Law Rep. 8 Chanc. 682.

The debtor having put an estimate on the debt is bound to tender the composition on the amount. This is not a question affecting the validity of the composition

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generally, and it should therefore be left to be tried at law—

Ex parte Hartel, re Thorpe, 42 Law J. Rep. (N.S.) Bankr. 34; s. c. Law Rep. 8 Chanc. 743;

Ex parte Paperstaining Company, re Bishop, Law Rep. 8 Chanc. 595.

He was stopped by the Court.

Mr. Winslow, for the debtor.—I quite admit the general law, but in this case there are reasons, as was said by Lord Justice Mellish in

Ex parte Peacock, re Duffield (ubi supra),

making it inequitable that the action should proceed. *Mr. Ashworth*, who was already in possession of the debtor's property as receiver, was appointed trustee in the matter. That must be under r. 279 of the rules of 1870, which provides that the creditors "may name some person as trustee for receipt and distribution of the composition." How could the debtor pay the composition when he was not in possession of the property? The trustee had in hand 70l., which was more than enough to pay this creditor, and he cannot raise the objection that there was not enough in hand to pay the others, who are now satisfied—

Naylor v. Mortimore, 38 Law J. Rep. (N.S.) C.P. 273; s. c. 17 Com. B. Rep. N.S. 207.

The debtor therefore has done his part to satisfy the composition, and if there was any default it was on the part of the creditor's own trustee.

Mr. De Gez and *Mr. Doria* were then both heard in support of the appeal.—The payment by the debtor to the trustee of the composition might discharge him, but there is in the first place no evidence of the payment; and secondly, the defence (if it is good) might be pleaded at law.

[JAMES, L.J.—You never applied to the trustee for payment. He might have chosen to pay you out of his own pocket if he had no other funds.]

[MELLISH, L.J.—Is not the appointment of a trustee to avoid the difficulties as to tender? I am not sure that the creditors must not go to their own trustee for payment.]

[JAMES, L.J.—It is quite clear that the trustee need not tender.]

LORD JUSTICE JAMES.—I am of opinion that this is quite a case for the Court to exercise its jurisdiction to restrain the action. It is not a case where through the default of the debtor a composition has not been paid, but here the parties came to an arrangement by which a trustee was appointed. The trustee never paid the composition, but he was always ready and willing to pay it, if the creditor would prove his debt. In my opinion he made a mistake in requiring the proof, but then it was a mistake by the creditor's trustee, and not by the debtor. I think it is quite obvious that the dispute in the correspondence was not as to whether the composition was properly tendered. The real dispute was one in which the trustee was wrong and the creditor was right, namely, whether the creditor must prove his debt. The creditor, however, does not say—give me the composition on the amount stated by the debtor. It is possible that if he had, the trustee would not have been justified in refusing it. The Registrar appears to have rightly said—"That dispute is all over. Now pay him the amount of the composition." I do not think we ought to allow the mistake of the trustee to prejudice the debtor.

But beyond that, I think the time of payment was waived. The creditor was dealing with the trustee as the trustee for payment after the time named for payment of the composition.

LORD JUSTICE MELLISH.—I am of the same opinion. I am of opinion that where a trustee is appointed under rule 279—which seems to me a very proper course, and much better than to leave the debtor to pay the composition—when that is done, we cannot allow the debtor to be sued, because the trustee, who is an officer of the Court, and appointed by the creditors themselves, has made a mistake.

Appeal dismissed with costs.

Solicitors—Messrs. Harper, Broad & Batcock, for the appellant; Messrs. Townley & Gard, for the debtor.

LORDS JUSTICES.

1874.

Jan. 20.

Ex parte JEFFERY ;
Re HAWES.

Bankruptcy—General Rule, 292—Bankruptcy pending Proceedings for Liquidation—Costs of Liquidation out of Estate.

For the purposes of the 292nd Rule in Bankruptcy, whereby if bankruptcy occurs "pending proceedings for or towards liquidation by arrangement," the costs in relation to such proceedings are made payable out of the debtor's estate, the proceedings will be deemed to be pending so long as the Court can make any order thereunder, and the creditors under the subsequent bankruptcy can derive a benefit from them. Therefore where upon a petition for liquidation the creditors refused to pass a resolution for liquidation and bankruptcy ensued next day, but the receiver, who had taken possession under the liquidation, had not been discharged before the trustee in bankruptcy was appointed, it was held that the proceedings in liquidation were for the purposes of the above rule pending when the bankruptcy occurred.

This was an appeal from a decision of the Chief Judge in Bankruptcy, reported ante p. 1, s. c. Law Rep. 17 Eq. 61.

On the 31st of January, 1873, H. M. Hawes filed a petition for liquidation of his affairs by arrangement, and a receiver was appointed. At the first meeting of creditors, held on the 28th of February, the creditors declined to pass any resolution for liquidation by arrangement. On the 1st of March the debtor filed a declaration of insolvency, and he was thereupon adjudicated a bankrupt upon a creditor's petition. The receiver under the liquidation proceedings remained in possession until the 13th of March, when a trustee in the bankruptcy was appointed. The solicitor who had filed the liquidation petition, applied to the trustee for payment of his costs in the liquidation proceedings, amounting altogether to 97*l.* out of the bankrupt's estate. The trustee refused to pay them, and the County Court Judge decided that he was right in his refusal. The Chief Judge reversed the decision of the County Court Judge, and the trustee in bankruptcy appealed from the decision of the Chief Judge.

The question turned upon the construction of General Rule, 292, under the Bankruptcy Act, 1869, which provides that, "Where bankruptcy occurs pending proceedings for or towards liquidation by arrangement or composition with creditors, the proper costs incurred in relation to such proceedings shall be paid by the trustees under the bankruptcy out of the estate unless the Court shall otherwise order."

The question was whether under the above mentioned circumstances the bankruptcy had occurred pending proceedings for or towards liquidation or composition within the meaning of this rule.

Mr. De Gex and Mr. Winslow appeared for the trustee in bankruptcy, in support of the appeal.

Mr. Little and Mr. Finlay Knight were for the respondent.

LORD JUSTICE MELLISH said the sole question was whether the solicitor who presented the liquidation petition was entitled to the costs of it under Rule 292. What the Court had to decide was whether in the present case there were proceedings for or towards liquidation pending on the 1st of March when the adjudication was made. His Lordship was of opinion that there were: the object of the rule was plain enough. If there were no such provision no solicitor would ever act on behalf of a debtor who desired to present a liquidation petition or would recommend him to adopt such a proceeding without getting his costs before-hand. The object of the rule was that solicitors might know that if they acted properly they would get their costs of a liquidation petition, notwithstanding that bankruptcy might ensue. That being the object of the rule such a construction should, if possible, be put on it as would fairly carry out the object. His Lordship was of opinion that it was not necessary to adopt such a strict construction as to hold that whenever anything had occurred which rendered a liquidation impossible under the petition the proceedings were no longer pending. So long as the property remained under the protection of the Court, so long as the Court could make an order, as for instance for the discharge of the receiver,

or the passing of his accounts, and the creditors under the subsequent bankruptcy could derive a benefit from the liquidation proceedings, they might be said to be still pending. The receiver was an officer of the Court, and until he was discharged he held possession of the property for the creditors generally, and the person who was entitled to the property on the assumption that the proceedings were put an end to must come to the Court and ask for the discharge of the receiver. In this case the creditors got the benefit of the possession of the receiver, and the proceedings under the liquidation petition might fairly be said to have been pending when the adjudication was made. In this particular case there might be another ground for saying that this was so, inasmuch as the resolution of the meeting could not be said to be finally passed till after the expiration of the three days allowed by the rules for registration, since within that time any creditor who voted at the meeting against liquidation by arrangement might have changed his mind and signed the resolution in favour of it. This was intercepted by the bankruptcy. But his Lordship preferred to rest his decision on the other more general ground.

LORD JUSTICE JAMES was of the same opinion. The petition must be dismissed with costs.

Solicitors—Mr. C. Mallam, agent for Messrs. T. & G. Mallam, Oxford, for appellant; Messrs. Phelps & Sidgwick, for respondent.

LORDS JUSTICES.
1873.
Aug. 7.

Ex parte MORLEY;
Re WHITE.

Bankruptcy — Partnership Business — Construction of Partnership Deed — Capital to belong to one Partner — Death of that Partner — Continuance of Business by Survivor — Joint and Separate Assets.

Business was carried on by W. & T., in partnership under a partnership deed which provided that all the capital in the business should belong to W., and that in

case of his death the share of T. in the profits should thenceforth belong to W.'s representatives or nominees, and the business should thenceforth be carried on by his personal representatives or nominees, and that T. should continue in it for six months to assist such representatives or nominees. W. died, having appointed T. his executor. The business, which was greatly in debt at W.'s death, was continued by T. for fourteen months. T. then filed a petition for the liquidation of his affairs. The stock in trade at the time of the liquidation consisted partly of things which had belonged to W. & T. during their partnership and remained in specie, partly of things acquired by T. after W.'s death:—Held, that the partnership deed meant only that the capital, subject to the payment of the debts, should belong to W., and that the proceeds of such part of the stock in trade as had been in existence during the partnership formed joint assets applicable to the payment of the joint debts of the partnership, and that so much of the stock in trade as had been acquired by T. since W.'s death, was separate assets of T. applicable to the payment of his separate debts.

This was an appeal motion for the purpose of setting aside an order made by Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy, in the liquidation of the affairs of W. Thompson White. The appellants, who were the trustees of the marriage settlement of W. Thompson White, were creditors, under a covenant contained in his marriage settlement, against the estate of his late father W. White, and the question to be determined was how far they were entitled to share in the proceeds of certain assets which had been realised in the liquidation of W. Thompson White's affairs.

The same case came before the Court of Appeal in November, 1872, upon the question whether the administration of the estate was to take place in the Court of Chancery or in the Court of Bankruptcy, and the Lords Justices then decided that the proper tribunal was the Court of Bankruptcy. (*See Morley v. White; In re White*, 42 Law J. Rep. (N.S.) Bankr. 76; s. c. Law Rep. 8 Chanc. 214.) The material circumstances were as follows

—Wm. White, W. Thompson White and C. G. Collins, for many years previously to and down to the death of W. White in January, 1871, carried on business as carpet warehousemen in co-partnership together, under the provisions of a deed of partnership dated the 20th of February, 1854, by which, after recitals to the effect that the premises upon which the business was carried on, and the capital stock in trade and effects thereof belonged to W. White alone, it was stipulated (amongst other things) that the capital of the partnership should consist of the premises in which the business was carried on, and of the stock in trade, book debts and other assets and effects in the business, according to a valuation thereof made the 31st of December, 1853; that W. White should be at liberty to bring in or withdraw capital at pleasure; that W. Thompson White and Collins might bring in capital with W. White's assent; that the capital of each partner should carry interest at 5l. per cent. per annum; that in case of the death of W. White, the partnership should thereupon be dissolved and determined, and the shares of W. Thompson White and Collins in the profits and gains of the partnership should thenceforth belong to W. White's personal representatives or the person or persons to whom he should have bequeathed such shares, and the said business should thenceforth be carried on by his personal representatives or by such persons as he should by will appoint; that W. Thompson White and Collins should continue in the business for six months from Wm. White's decease, and assist his representatives or nominees in carrying on the same, receiving a certain sum for their services, and that such personal representatives or nominees should pay to W. Thompson White and Collins, within six months of the death of the said W. White, the sums thereinbefore provided to be paid for their services, and the additional sum of 500l., and also the amount of their respective capital in the said partnership, with interest from the death of the said W. White.

W. White died in January, 1871, having by his will given his real and personal estate to the said W. Thompson

White and two other persons, whom he appointed his executors and trustees, upon trusts for conversion and sale, and to stand possessed of the proceeds thereof in trust for certain persons of whom W. Thompson White was one. The said will empowered the trustees to postpone the conversion of the said testator's estate for two years, and directed that the profits of his business should in the meantime go as income of the testator's estate. W. Thompson White alone proved his father's will, and he continued to carry on the business for about fourteen months after his father's death, until in March, 1872, he filed a petition for the liquidation of his affairs by arrangement. The trustee under the liquidation realised the stock in trade and other property employed in the business, for the sum of 48,000l. Of this sum about 3,200l. represented the proceeds of stock in trade which had existed in specie at the decease of W. White, and about 37,000l. arose from the sale of stock in trade which had been acquired by W. Thompson White in the course of his business since his father's death; there was no sufficient evidence to shew whether the stock from which the balance of the 48,000l. was derived had been acquired before or after the death of the said W. White. Under these circumstances Mr. Registrar Pepys made an order declaring that the 3,200l. was applicable to the payment of the joint creditors of W. White and W. Thompson White, and that about 44,800l., the remainder of the 48,000l., was applicable only to the payment of the separate creditors of W. Thompson White. The appellants, who had proved as creditors only against the separate estate of W. White, for the amount of the debt due to them under his covenant, now appealed from this order.

Mr. Hemming and *Mr. Wingfield*, for the appellants, argued that the Court of Chancery was the proper Court to deal with this question.

[THE LORDS JUSTICES said, that on the former occasion they had decided that the Court of Bankruptcy was the proper forum, and they could not hear any argument upon that point now.]

Under the provisions of the partnership deed the whole assets of the firm became

the property of the said W. White upon his death—

Ex parte Ruffin, 6 Ves. 119; s. c. Tudor's L. C. in Mercantile Law 346;

Ex parte Williams, 11 Ves. 3.

The directions in W. White's will for his executor to carry on his trade could not affect the rights of his creditors.

Mr. De Gez and *Mr. Winslow*, for the trustee under the liquidation, were not called upon.

LORD JUSTICE JAMES said.—In his opinion there was no foundation for the appeal. In the first place, the question whether the administration and distribution of these assets was to be in Bankruptcy or in Chancery was the very point which they had decided on the former occasion (1). The case had been manifestly one for the application of the seventy-second section of the Bankruptcy Act, 1869, which enabled the Court of Bankruptcy to determine all questions as to which were joint and which separate assets, and which were joint and which separate creditors. After having stopped the suit in Chancery, the court would not now send back the assets to be administered by the Court of Chancery on principles borrowed from those acted on in the Court of Bankruptcy.

The only question now fairly open to argument was whether anything had occurred to make those assets which had now to be distributed, the separate assets of William White, the father. The registrar in bankruptcy had found that there were large portions of the assets which could be traced and which had remained in specie, and were separate assets of W. White, which had not been employed in the business. The other assets stood in this way: The father and son carried on business together in partnership. The father was said to be the owner of all the capital (if there really was any capital in the business), for capital meant, of course, the surplus of assets over liabilities. The son and another person, who came in as partners, were under the provisions

of the partnership deed entitled to share in the profits only; the deed provided that upon notice these two partners were to go out of the business, and to leave the father in possession of the assets, and that, upon the father's death, his personal representatives should pay a sum to the son and other partner, and should be owners of the business. There was nothing in that deed which professed to say that the son or other partner going out was not to be entitled to be indemnified in the usual manner, according to their legal rights, in the mode in which the Court of Chancery or the Court of Bankruptcy would indemnify them in respect of the partnership debts. The mode in which the Court would effect this was by taking care if there were joint and separate assets, that the joint assets were applied in payment of the joint creditors before any part of them was applied to the payment of the separate creditors. In this case the trade assets, so far as they remained in specie, were undoubtedly joint assets. Those, therefore, were to be applied in payment of the joint creditors, so far as there were any remaining, and the surplus, if there was one, would be applicable among the persons entitled thereto. But as regarded any assets or anything bought by the executor when he was carrying on the business, whether in pursuance of the will or not, they were his in point of law. He had bought the assets and become the legal owner of them, and if he owed to his father's estate any money in respect of them, he was bound to pay it; but that could not make the assets which he himself had bought, or the debts which he himself had incurred, the assets or debts of the father. In the ordinary course of a business there was a constant change in the stock, to-day's stock was sold and more bought, old debts were paid and new ones incurred, and it was not surprising to find that in this case the greater part of the moveables had been purchased by the executor carrying on the trade on his own liability and at his own risk. That being so, there was no pretence for holding that either the joint assets

(1) 42 Law J. Rep. (N.S.) Bankr. 76; s. c. Law Rep. 8 Chanc. 214.

belonging to the joint trade which remained in specie or the separate assets created by the separate trading of the son after his father's death could be separate assets of the father. The appellants who had not proved as joint creditors of the firm or as separate creditors of the son, stood before the Court only as creditors of the separate estate of W. White, the father, and could not be heard upon any question which affected them as joint creditors of the father and son or separate creditors of the son. Their appeal must therefore be dismissed with costs.

LORD JUSTICE MELLISH concurred in thinking that the only question properly before the Court was whether the separate creditors of W. White, the father, were entitled to any part of the 48,000*l.* Since the appellants had not proved as joint creditors, the Court could not now determine any question between the joint creditors and the separate creditors of the son. Looking at the fact independently of the provisions of the partnership deed, there could be no doubt upon the question. The father and son carried on business in partnership, the father died leaving large assets of the partnership; the son carried on the business for some time with those assets, and then became a liquidating debtor. Under these circumstances, it was clear that all the assets of the partnership remaining in specie would be divided among the joint creditors, and that the assets acquired by the son after his father's death would be separate assets divisible among his own separate creditors. The only question was whether the provision in the partnership deed that the capital should be treated entirely as the capital of the father, and that upon the death of the father the son should cease to be entitled to any share of the profits, and should receive certain sums out of the father's estate, made any difference. And, in his Lordship's opinion, they did not. It was clear that they would not at law take away the legal estate in the chattels acquired during the partnership which vested in the son as surviving partner. The only question was as to the effect of the deed in equity?

Did it mean to alter the rights of creditors and vest the whole of the assets in the father's representative, or did it merely mean to vest them in him subject to the payment of the debts? His Lordship thought it was intended only to vest them in the father's representative, subject to the payment of the debts. It would be very unjust to the son if at his father's death, in case of the firm being (as in fact it was) largely indebted, he was not to be entitled to apply the partnership assets in payment of the partnership debts for which he was liable. There was nothing in the deed to compel them to come to that conclusion. In his Lordship's opinion the assets, which were joint assets, at the father's death, remained joint assets distributable among the joint creditors. The appeal must be dismissed with costs.

Solicitors—Messrs. Tyas & Huntington, for the appellants; Mr. W. Bristow, for the trustee.

LORDS JUSTICES.

1874.

Jan. 23, 30.

Feb. 13.

Ex parte IZARD;
Re COOK.

Act of Bankruptcy—Fraudulent Conveyance—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, sub-sec. 2—Past Consideration—Bill of Sale—Costs.

*In August, 1870, two brothers trading as grocers, in consideration of 500*l.* previously advanced by their father and brother as to the greater part upon a verbal agreement for the security, executed an agreement to assign on demand their business, with the lease of their premises (which was deposited), stock in trade, fixtures, utensils and book debts, with a proviso that if the 500*l.* with any further advances and interest was repaid, the agreement should be void, but if not, providing for the sale of the property to the mortgagees at a valuation, and payment of the balance (if any) to the traders.*

In March, 1873, the brother making the advance, and who was employed in the business, informed his father that the

traders were in difficulties, and thereupon demand for payment was made. On the 4th of April the property was valued at 683*l.*, and on the 5th, 123*l.*, the balance over the amount due, was paid by the father and brother upon an assignment of the property, which comprised all the traders' property except furniture worth 30*l.*, which was purchased by the father and brother at the same time.

The deed was not registered as a bill of sale, but possession was forthwith taken, and a circular issued to the wholesale dealers who were the principal creditors, informing them of the sale of the business.

The 123*l.* and 30*l.* were spent in paying two creditors, and on the 16th of April the traders presented a petition in liquidation, stating their assets to be nil and their debts 1,833*l.* :—

Held (affirming the decision of the Registrar sitting as Chief Judge), that the transaction could not be impeached as an act of bankruptcy, nor (possession having been taken) under the Bills of Sale Act.

The transaction, however, being one that required investigation, the trustee's appeal was dismissed without costs.

This was an appeal from an order of Mr. Registrar Murray as Chief Judge.

In the month of May, 1868, the debtors, William Cook and John Cook, who were brothers, purchased from a Mr. Wilson the business of a grocer carried on in West Street, Reading.

On the 8th of November, 1868, their father, Aaron Cook, advanced them the sum of 80*l.*, and on the 16th of December, 1868, the further sum of 170*l.*

On the 11th of July, 1870, Robert Cook, a brother of the debtors, advanced them 100*l.*, and on the 4th of August, 1870, the further sum of 150*l.*

On the 29th of August, 1870, an agreement was made between William Cook and John Cook (described as trading in partnership) of the one part, and Aaron Cook and Robert Cook of the other part, after reciting that "the said Aaron Cook and Robert Cook had, prior to the date thereof, advanced to the debtors the sum of 500*l.* and upwards for the purpose of enabling them to carry on their business as aforesaid, and that interest was to be

paid on the said advances at the rate of six per cent. per annum, and that the debtors required further advances for the purposes aforesaid, and to enlarge their trade, it was agreed and declared that in consideration of such advances theretofore made, and of such further advances to be made, they, the said William Cook and John Cook, would on demand assign the business then carried on by them to the said Aaron Cook and Robert Cook, together with the lease of the premises occupied by them, and in which the same business was then carried on (which said lease, by way of equitable charge to secure the due observance of the agreement, was then deposited with the said Aaron and Robert Cook or one of them), as also the fixtures, stock and utensils in trade, together with the book debts, so that the said Aaron Cook and Robert Cook or one of them should and might be able to carry on the said business, either in their name or that of one of them, or in the name of the said W. & J. Cook, in which the said business was then carried on. Provided, nevertheless, that if the said W. & J. Cook should repay the said sum of 500*l.* and interest aforesaid, and also such further advances as might be made in pursuance of the agreement, with interest at the like rate, the agreement should be void. But should the said W. & J. Cook be unable or unwilling to repay the amounts aforesaid, then an inventory and valuation of the premises thereby agreed to be assigned should be taken and had in such manner as the parties thereto might mutually agree, and in default thereof, by valuers on each side or their umpire. The payment of such purchase-money and valuation, or the balance thereof (if any) to be made in the manner agreed to by the parties thereto or otherwise, upon valuation in accordance with the custom of the trade. It was also agreed that the said W. & J. Cook should pay or reimburse all outgoings, and do all acts necessary to comply with the equity of this agreement. And it was also further agreed that for the purposes of success in the said business, the said Aaron Cook and Robert Cook should employ and retain in the conduct and management of the said business the said W. & J. Cook, or one of them, and

that the salary to be received by them should be paid at the rate fixed upon the execution of the assignment they agreed to be made, all just exceptions to this arrangement being reserved. And it was finally agreed that all advances beyond the said sum of 500*l.* due on signing the agreement should be endorsed thereon, and on a copy thereof to be kept by the said W. & J. Cook."

On the 31st of December, 1870, the lease of the premises was obtained from the landlord and was deposited by the debtors with their father.

Shortly after the making of the agreement Robert Cook entered into the service of his brothers as shopman at a salary, and continued in their service until the 5th of April, 1873.

In March, 1873, the affairs of the debtors became embarrassed, and some writs were served on them. Robert Cook informed his father that he was afraid executions would be levied upon the goods on the premises. They consulted Mr. Mortimore, the family solicitor, and by his advice a demand in writing requiring the debtors to execute an assignment of their property, in pursuance of the agreement of the 29th of August, 1870, was served upon them.

On the 4th of April, 1873, Mr. Robert Churchman, who was the valuer who had valued the stock in trade when the debtors purchased it, by the direction of Mr. Mortimore, made a valuation of the property to be conveyed, at the sum of 683*l.* 10*s.*, which amounted to 123*l.* 10*s.* more than the sum due to Robert and Aaron Cook for debt and interest.

On the 5th of April, 1873, Aaron Cook and Robert Cook paid to the debtors in cash 123*l.* 10*s.*, and the debtors, by a deed of that date, in consideration of that sum and the 500*l.* and interest, assigned to Aaron and Robert Cook the lease of the premises, and also the fixtures, stock and utensils in trade, and book debts, being in fact the whole of their property with the exception of furniture of the value of 30*l.*

Aaron Cook and Robert Cook also paid the debtors 30*l.* for the furniture.

At the time the deed was executed possession of the premises and of the stock contained therein was given by the

debtors to Aaron Cook and Robert Cook, and shortly afterwards a circular was sent to the wholesale firms, who were the principal creditors of the debtors, informing them that the business was bought by Aaron Cook and Robert Cook.

The debtors disposed of the 123*l.* 10*s.* and the 30*l.* by paying two of their creditors; and on the 16th of April, 1873, presented a petition for liquidation, stating their assets to be *nil* and their debts to be 1,833*l.*

The trustee in the liquidation made an application asking that the assignment of the 5th of April, 1873, might be declared fraudulent and void as against him, and for an account of the property. This application was refused by the Registrar, and the trustee appealed.

Mr. De Gex and Mr. Finlay Knight, for the appellant, contended that this was an attempt to evade the provisions of the Bankruptcy Act, 1869, and of the Bills of Sale Act. They cited

Ex parte Fisher; re Ash, 41 Law J. Rep. (N.S.) Bankr. 62; s. c. Law Rep. 7 Chanc. 636;

Ex parte Cohen; re Sparks, 41 Law J. Rep. (N.S.) Bankr. 17; s. c. Law Rep. 7 Chanc. 20;

Ex parte Pearson; re Mortimer, 42 Law J. Rep. (N.S.) Bankr. 44; s. c. Law Rep. 8 Chanc. 667.

Mr. Rosburgh and Mr. Colt, for Aaron and Robert Cook, cited

Hutton v. Oruttwell, 1 E. & B. 15; s. c. 22 Law J. Rep. (N.S.) Q.B. 78;

Lomas v. Buxton, 40 Law J. Rep. (N.S.) C.P. 150; s. c. Law Rep. 6 C.P. 106;

Mercer v. Paterson, 36 Law J. Rep. (N.S.) Exch. 218; s. c. Law Rep. 2 Ex. 304; s. c. (Ex. Ch.) Law Rep. 8 Exch. 104;

Holroyd v. Marshall, 2 De Gex, F. & J. 596; s. c. 30 Law J. Rep. (N.S.) Chanc. 385; s. c. (H.L.) 33 Law J. Rep. (N.S.) Chanc. 193; s. c. 10 H. L. Cas. 191;

Ex parte Topham; re Walker, 42 Law J. Rep. (N.S.) Bankr. 57; s. c. Law Rep. 8 Chanc. 614.

They also relied on

Ex parte Ash (*ubi supra*).

Mr. De Gex in reply.

F

LORD JUSTICE MELLISH (on Feb. 13) delivered the written judgment of the Court. He stated the facts as above and proceeded—On the part of the appellant it was contended that the deed of the 5th day of April, 1873, was an act of bankruptcy as an assignment of all the debtor's property for a past consideration, the 123*l.* 10*s.* and the 30*l.* not being, under the circumstances, a substantial exception, and *Ex parte Fisher re Ash* (*ubi supra*) was relied on. On the part of the respondents it was contended that the deed of the 5th of April, 1873, simply carried out the previous agreement of the 29th of August, 1870, which was a valid equitable security, and could not therefore be an act of bankruptcy.

I will, therefore, first consider what was the effect of the agreement of the 29th of August, 1870. Now by that agreement the debtors agree on demand to assign to Aaron Cook and Robert Cook the property mentioned in the agreement, and we are of opinion that until demand no right to the property agreed to be assigned, with the exception of the lease, which was deposited, would pass, either at law or in equity. We think that it was intended that until demand, the debtors should have the power of dealing with their property in any way they pleased. When, however, a demand of an assignment was once made, we think that a right in equity to the property agreed to be assigned as a security for the 500*l.* and interest immediately accrued. It was objected that the agreement was an agreement for a sale at a valuation to be made by a valuer to be agreed upon, and that a Court of Equity has no means of granting specific performance of such an agreement. We are of opinion, however, that the substance of the agreement is that the respondents should have a security on the property of their debtors for a debt, and that the valuation is merely a mode of carrying that security into effect. In an ordinary mortgage there is a power of sale, and after satisfying debt, interest and costs by the sale, the mortgagee has to pay the surplus to the mortgagor. By this agreement the creditors instead of selling the property are to have it valued and to

pay any surplus, after satisfying the debt and interest to the debtors. Assuming that a Court of Equity could not carry out this part of the agreement if the parties did not agree about it, that ought not to affect the security of the creditors on the property of their debtors, which was the main object of the agreement. We are of opinion, therefore, that the agreement was, after demand, a valid equitable security upon the property of the debtors, unless it was rendered invalid, either by the Bankruptcy Act or the Bills of Sale Act.

Now the Bankruptcy Act could not affect the validity of the agreement unless we hold that the agreement itself, either immediately it was executed, or when the demand was made, was in substance an assignment of all the debtor's property for a past consideration, or unless we hold that if the agreement was itself given as a security for a past debt, it could not render valid an assignment of the debtor's property for the same debt, or prevent its being an act of bankruptcy. It is, therefore, necessary to consider whether the agreement of August, 1870, was itself given as a security for a past debt, or was given in the whole or in part for a *bona fide* substantial advance to be made at the time. Aaron Cook in his affidavit says that before he advanced the 250*l.* his sons agreed to assign to him by way of mortgage not only the lease of their premises, but also the good will and stock-in-trade of their business. His sons, the debtors, however, do not support this statement, but only mentioned the lease as the security on which the money was advanced, and we are of opinion that there is no sufficient evidence of any agreement to give the father a security on the debtor's stock-in-trade, fixtures and book debts before his money was advanced. With respect, however, to the 250*l.* advanced by Robert Cook, not only the father and Robert, but the debtors also state that the security was in substance agreed upon before the money was advanced; and as the agreement of the 30th of August, 1870, was actually signed a few weeks afterwards, and as Robert, who was a young man just of age, could not have been expected, and indeed

ought not to have been asked, to advance a sum of money of great importance to him and to his brothers without all the security he could get, we think that his 250*l.* ought to be treated as a *bona fide* and substantial advance made on the security of the agreement of the 30th of August, 1870.

Then with respect to the Bills of Sale Act it is unnecessary to determine whether, as far as respects the goods and chattels and fixtures comprised in it, the agreement was a bill of sale within the Act (though I incline to think it was) because at the time the petition for liquidation was presented, the goods, chattels and fixtures were not in the possession or apparent possession of the debtors. We are of opinion, therefore, that the agreement of the 29th of August, 1870, gave the respondents a good equitable security upon all the property of the debtors which was included in the assignment of the 5th of April, 1873, and having come to this conclusion, we think it is impossible to hold that the assignment of the 5th of April, 1873, was itself fraudulent or an act of bankruptcy. If that assignment had never been executed, and all that had taken place on the 5th of April had been that the respondents had paid the debtors the 123*l.* 10*s.*, and the debtors had given possession to the respondents of the premises, stock-in-trade and fixtures, the title of the respondents to the property under the agreement of the 29th of August, 1870, would in our opinion have been good. The only effect of the assignment was that it conveyed to the respondents the legal estate in the leasehold premises, and furnished a record of the completion of the transaction. The beneficial interest was already in the respondents. Neither was the assignment of the 5th of April, 1873, executed for the purpose of evading the Bills of Sale Act, and curing the defect caused by the non-registration of the agreement of the 29th of August, 1870, because possession of the property conveyed was given at the same time the deed was executed, which alone would have prevented the operation of the Bills of Sale Act, and this distinguishes the present case from the case of *Ex parte Cohen* (*ubi supra*). Upon the whole

we are of opinion that the judgment of the registrar ought to be affirmed, but as the circumstances of the case were very suspicious, and the creditors were entitled to have them fully enquired into, and there is, as we were informed, absolutely no estate out of which to pay costs, we think that there ought to be no order as to the costs of the appeal and that the deposit should be returned.

Solicitors—Messrs. Weeks & Son, for appellant;
Mr. T. H. Mortimore, for respondents.

BACON, C.J. } *Ex parte* BROOKE;
1873. } *Re* HASSALL.
Dec. 8. }

Execution Creditor—Seizure and Sale—Payment by Debtor to Sheriff before Bankruptcy to avoid Execution—Sheriff whether Agent for Debtor or Execution Creditor—Bankruptcy Act, 1869, s. 6, sub-s. 5, s. 87.

A sheriff's officer, instead of levying execution, accepted payment from the debtor of part of the amount owing. Two days after, the debtor filed a petition for liquidation. After the officer had had notice of the liquidation, but before he had had notice from the trustee to pay the amount to him, he paid this amount to the solicitor for the execution creditor:—Held (affirming the decision in the County Court), that when the liquidation petition was filed the amount belonged to the debtor, and that it must be repaid by the execution creditor to the trustee.

This was an appeal from a decision of the registrar of the County Court at Huddersfield.

On the 28th of February, 1873, a bill for 100*l.* payable four months after date was drawn by Hassall and accepted by a Mr. Binns, and on the 29th of April following another bill for 64*l.*, payable two months after date, was drawn by Messrs. Brooke & Sons and accepted by Hassall. On the 9th of July, 1873, Messrs. Brooke & Sons, who held both these bills, com-

menced actions against Hassall to recover 169*l.*, the amount due on these two bills and their costs. An action was also commenced against Binns on the bill of exchange on which he was jointly liable.

The actions were undefended, and Hassall, knowing that he was liable to execution on the 24th of July, called on the 22nd on the sheriff's officer and informed him that he would pay the amount due and all charges without the writ being executed. On the morning of the 24th the sheriff's officer had the writ, but relying on the promise of Hassall he did not at once execute it, and in the course of the day Hassall gave to the officer the sum of 106*l.*, consisting of a good bill of exchange, a promissory note and three five pound Bank of England notes. On the same day Binns brought 4*l.* and promised to bring the balance, 44*l.*, on the following day, but he did not bring it till the 26th of July.

On the 26th of July Hassall filed his petition for liquidation by arrangement or composition, and on the same day obtained from the County Court an interim order restraining the actions commenced by Messrs. Brooke, and appointing Mr. Schofield receiver. Notice of this order was on the same day served on the sheriff's officer.

On the 28th of July the officer handed over to Messrs. Brooke's solicitors the bill, cheque and money he had received from the debtor, and also the amounts he had received from Binns. On the same morning, but not till after the amount had been paid to Mr. Brooke's solicitors, the officer received a notice to pay the amount to the receiver.

On the 25th of September, on the application of Mr. Schofield, who had been appointed trustee in the liquidation proceedings, an order was made by the registrar of the County Court directing Messrs. Brooke or the sheriff's officer to hand over to him the 106*l.* obtained from the debtor under the above mentioned circumstances. Against this order Messrs. Brooke appealed.

Mr. De Gez and *Mr. Finlay Knight*, for the appellants.—In this case the execution was not "levied by seizure and sale," and therefore it does not come within sect. 6,

sub-sect. 5 of the Bankruptcy Act, 1869, and is not governed by—

Ex parte Pearson; re Mortimer, 42 Law J. Rep. (N.S.) Bankr. 44; s. c. Law Rep. 8 Chanc. 667.

Payment to the sheriff's officer did not amount to a levy—

Nash v. Dickenson, Law Rep. 2 C.P. 252.

The sheriff's officer did not take this as a levy but as the agent or servant of the creditor—

Gregory v. Cotterell, 5 E. & B. 571; s. c. 25 Law J. Rep. (N.S.) Q.B. 38.

In the Court below the case was rested entirely upon

Collingridge v. Paxton, 11 Com. B. Rep. 688; s. c. 21 Law J. Rep. (N.S.) C.P. 89,

but this only decides that money seized under a *fi. fa.* is in the same position as money, the proceeds of goods so seized.

We contend that the money though in the hands of the sheriff's officer was really the property of the execution creditor, and that therefore sect. 87 did not apply. Also there was no fraudulent preference.

Mr. Little, for the trustee, was not called upon.

BACON, C.J.—I do not think that the order made in the Court below can be found fault with at all. The money belonged to the debtor at the time he filed his petition for liquidation. It was not paid to the execution creditor but to the sheriff's officer, and it was paid to him to obtain forbearance. The money, therefore, being the property of the debtor when he filed his petition, belongs to the trustee. This appeal must be dismissed, but there will be no order as to costs.

Solicitors — Messrs. Williamson, Hill & Co., agents for Mr. Jacob, of Huddersfield, for the appellant; Messrs. Learoyd & Learoyd, agents for Mr. Learoyd, Huddersfield, for the trustee.

BACON, C.J.
1874.
Feb. 9.

Ex parte LOVE;
Re JAGGER.

*Bankruptcy — Petitioning Creditor —
First Petition dismissed by Arrangement
—Special Leave to file second Petition—
Bankruptcy Rules, 1870, r. 39.*

L. took out a debtor's summons and filed a petition to adjudicate J. bankrupt. J. promised to pay L. fifteen shillings in the pound and to satisfy his other creditors, and on this understanding the petition was, with the consent of all parties, dismissed. J. made no payment, and L. obtained special leave from the Registrar of the County Court to file a second petition founded on the same act of bankruptcy. This petition was heard before the County Court Judge, and by him dismissed on the ground that a debtor could not be adjudicated a bankrupt upon an act of bankruptcy on which a former petition had been founded:—Held (discharging the order appealed from), that the second petition was properly filed, and that the creditor was entitled to have it heard upon the merits.

This was an appeal from the County Court of Yorkshire, holden at Huddersfield.

On the 22nd of September, 1873, the appellant, James Allen Love, filed an affidavit and took out a debtor's summons against John Jagger to recover 740*l.* which was owing to him on six bills of exchange. On the 16th of October, the summons not having been satisfied, Love presented a petition for the adjudication of Jagger bankrupt. The petitioning creditor's debt was disputed by the debtor, and after two adjournments the petition came on for hearing on the 8th of November. Before that day the debtor had seen Love and had promised to pay him fifteen shillings in the pound on his debt and to satisfy all his other creditors, and Love agreed, on these terms, to take no further steps in the matter of the petition. Accordingly, on the 8th of November, an order was made, with the consent of both parties, dismissing the petition. Love then called upon Jagger to comply with the terms of the arrangement, but

the latter refused to do so. In consequence of this, Love, on the 9th of December, having first obtained special leave from the Registrar of the Court, presented a second petition against Jagger, alleging the same debt and the same act of bankruptcy as before.

This second petition came on for hearing on the 19th of December, and was dismissed by the Judge on the ground that the debtor could not be adjudicated a bankrupt upon an act of bankruptcy which had been already made use of on the former petition.

The application to file the second petition was made in pursuance of r. 39 of the Bankruptcy Rules, 1870, which is as follows—

“39. If any creditor shall neglect to appear on his petition, no subsequent petition against the same debtor or debtors, or any of them, either alone or jointly with any other person or persons, shall be presented by the same creditor without the special leave of the Court to which the previous petition was presented.”

Mr. De Gea and *Mr. Robson*, for the appellant.—The act of bankruptcy was not purged by the dismissal of the petition; it could not be purged except by payment, or some arrangement equivalent to payment. The cause not having been heard on the merits cannot be considered as *res judicata*.

The proceeding, when the first petition was dismissed, amounted to a nonsuit, and the plaintiff was entitled to be nonsuited whenever he chose.

Mr. Morton, for the respondent.—If the petition had been adjourned it would have been more like a nonsuit; but the first petition was, in fact, dismissed.

This is really an appeal from a decision of the Registrar to the County Court Judge, and this is not permitted by the Act.

BACON, C.J.—This is a case of considerable importance to creditors. The debtor cannot be allowed to take advantage of what has been done in this matter to defeat his creditors. Section 6, clause 6, of the Act, provides for service of the debtor's summons, and section 7 points

out how a debtor may get rid of that proceeding. In the present case it is clear that the requirements of the 6th section were complied with by the creditor, and it is also clear, upon the evidence, that no notice of any intention to dispute the act of bankruptcy was given. Some arrangement seems then to have been made whereby the debtor agreed to pay or satisfy the debt of the petitioning creditor as well as all his other liabilities, and thereupon the petition was dismissed. The petitioning creditor is then prevented, by rule 39, from filing a second petition without the special leave of the Court. Accidents of various kinds might arise, and the Court, in the exercise of its discretion, is at liberty to say whether it is right that the creditor should proceed. I must hold that by law the petitioning creditor obtained the sanction of the Court to file the second petition. To say he is not entitled to do so would be to introduce a dangerous practice, contrary to common sense. The appeal must be allowed, and the case sent back to the learned County Court Judge, to be heard by him upon the merits.

Solicitors—Messrs. Evans, Laing & Eagles, agents for Mr. Edwin Sykes, of Huddersfield, for the appellant; Messrs. Learoyd, Learoyd & Peace, agents for Messrs. Learoyd & Learoyd, of Huddersfield, for the debtor.

BACON, C.J. }
1873. }
Aug. 4. }

Ex parte HOARE;
Re WALTON.

Bankruptcy Act, 1869, s. 126, Rules 266, 267—Composition—Act of Bankruptcy—Adjudication.

In 1870 *W.* mortgaged a lease of certain premises to *H.* to secure 600*l.* In November, 1872, *W.* filed a petition for liquidation, and in December the creditors passed a resolution for composition, which was duly confirmed and registered, but the composition was not paid. In March, 1873, *W.* again mortgaged the lease to *H.* to secure 700*l.*, which included the 600*l.*, &c., then owing to *H.* In May, 1873, *W.* was adjudicated bankrupt, the act of bankruptcy alleged being the presentation of the above

petition. An application by H. to the County Court to have the mortgage declared a valid security, and for an account, was dismissed:—Held, on appeal, that the debtor having been left master of his affairs by the composition, the second mortgage, which was merely in substitution of the first, was not invalidated by the petition for liquidation, and the order of the County Court was discharged.

This was an appeal from an order made by the County Court Judge for Hertfordshire, sitting at Barnet.

By a lease made on the 3rd of October, 1870, Samuel Walton demised a public house called the "Warwick Tavern," to Zachariah Walton, for the term of fifty years. On the 6th of October, 1870, *Z.* Walton mortgaged the same property to Messrs. Hoare & Co. to secure 400*l.* and further advances up to 600*l.* In 1872 an action of ejectment was commenced by a Mr. James Wenn and others, who claimed to be mortgagees in fee of the premises by mortgage deed executed prior to the lease of the 3rd of October, 1870, for the purpose of recovering possession of the premises from *Z. Walton.*

On the 12th of November, 1872, *Z.* Walton filed his petition for liquidation by arrangement or composition. On the 12th of December, the first meeting of creditors was held, notice of which was given to Messrs. Hoare, and at that meeting a resolution was passed to accept a composition of five shillings in the pound payable by certain promissory notes. On the 24th of December the resolution was confirmed, and on the 30th duly registered, but subsequently the arrangement for the payment of the composition fell through.

In February, 1873, it was agreed to compromise the action for ejectment, and arranged that the plaintiffs in the action should grant to *Z. Walton* a fresh lease of the premises, Messrs. Hoare agreeing to pay certain costs. Accordingly on the 28th of February, 1873, a new lease was granted to *Z. Walton* for a term of twenty-one years, the lease including the tavern and also some cottages which were not included in the former lease. On the 29th of March follow-

ing this new lease was, in pursuance of an arrangement previously made with Messrs. Hoare, mortgaged to them to secure 700*l.* stated to be then owing by Walton to Messrs. Hoare.

On the 29th of April, 1873, a petition for adjudication in bankruptcy was presented in the County Court against Z. Walton, the act of bankruptcy alleged being the presentation of the petition for liquidation on the 12th of November, 1872. On the 28th of May, 1873, Z. Walton was adjudicated bankrupt, and Mr. Sidney Smith was appointed trustee.

An application was made by Messrs. Hoare to the County Court for a declaration that the mortgage of the 29th of March, 1873, was a valid and subsisting mortgage, and for an account of what was due to Messrs. Hoare for principal, interest and costs under that security. The application was heard on the 16th of July, when the County Court Judge made an order dismissing it with costs, and also declaring the mortgage void against the trustee. From this order Messrs. Hoare appealed.

Mr. Little and Mr. Joseph Dixon, for the appellants, referred to s. 126 of the Bankruptcy Act, 1869, and to the bankruptcy rules of 1870, Nos. 266 and 267, and contended that when there is a composition all the transactions under the composition cannot many months after be set aside and the debtor adjudicated a bankrupt because he made a composition.

Mr. Roxburgh and Mr. Doria, for the respondents.—This was a transaction which took place after an act of bankruptcy, of which Messrs. Hoare had distinct notice. The petition for liquidation by arrangement or composition was a valid act of bankruptcy on which a valid adjudication took place—

Ex parte Duignan, re Bissell, 40 Law J. Rep. (N.S.) Bankr. 33, 68; s. c. Law Rep. 6 Chanc. 605.

[BACON, C.J.—That was a case of liquidation by arrangement, and the liquidation was proceeding.]

The mortgage in question was wholly in respect of a past debt, and was in fact for the whole of the debtor's property—

Ex parte Foxley, In re Nurse, Law Rep. 3 Chanc. 515.

BACON, C.J., said—In my opinion this order cannot be sustained. The question as to the act of bankruptcy may, upon some other occasion, require to be considered, but in this case Messrs. Hoare at the time they had notice of the act of bankruptcy had, as part of the same transaction, notice of the resolution of the creditors to accept a composition. The effect of this resolution would be to leave the debtor master of his own property, and to prevent the presentation of the petition being an act of bankruptcy which could then be available for adjudication, for it is admitted that if the composition had been paid the petition would not have been an act of bankruptcy available for adjudication. The arrangement was a proper arrangement between Messrs. Hoare and the debtor, and the debtor was, with the consent of a majority of his creditors who had joined in the resolution as against a minority who did not assent, a perfectly free agent. The second mortgage was a transaction which perfected the security of Messrs. Hoare and extended it, and there is no answer to their application to realise their mortgage security. The first mortgage was a perfectly good mortgage, and the second is a mere substitution of the first and not in respect of an antecedent debt. In my opinion the mortgagee is entitled to the order he has asked for. The order of the County Court must be discharged.

Solicitors—Messrs. Symes, Sandilands & Humphry, for appellants; Messrs. Lewis, Munns & Longden, for respondents.

BACON, C.J. }
1874.
March 2. }

Ex parte SOUTHAM;
Re SOUTHAM.

Bill of Sale—Condition to be written on same Instrument—Payment by Instalments—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 2.

An antecedent parol arrangement to repay by instalments a loan secured by a

bill of sale is a condition within the meaning of the 2nd section of the Bills of Sale Act, and as such must be reduced into writing and appear on the registered copy of the bill of sale, otherwise the latter will be void against a trustee in bankruptcy.

This was an appeal from a decision of the Judge of the Manchester County Court.

In August, 1869, William Southam purchased some household furniture from Edward Southam, and being unable to pay for it at the time, he, on the 14th of August, gave to Edward Southam a bill of sale over the furniture to secure the repayment of 250*l.* and interest.

The bill of sale was, on the 3rd of September, 1869, duly registered.

On the 3rd of April, 1872, Edward Southam took possession of the furniture. Later on the same day a petition was filed against William Southam, and a receiver was appointed, who took possession of the furniture. Edward Southam then withdrew on the understanding that he should not be prejudiced thereby. The furniture was afterwards sold by the receiver, and realized 106*l.*

On the 4th of April, 1873, William Southam was adjudicated bankrupt. An issue was directed to try whether the 106*l.* belonged to the trustee in the bankruptcy or to Edward Southam. On cross-examination Edward Southam admitted that, about the time the bill of sale was taken, the bankrupt informed him that he could not pay the whole 250*l.* at once, but offered to pay in weekly instalments of 1*l.* or 1*l.* 10*s.* This Edward Southam had consented to accept, and at the time of the bankruptcy the debt of 250*l.* was reduced to about 170*l.* During the year prior to the bankruptcy only about 6*l.* had been paid.

On the 15th of January, 1874, the County Court Judge decided that the 106*l.* belonged to the trustee on the ground that the arrangement for payment by instalments amounted to a "condition" within the meaning of the Bills of Sale Act, 1854, s. 2, and that, as this condition did not appear on the bill of sale at the time of registration, the bill of sale was void against the trustee.

From this decision Edward Southam appealed.

Mr. De Gez and *Mr. E. Griffiths*, for the appellant.—There was no necessity to state the parol arrangement to pay by instalments on the bill of sale. The arrangement could not mislead other creditors of the debtor, because, if anything were paid under it, that would be to their advantage—

Bramwell v. Eglinton, 33 Law J. Rep. (N.S.) Q.B. 130; s. c. 5 B. & S. 39;

Robinson v. Collingwood, 34 Law J. Rep. (N.S.) C.P. 18; s. c. 17 Com. B. Rep. N.S. 777.

Mr. Little and *Mr. H. Humphreys*, for the trustee, were not called upon.

BACON, C.J., said—This case comes clearly within both the meaning and the words of the 2nd section of the Bills of Sale Act. It was admitted and proved that the appellant was the owner of some furniture which the bankrupt desired to buy, and that, as the bankrupt was unable to pay for it at the time, it was arranged that he should give a bill of sale, and pay for it by instalments. The bill of sale was then executed, and no reference was made in it to the arrangement. It made all the difference whether the arrangement was before or after the bill of sale, but there could be no doubt that it was before. The statute said that, if there be any condition, it must be reduced into writing and appear upon the instrument that is registered. Here, then, was a condition which might or might not have been enforceable at law, but could certainly have been enforced in equity, and therefore came clearly within the terms of the Act. The appeal must be dismissed, with costs.

Solicitors—*Mr. A. D. Smith*, agent for *Mr. C. Kearsley*, of Manchester, for the appellant; *Messrs. Johnson & Weatheralls*, agents for *Mr. Storer*, of Manchester, for the trustee.

BACON, C.J. }
1873.
Dec. 15. }

Ex parte KING ;
Re HARPER.

Composition—Disputed Debt—Failure to pay Composition—Action at Law—Bankruptcy Act, 1869, s. 126.

In February, 1871, H. effected a composition with his creditors. The proof of one of the creditors, K., was disputed, and was only settled by the Judge on the 29th of July, 1873. The composition on the amount as settled was not then paid at once, but the solicitors of both parties waited till the order was drawn up and signed by the registrar. On the 22nd of August, 1873, the debtors asked to be allowed to pay the composition partly in cash and partly in bills at two and four months. This request was refused, and K. then said that the composition not having been paid he should commence an action for the whole debt. On the 27th of August the registrar signed the order, and on the same day the debtors tendered payment of the composition in cash. This was refused, and an action for the original debt commenced on the 29th of August:—Held (affirming the decision of the County Court Judge), that it would be inequitable to allow K. to proceed with the action.

This was an appeal from a decision of the Judge of the County Court, holden at Walsall.

On the 15th of May, 1871, the debtors, Messrs. Harper & Co., filed their petition for liquidation by arrangement or composition. On the 29th of June, at the first meeting of creditors, resolutions were passed in favour of accepting a composition of 5s. in the pound, payable by three equal instalments at six, twelve and eighteen months from the date of the resolution.

Till within about three months of the filing of the petition, King, the present appellant, carried on in London a business in partnership with the debtors, but this was a distinct business from the one carried on in Staffordshire. On the 14th of February, 1871, this partnership was dissolved, and it was then agreed that if the liabilities of the London concern should exceed the assets the debtors should pay half the deficiency. Accordingly at the first meet-

ing of creditors King tendered a proof for 2,721*l.* and a claim for 110*l.*, and these were admitted, subject to investigation. Before the investigation had taken place the first instalment of the composition became payable, and the sum of 226*l.* was paid to King, being the instalment payable on the full amount of his claim, subject to adjustment if the claim should not be substantiated. No further payment was made by the debtors to King, when the second and third instalments became due, and it was not till the 29th of July, 1873, that the amount of the proof and claim was ultimately settled by the Judge at 2,205*l.*, making the total amount of the composition payable 550*l.*, and the balance (after payment of the 226*l.*) 324*l.* The Judge ordered both parties to pay their own costs of the application, but some dispute arose as to the drawing up of the order, and this was not settled till the 19th of August, when King's solicitors wrote to the debtors' solicitors a letter which contained the following passage, "When the order is signed I shall be glad to know if you are prepared to pay the amount of the composition." Owing to the absence of the registrar the order was not signed till the 27th of August, and in the meantime, and on the 22nd of August, the debtors applied to King to know if he would accept payment of the remainder of the composition partly in cash and partly in bills at two and four months, but King declined to receive anything but cash and then stated that as the composition had not been paid in the manner provided by the Act he should proceed for the whole debt.

On the 27th of August, the day that the registrar signed the order, the debtors tendered in cash the sum of 320*l.*, which was the balance of the composition (4*l.* having been deducted for certain costs) to King's solicitors; having first made an ineffectual attempt to find King himself. This tender was refused, and on the 29th of August King commenced an action against the debtors for 1,979*l.*, being the whole amount of the debt which they had proved, less the composition payment of 226*l.*

The debtors applied to the Judge for an injunction to restrain this action, and

the Judge made the order asked for (1), and against this order King appealed.

(1) Oct. 27, 1873.—The County Court Judge (Mr. Martineau), in delivering judgment, said—

The law bearing on the question before me is to be collected from the cases of *Edwards v. Coombe*, 41 Law J. Rep. (n.s.) C.P. 202; s.c. Law Rep. 7 C.P. 519; *re Hatton*, 42 Law J. Rep. (n.s.) Bankr. 12; s.c. Law Rep. 7 Chanc. 723; *re Bishop*, Law Rep. 8 Chanc. 595; *ex parte Peacock*; *re Duffield*, 42 Law J. Rep. (n.s.) Bankr. 78; s.c. Law Rep. 8 Chanc. 682; *ex parte Härtel*; *re Thorpe*, 42 Law J. Rep. (n.s.) Bankr. 34; s.c. Law Rep. 8 Chanc. 743; and *Slater v. Jones*, 42 Law J. Rep. (n.s.) Exch. 122; s.c. Law Rep. 8 Exch. 186. The result of those cases appears to me to be this. First. The Court of Bankruptcy has jurisdiction after resolutions for composition have been passed to restrain a particular creditor from maintaining an action against the debtor for a debt which is included in the composition. Second. A creditor will be restrained from proceeding at law in order to try the validity of the resolution generally on grounds applicable to all the creditors. Third. A creditor will not as a general rule be restrained when he objects to be bound by the composition on grounds personal to himself, and not applicable to the rest of the creditors. Fourth. Where the debtor fails to pay the composition at the time agreed upon, or within a reasonable time after, the Court of Bankruptcy will not in general restrain a creditor suing at law to recover the amount of his original debt, but the Court may nevertheless in such a case give relief to the debtor by injunction, where something has been done by the creditor which makes it inequitable that he should enforce his strict legal right, and perhaps also in cases of accident or mistake. I think the questions for me to consider are, first, whether the debtors have made default in payment of the composition at the times agreed upon or within a reasonable time after; secondly, whether anything has been done by the creditor which makes it inequitable that he should not enforce his strict legal right. In the view which I take of the case I do not think it necessary to determine the first question, for I have come to the conclusion that the course pursued by Mr. King makes it inequitable that he should now enforce his right to recover the amount of his original debt. My reasons for coming to this conclusion are as follows. King's proof was considerably in excess of the true amount of his debt, and up to the 29th of July, 1873, he in effect declined to receive the amount of the composition to which he was really entitled. Upon this point I may refer to the observation of Mellish, L.J., in *Ex parte Peacock* (*ubi supra*), that where a creditor "has done anything tending to shew that he was not ready to receive the composition, if tendered, that might be a circumstance to be taken into consideration." Under the arrangement come to on the 31st of January, 1872, King received an amount in excess of what was properly payable to him for the first instalment. He did not take any

Mr. G. W. Lawrance and Mr. E. Pollock, for the appellant, contended that King was entitled to go on with the action, and

steps to sustain his proof until after both the remaining instalments had become payable, notwithstanding that on the 31st of January, 1872, he himself proposed that the Court of Bankruptcy should determine the true amount of his debt. After failure of the debtors to pay the second instalment, King elected to avail himself of the summary remedy given by the Act for enforcing the provisions of the composition by application to the Court of Bankruptcy, and after failure of the debtors to pay the third and last instalment, he applied to the Court of Bankruptcy to investigate his proof. On this point I may refer to the observation of Mr. Justice Willes in *Edwards v. Coombe* (*ubi supra*), "his (the creditor's) ordinary common law remedy still subsists until he elects to avail himself of the powers of the Court of Bankruptcy. On the 29th of July, 1873, the true amount of King's debt, and of the composition payable to him, was ascertained by the Court of Bankruptcy, and if the balance of the composition had been tendered to him on that day, or within a reasonable time after, I think the course pursued by him was such that it would then have been inequitable for him to have attempted to enforce his strict legal right to recover the amount of his original debt. The question then is, whether what occurred subsequently to the 29th of July, 1873, has altered the case. Now I feel some difficulty on this point, because I see no reason whatever why the ascertained balance of the composition should not have been paid at once, without waiting to have the order of the 29th of July, 1873, signed by the registrar, and because the course pursued by the debtors on the 22nd of August, in proposing to pay the balance of the composition by instalments in the shape of bills, tends to shew that they were not then ready and willing to pay the balance of the composition. It is, however, to be observed that it was the creditor's solicitor who first appears to have suggested by the letter of the 19th of August, 1873, that the balance of the composition should be paid after the order was signed. That suggestion was, I think, equivalent to saying to the debtors, "Pay the balance of the composition when the order is signed, and our client will be satisfied," and would have a tendency to throw the debtors off their guard, and I think that until the sort of consent given by that letter for postponing the payment until the order was signed had been clearly and expressly withdrawn by the creditors, it would not have been equitable that the creditor should take advantage of the omission of the debtor to pay before the order was signed. As regards the course taken by the debtors in proposing payment of the composition by instalments or bills, though I am not surprised at the creditor considering that proposal as indicating inability to pay, still if, as I think, it was a mere proposal, without any positive refusal to pay the composition in cash down as soon as the order was signed, I

cited the cases referred to in the judgment of the learned County Court Judge.

Mr. De Gez and *Mr. Anstie*, for the debtors, were not called upon.

BACON, C.J.—In this case I have had the advantage of reading the judgment of the learned County Court Judge which is clear and luminous, and contains a lucid statement of the facts of the case. In it he fully recognises all the authorities upon which the appellant relies, and which decide that although the failure of a debtor to pay to a creditor at the appointed time the amount of the composition which has been agreed upon under the provisions of the 126th section of the Act sets the creditor at liberty to pursue all his legal remedies for his original debt, still that right is subject to the jurisdiction of the Court of Bankruptcy to restrain him from doing so upon equitable grounds according to all the circumstances of the case. In the present case the amount of the debt was disputed, the circumstances under which it arose were complicated, and it was agreed that the amount should be determined by the Court. That was not done till the 29th of July, 1873. It was distinctly agreed that the order made on that day should be drawn up, and there could be no default in paying the balance of the composition till that order was in force. It has been argued that what took place shewed inability on the part of the debtors to pay. The most, however, that is proved by what they did

think the creditor was not entitled at once to treat the debtors as having failed to pay the balance of composition, and that he should have simply given notice that if the composition was not at once paid down in cash, he would proceed to recover the full amount of his original debt. Instead of taking this course he immediately claimed the full amount of his original debt. The balance of the composition was tendered in cash on the day the order was signed, and the action was not commenced until two days afterwards. In my opinion the course pursued by Mr. King makes it inequitable that he should now bring an action at law to recover the full amount of his original debt, and I shall grant an injunction to restrain him from further proceeding with the action. There will be liberty to apply. The debtors must of course be prepared to pay the 320*l.* at once in case King should be willing to take it. If they fail to do this the injunction will be dissolved.

is, that it was inconvenient to them to pay until the 23rd of August. Could anything be more inequitable than that the creditor should take advantage of the debtor's having asked him to accept payment partly in bills to bring his action for the balance of the original debt? The learned Judge, after going through the facts with the most perfect fairness and clearness, has come to the conclusion which he has stated in his judgment. In my opinion he could not properly have come to any other conclusion. I must dismiss the appeal with costs, but it must be understood that the 320*l.*, the balance of the composition, is to be paid at once.

Solicitors—Messrs. Ashurst, Morris & Co., for the appellant; Messrs. Duignan & Smiles, agents for Messrs. Duignan, Lewis & Lewis, Walsall, for the respondents.

BACON, C.J. }
1874.
March 9. }

Ex parte FURNESS;
Re SIMPSON.

Partnership—Death of Partners—Continuation of Business by Surviving Partners—Bankruptcy—Priority of Creditors.

Four brothers were in business together as cotton spinners. By articles of partnership it was agreed that accounts and balance sheets should be taken half-yearly, and that in case of death of either of the partners the capital of the deceased partners should not be withdrawn from the business, but that the amount should be ascertained at the succeeding half-yearly stock-taking, and should remain secured by promissory notes at interest in the business half for three and the other half for five years from his decease. Two of the partners died within a few months of each other, and within a year from the death of the one who last died, the two surviving partners filed a petition for liquidation. Part of the assets consisted of machinery which had belonged to all four partners. On question raised on special case to decide whether the machinery belonged to the creditors of the four in priority to the other

creditors :—Held (reversing the decision of the County Court Judge), that the creditors of the four had no priority, but that the assets must be distributed amongst all the creditors rateably.

This was a special case on appeal from a decision of the Judge of the Manchester County Court.

On the 2nd of January, 1871, four brothers, Charles John Simpson, Arthur Simpson, Walter Simpson and Frederic Simpson, who had previously traded together, entered into articles of partnership for the purpose of carrying on together the business of cotton spinners at Preston. The articles provided, amongst other matters, for taking accounts every July and January, and in particular, "That in case of the death of either or any of them the said C. J. Simpson, A. Simpson, W. Simpson and F. Simpson, such event shall not dissolve the partnership, but the survivors or survivor of them shall carry on the business, and the share of either or any of them so dying shall be ascertained at the succeeding stock-taking after the death of either of them, the balance then found to be due to either or any of them, the said C. J. Simpson, A. Simpson, W. Simpson and F. Simpson, so dying as aforesaid, shall, subject as hereinafter mentioned as to one-half part thereof, except as to the sum of 200*l.*, remain in the hands of the survivors or survivor of them, the said C. J. Simpson, A. Simpson, W. Simpson and F. Simpson, for three years from the decease of either of them; and as to the other half part thereof, except as to the said sum of 200*l.*, remain in the hands of the survivors or survivor of them, the said C. J. Simpson, A. Simpson, W. Simpson and F. Simpson, for five years from the decease of either of them, and the whole of the said balance, except as to the said sum of 200*l.*, shall be secured to the representative of either or any of them, the said C. J. Simpson, A. Simpson, W. Simpson and F. Simpson, so dying as aforesaid, by the promissory notes of the survivors or survivor of them, the said C. J. Simpson, A. Simpson, W. Simpson and F. Simpson, such notes bearing interest at the rate of 7½ per

cent., payable and to be paid to such representative quarterly. And the said sum of 200*l.* shall be paid to the representative of each of them, the said C. J. Simpson, A. Simpson, W. Simpson and F. Simpson, so dying as aforesaid, within one calendar month after the death of either of them."

The working capital of the concern consisted in part of moneys left in the hands of the four partners by the representatives of their father and amounts owing to other family connections, which were also allowed to remain in their hands. They also had a considerable stock of spinning and weaving machinery. No balance sheets were ever made out by them in pursuance of the clauses in that behalf in their articles.

Arthur Simpson died on the 27th of September, 1871, and the business was continued by the three surviving partners. Arthur's share was not ascertained at the stock-taking succeeding his death, as no complete balance sheet was then taken.

Charles John Simpson died on the 15th of January, 1872, and after his death the business was continued by the two surviving partners. No correct balance sheet was taken in July, 1872. The 200*l.* was not in either case paid to the widow of the deceased partner within the month, though small sums were subsequently paid on account.

On the death of each partner his assets in the business were taken and used by the survivors for the purposes of their business.

On the 19th of December, 1872, the two surviving partners, Walter and Frederic, filed their petition for liquidation.

An investigation of the affairs of the partnership showed that the liabilities were about 43,627*l.*, and of these debts about 23,873*l.* were contracted before the 27th of September, 1871, when all the four partners were living, and about 365*l.* more were contracted between the 27th of September, 1871, and the 15th of January, 1872, when three partners were living.

The debts of the four and the three partners were treated by the two surviving partners as their own debts. The

question submitted by the special case was, "Whether or not the creditors of the four are entitled to have the machinery or such part thereof as can be distinguished as having belonged to the partnership of the four or the proceeds thereof or of such portion thereof as can be distinguished as aforesaid divided amongst the creditors of the four in priority to the other creditors." The County Court Judge answered the question in the affirmative, and directed the registrar to enquire what part of the machinery could be distinguished as having belonged to the four partners. From this decision the creditors of the two partners only appealed. They desired that the whole estate should be thrown into hotchpot, and divided amongst all the creditors of the different partnerships rateably.

Mr. A. G. Marten and Mr. Ambrose, for the appellant, after stating the case and citing

Ex parte Ruffin, 6 Ves. 119,
were stopped by the Court.

Mr. De Gez and Mr. Ford North, for the creditors of the four partners, contended that the machinery which could be distinguished as having belonged to the earlier partnership of four partners, or the proceeds of such machinery, were assets divisible amongst the creditors of the earlier partnership in priority to the creditors of the second and third partnerships—

Ex parte Ruffin (*ubi supra*);

Ex parte Williams, 11 Ves. 3;

Ex parte Peake, 1 Madd. 346;

Ex parte Clarkson, 4 Deac. & C. 56;

Ridgway v. Clare, 19 Beav. 111;

Brett v. Beckwith, 26 Law J. Rep.
(N.S.) Chanc. 130;

Ex parte Morley, Re White, ante p. 28,
Law Rep. 8 Chanc. 1026.

Mr. George Fardell, for the trustee.

BACON, C.J., said, I am of opinion that there is no foundation for the question which has been raised upon this special case. A partnership was formed, two of the partners died successively, the other two continued to carry on the business, not only ostensibly and in actual possession of the partnership assets, but being

entitled to the enjoyment of the partnership assets under the terms of the partnership deed, which stipulates that the death of a partner shall not dissolve the partnership, and contains all other stipulations necessary to carry on the business. Under those circumstances the joint creditors of the four have these rights—they may sue the representative of the deceased partner, and they may sue the continuing partners; but what possible right can any creditors of the four, or the two, have to come and lay hands on any particular set of assets and say they are to be applied in discharge of their debts? There is no authority for that in any of the cases which have been cited—*Ex parte Morley, Re White* (*ubi supra*)—least of all, because there the testator provided by his will that a certain portion of his property should be left in the business to be carried on after his death; his son did carry it on, and became bankrupt, and it was of necessity, as well as of right, that there should be an account of the debts due in respect of the business in which the testator had employed his property, and of that which was only liable for the debts of the son. The facts stated in the special case are distinct. The representatives of the two deceased partners made no claim, but were content with the stipulation of the partnership deed, and whether anything, much or little, was paid was their affair. Claim to the partnership assets they have none till the joint debts are all paid. When the bankruptcy happens this is found to be the case: the continuing partners, who are liable for every shilling of the joint debts as well as for their debts, are found in possession of these chattels and all the other things that constitute what the deed calls partnership property. The only proper and just way of administering that estate is to treat all the creditors of the four just as the creditors of the two, that is, as if they had all proved their claims under the bankruptcy, and as entitled to have all the assets of the two, including that which they derived by contract with the deceased partners, distributed in payment of the debts of the four. There is no principle, and certainly no authority has been referred to to justify

me in saying there is any principle, upon which, two years after the death of the last surviving partner, persons who are creditors of the four can say, "Pick me out this and that which was in existence at the time of the partnership between the four partners." There is no foundation for the question raised by the special case, and the order will be varied by answering that question in the negative. The costs of all parties to be paid out of the estate.

Solicitors—Messrs. Phelps & Sidgwick, agents for Messrs. Sale & Co., Manchester, for the trustee; Messrs. Gregory, Rowcliffe & Co., agents for Messrs. Cooper & Sons, Manchester, for the appellants; Messrs. Pritchard & Englefield, agents for Messrs. Boote & Edgar, Manchester, for the respondents.

BACON, C.J. } *Ex parte* JACOBS;
1874. } *Re* CARTER.
March 2. }

Practice—Bills of Exchange—Proof of Debt—Production of Security—Bankruptcy Act, 1869, s. 16, sub-s. 2—Bankruptcy Rules, 1870, rr. 67, 134—Form No. 32.

Where a creditor of a bankrupt tenders proof of a debt due to him on bills of exchange, the bills must, unless there be some special reason to the contrary, be produced before the proof can be admitted. In case of their non-production, the creditor will not be entitled to vote as to the appointment of a trustee.

This was an appeal from a decision of the Judge of the Birmingham County Court.

The first meeting of the bankrupt's creditors was held on the 19th of January, 1874, when a proof was tendered on behalf of the Worcester City and County Bank for 2,031*l.*, for money lent and advanced by the bank, and other charges; and the bank stated that they had received no security other than a mortgage and certain bills and promissory notes. Particulars of the bills were set forth in the form provided by the Act, but the bills were not produced. On behalf of certain creditors, it was ob-

jected that the bank proof could not be admitted because of the non-production of the bills, but this objection was overruled by the registrar.

On the 27th of January the County Court Judge affirmed the decision of the registrar, and ordered the proof of the debt by the bank to stand admitted.

From this order the present appeal was brought.

It was admitted that the debt was owing to the bank; and the only practical question was, whether the bank had a right to vote at the first meeting of creditors, and so influence the appointment of the trustee.

Mr. De Gez and Mr. Finlay Knight, for the appellants.—The practice has for many years been that all securities should be produced when proof of the debt is tendered, in order that they may be marked by the chairman of the meeting. This is so laid down in all the books of practice, and lastly in Messrs. Roche & Hazlitt's *Bankruptcy*, p. 50, and is supported by the cases of

Ex parte Hossack, Buck's Rep. 390, and

Ex parte Petrie; re Petrie, 37 Law J. Rep. (N.S.) Bankr. 13; s. c. Law Rep. 3 Chanc. 610.

The bank might not be the real holder of the bills of exchange, and the latter might justly object that another proof had been admitted.

Mr. Roxburgh and Mr. Horton Smith, for the bank.—The practice as to the production of securities has been altered by the Act of 1869. The 134th rule says that bills of exchange and other securities upon which proof has been made must be exhibited before payment of dividend, and this shews that the rules did not contemplate their being exhibited upon proof of the debt.

The 16th section of the Act, sub-section 2, provides that the debts shall be proved in the "prescribed manner," and rule 67 states distinctly what this prescribed manner is to be, but does not say that securities are to be produced. On the contrary, rule 67 provides for debts being proved by affidavit sent through the post; and it could never have been intended that valuable secu-

rities should be sent in this manner. Since the new Act the practice has been universal to allow the proofs without production of the securities.

BACON, C.J., said—The practice in bankruptcy had been established for many years. A creditor coming to prove his debt who had a bill of exchange or other security, ought to produce it in order that it might be identified, and that the production might appear on the bankruptcy proceedings. That he was bound to produce his security before the receipt of the dividend was another thing, and did not at all shew that he need not produce it when he tendered his proof. There might be cases in which, from some accident, a creditor seeking to prove could not produce his securities; in such cases the Judge would exercise his discretion. Here the bank was the holder of the bills, and there was no shadow of reason why the bills should not have been produced. The order of the Court below must be discharged.

Solicitors—Messrs. Wilkins, Blythe & Marsland, agents for Mr. Crowther Davies, of Birmingham, for the appellants; Messrs. Field, Roscoe & Co., agents for Messrs. Barlow & Smith, of Birmingham, for the bank.

BACON, C.J. }
1874.
Feb. 9.

Ex parte OLD;
Re BRIGHT.

Trustee—Moneys in Hands of—Interest—Bank of England—Bankruptcy Act, 1869, s. 30. s. 125. sub-ss. 8 and 9.—Bankruptcy Rules, 1870, rr. 109, 275.

Creditors at a first meeting resolved on liquidation and appointed O. trustee. At the same meeting O. stated to the creditors that he should open an account in his own name, as trustee of the debtor, at the P. Bank, of which he was manager, and should pay into that account all moneys received by him from the debtor's estate. The creditors assented to this arrangement, but no formal resolution was passed confirming it:—Held (reversing the decision of the County Court Judge) that, the estate being under liquida-

tion, the creditors had sufficiently prescribed the bank into which the money was to be paid, and that the trustee could not be charged with interest for not having paid it into the Bank of England.

Held, also, that it is the duty of an inspector to see that accounts are filed by the trustee every three months.

This was an appeal from an order made by the County Court Judge at Neath.

In November, 1870, Joseph Bright filed his petition for liquidation. At the first meeting of creditors held on the 21st of November, a resolution was passed in favour of liquidation by arrangement, and Mr. Charles Old, who was the manager of the Neath branch of the London and Provincial Bank, was appointed trustee. Mr. Randall, of Newport, was appointed inspector. The debt of the bank amounted to 504*l.*, of which 300*l.* was secured by a mortgage. At the same meeting, after his appointment, Mr. Old stated to the creditors that he should open an account with the London and Provincial Bank in his own name as trustee of Joseph Bright, and should pay all moneys he received from the debtor's estate into this account. The creditors assented to this arrangement, but no formal resolution on the subject was passed.

On the 26th of November, 1870, Old opened the account and paid in from time to time the sums he received under the liquidation, which amounted to about 220*l.*

No dividend was declared because there was a debt of 124*l.* owing to the debtor's estate from a Mr. Hughes, of Antigua, and the trustee was anxious to realise this sum, and then pay a first and final dividend and so avoid the expense of an interim dividend. As, however, this sum was not paid, the trustee called a meeting of the creditors for the 24th of June, 1873, two years and a half from the date of the petition, for the purpose of declaring a dividend. This meeting was adjourned by the desire of the creditors to obtain further information from Antigua, and the fund which had till then been standing on a current account at the London and Provincial Bank, was from that time transferred to a deposit account. The inspector never applied to the trustee for

a statement of the accounts of the debtor's estate, but there was some conflicting evidence as to enquiries for an account having been made by a Mr. Thomas, one of the creditors.

On the 27th of September, 1873, on the motion of the inspector, Mr. Randall, an order was made by the County Court Judge that Old be removed from the trusteeship of the estate and pay the costs of the motion, that he be ordered to pay the 220*l.* into the Bank of England, that he be disallowed all remuneration for acting as trustee, and that he pay interest at the rate of twenty per cent. per annum on the sums exceeding 50*l.* which remained in his hands.

On a rehearing of the matter on the 22nd of December, 1873, the Judge made an order acquitting Mr. Old of improper motives, and discharging the order for dismissal, but ordering Mr. Old to pay interest at the rate of twenty per cent. on the amount over 50*l.* in his hands for more than ten days, and to pay his own costs.

Against this order Mr. Old appealed.

Mr. Rozburgh and Mr. G. W. Lawrence, for the appellant.—It was arranged by the creditors at the first meeting that Mr. Old should pay the moneys he received as trustee, into the London and Provincial Bank, and he did so, and thus complied with section 30 and rule 109, and with section 125, clause 8 of the Act of 1869. The creditors in effect, if not by special resolution, prescribed the bank into which the money received by the trustee was to be paid, and there was therefore no necessity for payment into the Bank of England, and no ground for ordering the payment by the trustee of interest at twenty per cent.

Mr. De Gex and Mr. Finlay Knight, for the respondents.—The trustee ought to have obtained a resolution in writing (rule 275), directing payment into the London and Provincial Bank, and failing that, it was his duty to pay all moneys received by him, above 50*l.*, into the Bank of England—Bankruptcy Act, 1869, s. 30.

The provisions as to payment into the Bank of England apply to liquidation as well as to bankruptcy, and do not come within the exceptions mentioned in section 125, clause 9.

By keeping this sum for more than two years on a current account, Old was assisting the bank in which he was interested as manager.

The trustee ought to have called a meeting of the committee of inspection every three months (section 20), and in failing to do so neglected his duty.

BACON, C.J. (after reading section 30 of the Act of 1869), said, I do not wish to say one word which can be construed as allowing trustees to make use of moneys coming into their hands. The 8th clause of the 125th section provides that the creditors may prescribe the bank into which the trustee is to pay the money, but there is nothing to shew that they must pass a resolution to do so. Where, in a liquidation by arrangement, the trustee proposes a certain course, and the creditors consent to that course being adopted, they have sufficiently complied with the statute. The evidence before me here is conclusive that at the first meeting the creditors sufficiently prescribed that the trustee should pay all the moneys he received as trustee into an account at the London and Provincial Bank. The facts shew that he faithfully and properly followed both in letter and spirit the directions of the creditors. I think therefore that there is no ground for charging him with interest on the moneys which he received as trustee.

With respect to the accounts, I think that neither the trustee nor the inspector did what they ought to have done. The trustee produced his accounts with unreasonable delay, and the inspector, whose duty it was to see that accounts were filed every three months, remained wholly silent and never asked for any accounts at all. Both then were equally to blame, and if the inspector did not call for an account, he cannot be heard to complain that one had not been rendered. The order appealed from must be discharged, but there will be no order as to the costs of this appeal.

Solicitors—Messrs. Norris, Allen & Carter, agents for Mr. Tennant, of Neath; Messrs. Vizard, Crowder & Co., agents for Mr. Leyson, of Neath.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.

JAMES, L.J.

MELLISH, L.J.

1874.

Jan. 30.

Feb. 13.

Ex parte BROOKE;
Re HASSALL.

Execution Creditor—Payment to Sheriff before Execution levied—Bankruptcy of Debtor—Payment by Sheriff to Execution Creditor before Notice of Bankruptcy—The Bankruptcy Act, 1869, ss. 6, 87.

Money paid by a trader to a sheriff's officer in part payment of the execution creditor's debt and in order to prevent the levying of execution is not within the 87th section of the Bankruptcy Act, 1869, relating to proceeds of sale of goods taken in execution, and if accepted by the creditor, may be retained by him notwithstanding the bankruptcy of the debtor within fourteen days.

On the 9th of July, 1873, Messrs. Brooke & Sons commenced an action against J. M. Hassall, a cloth miller, at Huddersfield, upon two bills of exchange. The action was undefended, and judgment was allowed to go by default for 169*l.* 4*s.* 2*d.*, and a writ of execution was issued and placed in the hands of the sheriff's officer. On the 24th of the same month Hassall called upon the sheriff's officer and requested him not to levy execution, promising to pay the amount for which the writ was issued, and the sheriff's charges; and the same afternoon he gave to the sheriff's officer a good bill of exchange for 65*l.*, a cheque for 23*l.* 3*s.* 6*d.*, which he had received from a customer, and three 5*l.* bank notes, making in all 106*l.* 3*s.* 6*d.* The rest of the debt was paid to the officer by a Mr. Binns, against whom also Messrs. Brooke had recovered judgment. On the 26th of July Hassall filed his petition for liquidation, a receiver was appointed, and an interim order was made and served on the sheriff's officer restraining further proceedings in the action. On the 28th of July the sheriff's officer handed over to Messrs. Brookes's solicitor the bill of exchange, cheque and 5*l.* notes which he had received from Hassall, together with the money paid by

NEW SERIES, 43.—BANKR.

Binns; and later in the same day he received a notice from the receiver in the liquidation requiring him to pay the amount to him. Under these circumstances the Registrar of the County Court at Huddersfield had ordered Messrs. Brooke to hand over to the trustee in liquidation the bill of exchange, cheque and notes received from Hassall; and upon appeal the Chief Judge affirmed the decision, being of opinion that they were in the hands of the sheriff's officer as agent for the debtor when the liquidation commenced.

Messrs. Brooke now appealed.

Mr. De Gez and Mr. F. Knight, for the appellants.—There has been no seizure in execution, and the 87th section of the Bankruptcy Act, 1869, does not apply. The officer, therefore, was the agent of the execution creditor and not of the trustee in liquidation—

Morgan v. Pellatt, 8 B. & C. 722;
s. c. 7 Law J. Rep. K.B. 54;

Wood v. Finnis, 7 Exch. Rep. 363;
s. c. 21 Law J. Rep. (N.S.) Exch.
138.

Mr. Little and Mr. Winslow, for the respondent.—This is money seized under the writ of execution, and therefore in the same position as if it were the produce of the sale of goods seized—

Collingridge v. Paxton, 11 Com. B. Rep. 683; s. c. 2 L.M. & P.P.C. 654; s. c. 21 Law J. Rep. (N.S.) C.P. 39.

The transaction amounted to a fraudulent transfer of the debtor's property under the 6th section of the Bankruptcy Act, 1869, sub-section 2, and was an act of bankruptcy—

Ex parte Pearson; in re Mortimer, 42 Law J. Rep. (N.S.) Bankr. 44; s. c. Law Rep. 8 Chanc. 667.

After counsel had been heard on both sides, Mr. E. Brooke, one of the execution creditors, was examined in Court, and stated that on the 25th of July his firm told the sheriff's officer that they consented to take what he had received from Hassall in part payment of their debt.

THEIR LORDSHIPS came to the conclusion upon this evidence, as well as upon the probabilities of the case, that the

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creditors had accepted what the sheriff's officer had received from Hassall in part payment before the petition in liquidation was filed; there was no seizure by the sheriff, and the provisions of the 87th section of the Act did not apply, and the payment had been made under such pressure as prevented it from being a fraudulent preference under the 6th section. The creditors were entitled to retain what they had received, and the order of the Court below must be discharged.

Solicitors—Messrs. Williamson, Hill & Co., agents for Mr. Jacob, of Huddersfield, for appellants; Messrs. Learoyd & Co., agents for Learoyd & Co., Huddersfield, for respondent.

MELLISH, L.J. } *Ex parte KEMPE;*
1874. } *Re FASTNEDGE.*
March 6, 20. }

Reputed Ownership—Choses in Action—Debts due—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), sect. 15, sub-sect. 5.

The word debts in section 15, sub-sect. 5 of the Bankruptcy Act, 1869 (the reputed ownership clause), which is not to include "things in action other than debts due to the bankrupt in the course of his trade or business"—though it would include debts payable in future—does not include debts depending on a contingency.

On discounting bills of a firm of merchants drawn on their consignees, the bankers gave (according to the usual custom) marginal notes to represent the balance of the price of the bills which was retained by them till the bills were paid, and which was to be then paid over, subject to any claim by the bankers. These notes were deposited by the merchants as security, and were so held when the merchants went into liquidation, the bills of exchange not having then been paid:—Held, that the notes did not represent "debts" within the meaning of the above clause, but that they were excepted from the operation of the clause as choses in action.

This was an appeal by the trustees of Messrs. Fastnedge & Co. from an order of Mr. Registrar Spring Rice.

Messrs. Fastnedge & Co. were exporters of goods to India, and were in the habit, according to the usual custom of the trade, of selling the bills drawn by them against consignments upon the consignees in India to bankers in London, with the bills of lading attached as security. The bankers did not advance the whole of the price of the bills in cash. They paid seventy per cent., or somewhat more, in cash, and for the rest of the price gave Messrs. Fastnedge what are called in the trade "marginal notes." The forms of the marginal notes given by the different bankers were not precisely the same, but in substance they all amounted to contracts that the bank giving the notes held the residue of the price of the bill of exchange on deposit, bearing interest, by way of security for the payment of the bill, and that the amount so deposited was not to be paid to Messrs. Fastnedge until advice was received of the due payment of the bill, and was then to be subject to any other claims which the bank might have against Messrs. Fastnedge.

Messrs. Robert Barbour & Brother were commission agents in Manchester, who had had dealings with Messrs. Fastnedge. Since 1870 they had been in the habit of selling goods to Messrs. Fastnedge, drawing bills of exchange upon them for the price of the goods, and receiving from them marginal notes that had been given by London bankers to Messrs. Fastnedge, as a security for the payment of such bills.

The marginal notes now in question were all given by different bankers to Messrs. Fastnedge & Co. previous to the month of March, 1873, and had all been deposited by Messrs. Fastnedge with Robert Barbour & Brother as a security for the price of goods sold by Robert Barbour & Brother to Messrs. Fastnedge.

On the 26th of March, 1873, Messrs. Fastnedge presented their petition in liquidation. At that time no notice had been given to the banks that the marginal notes had been assigned to Robert Barbour and Brother. Messrs. Fastnedge inserted the name of Robert Barbour and Brother in the list of their creditors for £3,500.

At the time the petition for liquidation was presented none of the bills of exchange in respect of the price of which the marginal notes were issued had been accepted; but since that time they had all been accepted and paid, and the banks were willing to pay the sums of money represented by the marginal notes to whoever was legally entitled to receive them.

The question was—whether these sums ought to be paid by the banks to Messrs. Robert Barbour & Brother, or whether they ought to be paid to the trustee, upon the ground that at the time the petition for liquidation was presented they were in the order and disposition of Messrs. Fastnedge, with the consent of Robert Barbour & Brother, the true owners.

The Registrar held that the sums were at the time the petition for liquidation was presented things in action, but were not debts due to Messrs. Fastnedge in the course of their trade, and were therefore not to be deemed goods and chattels within the 5th sub-section of the 15th section of the Bankruptcy Act.

The trustee appealed.

Mr. Benjamin and *Mr. Linklater*, for the appellant.—We say that the notes come within the reputed ownership clause. They represent a present debt just as much as an ordinary deposit note, although the amount is retained to answer the risk of the bills not being met. The debt is *debitum in præsentia*, though *solvendum in futuro*. The transaction is that the bank buys the bill on which the drawer is liable as well as the acceptor.

The amounts due are debts due in the ordinary course of trade—all the evidence shews that—and no notice having been given to the bank, they were in the reputed ownership of the debtors and belong to the trustee.

It was said that debts due means debts payable, but in sections 19 and 49 the word is used of debts not immediately payable.

Mr. Little and *Mr. Marten*, for the respondents.—Debts due means debts immediately due—

Ex parte Sturt, 41 Law J. Rep. (N.S.)

Bankr. 12; s. c. Law Rep. 13 Eq. 309;

under s. 6, sub-sect. 6 of the Act. Sections 25, 31, 16 (sub-sect. 3), 13, 32, and other sections also indicate that debts due mean debts payable. These debts are future—

Jeffries v. The Agra and Masterman's Bank, 35 Law J. Rep. (N.S.) Chanc. 686; s. c. Law Rep. 2 Eq. 674.

The Legislature meant to exclude all *choses in action* except trade debts in the ordinary sense, else why did they say “*things in action* other than *debts* due to him in the course of his trade or business?”—Why the change of expression?

Moreover, the title depends on the possession of the marginal notes, and this excludes the operation of the clause—

Ridout v. Lloyd, Mont. 103;

Lacon v. Liffen, 4 Giff. 75; s. c. 32 Law J. Rep. (N.S.) Chanc. 315;

Ex parte Masterman, 2 Mont. & Ayr. 209; s. c. 4 Law J. Rep. (N.S.) Bankr. 54;

Ex parte Littledale, 6 De Gex, M. & G. 714; s. c. 24 Law J. Rep. (N.S.) Bankr. 9;

Ex parte Watkins, 42 Law J. Rep. (N.S.) Bankr. 50; s. c. Law Rep. 8 Chanc. 520.

Mr. Benjamin in reply.—It is true that in section 6 debts due mean debts immediately payable. But that section stands on a different footing altogether—

Ex parte Hayward, 40 Law J. Rep. (N.S.) Bankr. 49; Law Rep. 6 Chanc. 566.

Every one of the acts of bankruptcy there mentioned states or implies an immediate debt. He also cited—

Mitchell's case, 39 Law J. Rep. (N.S.) Chanc. 530; s. c. Law Rep. 5 Chanc. 400.

LORD JUSTICE MELLISH, after stating the facts, as above, and observing that the question seemed to be a novel one, proceeded as follows: (1)

The words “debts due to him” are certainly words which are capable of a wide or a narrow construction. I think

(1) The judgment was written, and was read by Lord Justice James, on March the 20th.

that *prima facie*, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand there can be no doubt that the word "due" is constantly used in the sense of payable; and if it is used in that sense, then no debts which had not actually become payable when the act of bankruptcy was committed would be included.

Lastly, the expression "debts due" is sometimes used in bankruptcy proceedings to include all demands which can be proved against a bankrupt's estate, although some of them may not be strictly debts at all. Illustrations of these various meanings may be found in the Act itself. In the 6th sub-section of the 6th section it is enacted that it shall be an act of bankruptcy if a debtor, who has been served with a debtor summons requiring him to pay a sum due of not less than fifty pounds, has neglected to pay that sum. It is obvious that in this place due must mean payable, because it would be absurd to suppose that a man could be made a bankrupt for not paying a debt which was not yet payable. In *ex parte Sturt (ubi supra)*, the Chief Judge held that the word due must also mean payable in the other parts of that section, because it was not to be supposed that the same word could be used in different senses in the same section. So also in the 6th sub-section of the 25th section it is enacted that the trustee may sell the book debts due or growing due. In that place also due seems to mean payable, because debts due are distinguished from debts growing due. On the other hand, in the 19th section it is enacted that the bankrupt shall give such list of his creditors and debtors, and of the debts due to or from them respectively, as the trustee may reasonably require. In that place it is clear that the word due does not mean payable, and that all debts which have been contracted, whether the time for payment has arrived or not, were intended to be included. It is impossible that acceptances payable *in futuro*, or bills of exchange receivable *in futuro*, were intended to be excluded

from the list of debts due to or by a bankrupt. Then again, in the 49th section it is enacted that an order of discharge shall release the bankrupt from all other debts proveable under the bankruptcy, except debts due to the Crown. In that place I think that debts due to the Crown means all proveable demands which the Crown has against the bankrupt, whether they have become payable or not, and whether they are in point of law strictly debts or not. It is unnecessary to pursue this investigation further, and I return to the consideration of what is the true construction to be placed on the word debts due to him in the course of his trade or business in the 5th sub-section of the 15th section.

It was argued for the respondents that the order and disposition clause was a penal enactment: that it takes a man's property away from him, and ought therefore to be construed strictly.

I cannot give any great weight to this argument. In former times this clause was construed most favourably for creditors, of which there cannot be a greater instance than that the words "goods and chattels" were construed to include *choses in action*.

In later times the Judges have given a stricter construction to the clause, and have endeavoured, as far as possible, to confine it to cases properly within its principle. The Legislature has now, in the Act of 1869, re-enacted the clause with certain modifications, and in determining what those modifications are, I must endeavour to discover on what principle the Legislature has acted, and carry that principle out.

Things in action other than trade debts are taken out of the clause, probably because it was thought that things in action other than trade debts were not likely to procure a trader credit from his apparent possession of them, when he had really parted with them. His general creditors in all probability might never know that he possessed them. Debts due to a trader in the course of his trade or business are excepted, and are still kept within the clause, because what are ordinarily termed a trader's book debts are very likely to procure a trader credit from his

apparent possession of them. They often form a most important part of a trader's assets, and they are a part of his property which a trader in good credit does not usually pledge or part with.

There can be no clearer mark of a trader being in difficulties than that he is obliged to assign his book debts as a security to a creditor. The legislature has therefore thought it right not to alter the law which made an assignment of his book debts by a trader void as against his trustee, if notice of the assignment had not been given to the debtors prior to an act of bankruptcy being committed.

Now this being, in my opinion, the principle on which the legislature have proceeded, is there any sound reason for making a distinction between those debts which at the time an act of bankruptcy is committed have become actually payable and those which have not? I cannot see that there is. Many trades are obliged to give long terms of credit to their debtors, and this being known to their creditors procures them credit also; and if I were to hold that debts which have been incurred, and which are, in what I consider the proper sense of the word, due to the bankrupt, although they have not yet become payable, were taken out of the order and disposition clause, I cannot help thinking that I should defeat the object which the legislature had in view in enacting that debts due to a bankrupt in the course of his trade or business should still be kept in the clause.

On the other hand I think that I have no right to extend the meaning of the words "debts due" so as to include demands which are not properly debts. Until a sum certain has become due, and is to be paid in all events, there is, in my opinion, no debt due. The clause does not relate to demands which may be proved against the estate of a bankrupt, but to debts due to him; and the change in expression from things in action to debts seems to prove that all things in action which might accrue to a trader in the course of his trade or business were not intended to be included in the clause, but only those which had become debts before an act of bankruptcy was committed.

This, then, being the construction which I put on the clause, I have next to consider whether the sums represented by the marginal notes had become debts due from the respective banks to Messrs. Fastnedge & Co. before their petition for liquidation was presented. Now it is obvious that at that time not only had these sums not become payable—which in my opinion would not prevent their being debts—but it was wholly uncertain whether any sum would ever become payable to Messrs. Fastnedge at all in respect of them. It was argued by Mr. Benjamin that nevertheless they were debts due to Messrs. Fastnedge, because the sums represented by the marginal notes were, as he said, to be paid to Messrs. Fastnedge in all events, either by being paid to them in cash, or by being applied to discharge liabilities owing by them. I do not think this argument is sound.

In *Jefferys v. The Agra and Masterman's Bank* (*ubi supra*), Vice-Chancellor Wood thus describes the legal effect of marginal notes—"These documents in truth represent a debt due from the bank with an engagement to repay that debt to the person to whom they give the receipt note upon a certain condition and at a certain time, as far as that time is defined by the condition—namely, whenever they receive intelligence that the bills in respect of the discount of which they reserved the right of retainer have been duly paid and satisfied. It is, in other words, a debt which will accrue from the bank on that event happening." Lord Hatherley had not the point I am considering before him at all, and although the words he first uses, that the document represented a debt due to the bank, is favourable to the argument of the appellant, I think that his last description is more accurate, that the debt will accrue from the bank on the event happening. If, notwithstanding the bills were dishonoured, an action was brought against the bank to recover the sums represented by the marginal notes, the proper plea to raise the defence of the bank would be a plea of never indebted, and not a plea of payment or of set-off. What I have to consider is—what was it

which Messrs. Fastnedge assigned to Robert Barbour & Brother, and of which Robert Barbour & Brother were the true owners at the time the petition for liquidation was presented. Now it is obvious that Messrs. Fastnedge did not assign to Robert Barbour & Brother, and Robert Barbour & Brother did not become the true owners of, sums certain to be paid by the banks to Messrs. Fastnedge in all events; but Messrs. Fastnedge only assigned to Robert Barbour & Brother, and Robert Barbour & Brother only became the owners of, contingent claims, which might or might not end in becoming debts. In my opinion contingent claims of this kind are not debts due within the 5th sub-section of the 15th section.

On the whole I am of opinion that the order of the Registrar must be affirmed and the appeal dismissed with costs.

Solicitors—Mr. H. Wickens, for the appellant; Messrs. Milne, Riddle & Mellor, agents for Messrs. Hinde, Milne & Sudlow, Manchester, for the respondents.

SELBOENE, L.C.
MELLISH, L.J.
1873.
Dec. 19.

Ex parte JAY;
Re POWIS.

Debtor's Summons—Petition for Adjudication by Summoning Creditor—Receiver—Payment to Summoning Creditor—Bankruptcy Act, 1869, sec. 13.

A petition for adjudication of bankruptcy in default of compliance with a debtor's summons having been presented by the summoning creditor and a receiver appointed under the 13th sec. of the Bankruptcy Act, 1869, such receiver is an officer of the Court, and has no power to authorize the payment of any money of the debtor except under the authority of the Court. Therefore, where under such circumstances the debtor, with the knowledge and consent of the receiver, paid a sum of money to the summoning creditor and the petition for adjudication was dismissed, but before such dismissal the debtor had been adjudicated bankrupt upon the petition of another credi-

tor:—Held, affirming the decision of the registrar, that the payment to the summoning creditor was a fraud upon the rights of the trustee in the bankruptcy, and he was ordered to pay to such trustee the money he had received, with interest at 4l. per cent.

On the 12th of October, 1872, Mr. G. H. Jay presented a petition for adjudication of bankruptcy against Mr. Henry Powis, a fringe manufacturer and baby linen warehouseman at Islington, in default of compliance with a debtor's summons for 3,000l. taken out against him by Jay, and on the same day, on the application of Jay, a receiver of the debtor's property was appointed under s. 13 of the Bankruptcy Act, 1869.

On the 15th of October Powis, with the knowledge and consent of the receiver, paid 1,050l. to Jay, and on the 6th of December, Jay's petition was dismissed on his own application. In the meantime, however, viz., on the 6th of November, Powis was adjudicated bankrupt on the petition of another creditor and a trustee appointed. Upon the application of the trustee, Mr. Registrar Spring-Rice made an order declaring that the payment of the 1,050l. to Jay was fraudulent, as against the trustee in bankruptcy, and directing payment thereof with interest at 4l. per cent. to him.

Jay appealed from the order.

Mr. Little and Mr. Winslow, for the appellant.—The act of bankruptcy committed by non-compliance with the debtor's summons being available for adjudication only on the petition of the summoning creditor is not one to which the title of the trustee under the second adjudication can relate back—

Ex parte Wier; in re Wier, 41 Law J. Rep. (N.S.) Bankr. 14; s. c. Law Rep. 6 Chanc. 875.

It was therefore competent to Jay to withdraw his petition on any terms he thought fit.

Mr. De Gex and Mr. F. Knight, for the trustee, were not called upon.

THE LORD CHANCELLOR said he entertained no doubt about the case. He could not conceive that greater mischief could be done by those who had the ad-

ministration of bankruptcy than if such a transaction as this were permitted to stand for a single instant. A petition in bankruptcy was presented by a person who, no doubt, was the only creditor who could take advantage of the particular act of bankruptcy alleged. Then he procured a receiver to be appointed, who, when he was appointed, became the officer of the Court, whose duty it was not to part with any property which he received except under the direction of the Court, who had to account to the Court for what he received, and who, if the bankruptcy proceeded, would have to account to the trustee appointed under it (1). So strong and special a power as that of appointing a receiver immediately on the presentation of a petition, and even of granting an injunction to restrain creditors from pursuing their remedies against the debtor, could only be given with a view to an adjudication for the benefit of all the creditors. His Lordship did not dispute that the petitioner might afterwards have applied to the Court for an order to dismiss his petition and to discharge the receiver, and to direct him to pay over the money in his hands to the debtor, and after such an order had been made the receiver would have been justified in dealing with any moneys in his hands as the Court directed him. But nothing of this kind was done in the present case. On the contrary, without any authority of the Court, and in fraud, as it appeared to his Lordship, of the rights of the creditors if any adjudication should be made, this money was applied for the benefit of the particular creditor. It was urged that this might be done, because the creditor had entered into an agreement with the debtor to get his petition dismissed, but, if there was any such agreement, in his Lordship's judgment it would have made no difference, for so long as the receiver existed he did so as the officer of the Court, for the benefit of all the creditors. His Lordship agreed with the decision of the Registrar, and the appeal must be dismissed, with costs.

Lord Justice MELLISH was entirely of the same opinion. It was a matter of

considerable importance that creditors should understand that if they not only petitioned in bankruptcy against their debtors but obtained the appointment of a receiver, they did so for the benefit of all the creditors. When a receiver had been appointed, all money of the debtor should be paid to him, and the particular creditor had no right to intercept any part of it.

Solicitors—Messrs. Lewis, Munns & Longden, for appellant; Messrs. Wild, Barber & Brown, for respondent.

BACON, C.J. }
1874.
Jan. 26. }

Ex parte TATE ;
Re KEYWORTH.

Secured Creditor—Action on Bill of Exchange—Deposit of Money in Court to abide the Event—Arbitration—Bankruptcy before Award—Bankruptcy Act, 1869, ss. 12, 16 (sub-s. 5)—Bills of Exchange Act (18 & 19 Vict. c. 67), s. 2.

T. commenced an action against K. on a bill of exchange. K. obtained leave to defend upon terms of paying 880l. into Court to abide the event. The matter was submitted to arbitration, but before any award was made K. became bankrupt. On the application of the trustee in the bankruptcy the County Court Judge ordered the 880l. to be paid to him for distribution amongst the creditors:—Held, on appeal (reversing the decision in the County Court), that T. was a creditor holding a security.

On the 5th of April, 1873, a bill of exchange for 1,200l. was accepted by the liquidating debtors, Messrs. Keyworth & Co., and indorsed to the present appellants, John Passman Tate and George Selby, who carried on business under the style of Griffiths, Tate & Co.

On the 11th of July, 1873, the appellants commenced an action against Messrs. Keyworth on the bill of exchange. An affidavit having been filed by the partners in Messrs. Keyworth & Co. to the effect that only a small portion of the 1,200l. was really due on the bill of exchange, an order was, on the 22nd of July, made in the Common Pleas at

(1) G. R. 104, and form No. 13 (Jan. 7, 1870).

Lancaster, that upon payment into Court by the defendants to the action of 880*l.* to abide the event, they be at liberty to appear and defend the action.

On the 29th of July, 1873, a further order was made in the action, that the matters in dispute should be referred to arbitration.

No certificate or award had been made under the arbitration before the 2nd of September, when Messrs. Keyworth filed their petition for liquidation.

The trustee under the liquidation at once claimed the 880*l.* for distribution amongst the creditors; and on the 21st of November, 1873, on the motion of the trustee, the County Court Judge made an order staying all proceedings under the arbitration, and that the sum of 880*l.* should be paid to the trustee.

Against this order the present appeal was brought, but the appellants offered to allow the amount actually due to them to be ascertained either by continuing the arbitration or by proceedings in bankruptcy, as the Court should direct.

Mr. North (Mr. Herschell with him), for the appellants.—This fund was no longer part of the bankrupt's estate after it had been paid into Court, and the plaintiffs in the action had obtained certain rights over it—

Taylor v. Marling, 2 Man. & G. 55;

Wynne v. Jackson, 2 Russ. 351; s. c.

5 Law J. Rep. (o.s.) Chanc. 55;

Furnival v. Bogle, 4 Russ. 142;

Murray v. Arnold, 32 Law J. Rep.

(n.s.) Q.B. 11; s. c. 3 B. & S. 287.

We are clearly creditors holding a security within the meaning of the Bankruptcy Act, 1869, ss. 12, 16.

The object of the Bills of Exchange Act (18 & 19 Vict. c. 67), s. 2, was to provide a security, and it is against the event of bankruptcy that a security is most needed.

The debtor could not have disputed our right to hold this as security, neither can the trustee.

Mr. Benjamin and Mr. Bigham, for the trustee.—The money was the property of the bankrupt at the time of the bankruptcy, and ought to be distributed amongst the creditors.

The preamble to the Bills of Exchange Act shows that that Act was not intended to give a creditor a security, but to correct the abuse of persons defending actions simply to put off payment. The Bankruptcy Act, 1869, discountenances any preferences, unless they are given as a charge on a particular property.

There is a difference between "having" and "holding" a security, and the word "holding" is used in the Bankruptcy Act, 1869, sect. 16, sub-sect. 5—

Ex parte Greenway; re Adams, 42 Law

J. Rep. (n.s.) Bankr. 110; s. c.

Law Rep. 16 Eq. 619.

The plaintiffs in the action are not "secured" creditors. The words "charge or lien" in the Act of 1869, sect. 16, sub-sect. 5, means something that the debtor has undertaken to give the creditor as security, and not anything that the creditor has obtained by legal proceedings—

Holmes v. Tutton, 5 E. & B. 15; s. c.

24 Law J. Rep. (n.s.) Q.B. 346;

Turner v. Jones, 1 Hurl. & N. 878;

s. c. 26 Law J. Rep. (n.s.) Exch. 262;

Tilbury v. Brown, 30 Law J. Rep.

(n.s.) Q.B. 46;

Wood v. Dunn, 7 B. & S. 94; s. c. 35

Law J. Rep. (n.s.) Q.B. 11; s. c. 1

Q. B. Rep. 77 (Ex. Ch.); s. c. 36

Law J. Rep. (n.s.) Q.B. 27; s. c.

Law Rep. 2 Q.B. 73.

They also referred to

Culverhouse v. Wickens, 37 Law J.

Rep. (n.s.) C.P. 107; s. c. Law

Rep. 3 C.P. 295;

The Common Law Procedure Act,

1854, ss. 62, 63, 64, 65,

and

The Bankruptcy Act, 1849, s. 184.

BACON, C.J.—The case is one of considerable importance and of some nicety no doubt, but it is to be decided upon the general law, and I do not think that the clauses which have been referred to in this Bankruptcy Act, or any other Act referred to, do of themselves conclusively determine the question whether the present appellant is a creditor holding or having a security. Looking at the law relating to bills of exchange there can be no doubt

in my mind that the object of the law is that if a man comes and says, I have a defence to this action, and I swear that I have a defence, the Judge has to look into so much of the circumstances of the case suggested (not proved) before him, as will satisfy him of the amount of security (that is the proper word to use) that shall be given to the defendant to abide the event of the action. Without professing to know in what form orders are drawn up in the Courts of common law, I do not hesitate to say that the order in this case was drawn up in the proper terms; that it is the order of the Judge who made it; that it is a proper order and in accordance with the Act of Parliament, the object of which was to provide a security emphatically to abide the result of the action which was then pending. If it were necessary to give reasons for that they could be readily furnished. If it were otherwise, a bankrupt intending to cheat the creditor suing him would be furnished with a ready means of doing it, because he could easily find the money necessary to be deposited, intending to become bankrupt the next day or at some other time; and if there were half a dozen creditors suing on bills of exchange he might find the money for the purpose of temporary deposit, with a certain conviction that he would be able to get it back when he was bankrupt. That would be one of the evils that would arise from such a mode of dealing with the subject. But I think that the transaction is plain and distinct; and, according to all the cases referred to, the 880*l.* paid into Court, upon its being paid into Court, ceased to be the property of the bankrupt. It was no part of his estate. If the action had gone on to judgment, and the judgment had been for 880*l.*, the matter would have been quite clear and plain, and the money would have belonged to the plaintiff in the action. Even in the cases referred to, the right of the plaintiff, the person who had procured the deposit, is recognised beyond the possibility of dispute as it seems to me. In one of them, *Furnival v. Bogle* (*ubi supra*), it is true the order was not made for payment out, and the appeal was dismissed; but some

proceeding would be necessary in the Mayor's Court, or wherever else the proceeding might be taken, to ascertain how much of the sum deposited belonged to the man for whose security and for the satisfaction of whose claim it had been deposited. The case of *Holmes v. Tutton* (*ubi supra*), which was commented upon so elaborately by Mr. Benjamin, has not, in my opinion, the smallest application to the present case. That was a question upon the strict construction of the Common Law Procedure Act. Here I find the state of things to be this. At the time the bankruptcy happened there was a sum of 880*l.* which was no part of the bankrupt's estate, which had been paid into Court to abide the result of an action. If that action went on to judgment the plaintiff in the action is entitled to be paid his debt, when established, and the amount of his costs out of the sum deposited, and that right, I think, he has established. I am wholly prevented from adopting that part of Mr. Benjamin's argument in which he said the deposit was to abide the result of the action or to wait until the action was determined. That is an event that never now can happen, because the Judge of the County Court has by his injunction made it impossible to proceed in that action. There is a great plausibility in that mode of putting the case, and at one time I agreed with it, but I was reversed on that point by the Lords Justices. I think the appellant in this case is entitled to have the question which was pending between him and the bankrupt when the 880*l.* was deposited, decided. I think, having regard to the 72nd section of this Act, proceedings may now be taken in Bankruptcy to ascertain what is the amount that should be paid in respect of the sum deposited, and I understand that the appellant does not object to that. I think, therefore, that the 880*l.*, which, at the time of the bankruptcy, was no part of the bankrupt's estate, ought not to be paid over to the trustee to be distributed among the creditors proving under the bankruptcy, but that it would be convenient, right and just that it should be transferred into the bankruptcy, and there must be some proceedings to determine to how much

the appellant is entitled. The amount may, if the parties so agree, be determined in the arbitration, otherwise there must be an inquiry before the learned Judge. I make no order as to the costs of the appeal.

Solicitors—Mr. W. W. Wynne, agent for Messrs. Simpson & North, Liverpool, for the appellant; Mr. J. H. Lydall, agent for Messrs. T. & T. Martin, Liverpool, for the trustee.

BACON, C.J. }
1874. }
Feb. 9. } *Ex parte* LOVERING;
Re PEACOCK.

Execution Creditor—Seizure before Act of Bankruptcy—Debt under 50l.—Bankruptcy Act, 1869, ss. 13, 87.

The sheriff seized under a writ for a judgment debt exceeding 50l.; subsequently he seized under another writ for a judgment debt under 50l.; no sale was made under either. The debtor presented his petition for liquidation, and the trustee applied for an injunction to restrain the judgment creditors from proceeding to execute their writs:—Held, that no injunction could be granted against the creditor whose debt was under 50l.

On the 25th of November, 1873, William Prosser, a judgment creditor of John Thomas Peacock, a trader, issued a *fi. fa.* against him to recover 191*l.*, and on the same day the sheriff seized.

On the 1st of December Messrs. Ind, Coope & Co., also judgment creditors, issued a *fi. fa.* against Peacock to recover 37*l.* 19*s.* 6*d.*, and on the same day the sheriff seized.

On the 13th of December Mr. M'Donald, another judgment creditor, issued a *fi. fa.* against Peacock to recover 148*l.*, and on the same day the sheriff seized.

On the 16th of December Messrs. Greenlees, also judgment creditors, issued a *fi. fa.* against Peacock to recover 37*l.* 15*s.* 6*d.*, and on the same day the sheriff seized.

No sale was made under any of the writs.

On the 30th of December Peacock filed his petition for liquidation.

On the 8th of January, 1874, a receiver was appointed, and an interim order granted, restraining all the execution creditors from proceeding on their writs.

On the 22nd of January, the creditors resolved on liquidation by arrangement, and Thomas Lovering was appointed trustee.

Lovering now moved for a declaration that the goods seized under the several executions were the property of the trustee, and for an order that the sheriff should withdraw from possession, and be restrained from further proceedings under the executions.

Mr. Shortt, for the trustee.—If the sheriff sells he must do so under the first writ, and as the debt on that judgment is over 50*l.* the property will belong to the trustee—

Bankruptcy Act, 1869, sec. 87.

The trustee is entitled to the goods though no sale has yet taken place—

Ex parte Rayner, re Johnson, 41 Law J. Rep. (N.S.) Bankr. 26; s. c. Law Rep. 7 Chanc. 325.

Mr. Rose, for Messrs. Greenlees.—The sheriff holds under all the writs, and if he sells must sell under all—

Drewe v. Lainson, 11 Ad. & E. 529; s. c. 3 P. & D. 245; s. c. 9 Law J. Rep. (N.S.) Q.B. 69.

We are execution creditors for a sum less than 50*l.*, and our rights are therefore not affected by section 87—

Slater v. Pinder, 41 Law J. Rep. (N.S.) Exch. Ch. 66; s. c. Law Rep. 7 Ex. 95, affirming s. c. 40 Law J. Rep. (N.S.) Exch. 146; s. c. Law Rep. 6 Exch. 228;

Ex parte Roche, in re Hall, 40 Law J. Rep. (N.S.) Bankr. 70; s. c. Law Rep. 6 Chanc. 795.

Mr. Shortt, in reply.—There could not have been a realisation of the proceeds without committing an act of bankruptcy.

BACON, C.J.—The difficulty in this case is caused by the omission from the Act of 1869 of the 184th section of the Act of 1849. The law, however, is clearly settled by the case of *Slater v. Pinder* (*ubi supra*).

A judgment creditor who levies execution obtains certain common law rights, of which he cannot be deprived except by statute, and if his debt be for an amount under 50*l.* he is exempted from the operation of sec. 87 of the Act of 1869, and there is no other statutory enactment which takes away his common law rights.

In this case there was no act of bankruptcy committed before the filing of the petition, because, though the sheriff had seized under the writs, there had been no sale. Therefore, at the date of the petition, the judgment creditor for less than 50*l.* had acquired rights which there was no statutory enactment to set aside, and in the exercise of which he cannot be interfered with.

The execution creditor for less than 50*l.* is therefore entitled to proceed to a sale, and the injunction against him will be discharged.

Solicitors—Mr. F. Smith, for the execution creditor; Messrs. Fallows & Whitehead, for the trustee.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.	} <i>Ex parte</i> MAULE; <i>Re</i> MOTION. MAULE v. DAVIS.
JAMES, L.J.	
MELLISH, L.J.	
1873.	
Dec. 10, 11, 12, 15, 16.	

Partnership—Decree for Dissolution—Bankruptcy of one Partner—Sale of Partnership Assets by Order of Court of Chancery—Jurisdiction of Court of Bankruptcy to set aside—Bankruptcy Act, 1869, section 72—Bankrupt Law Consolidation Act, 1861, section 137.

The 72nd section of the Bankruptcy Act, 1869, does not give the Court of Bankruptcy jurisdiction over property or the owners of property not vested in the assignee and not originally subject to the administration in bankruptcy. Still less does it authorise that Court when a decree for sale and accounts has been made in a Chancery suit against solvent partners of a bankrupt to treat such a decree as giving rights to be

worked out in Bankruptcy and not in Chancery.

Under a decree made in a suit for dissolution of partnership it was, amongst other things, ordered that the business property and effects of the partnership should be sold by auction as a going concern. One of the partners became bankrupt, and an offer by the solvent partners to purchase his interest being rejected as inadequate, another order was made for the sale of the whole of the partnership premises, plant and effects as a going concern, the solvent partners being prohibited from purchasing. Afterwards, no sale having taken place, the solvent partners entered into an agreement with the assignees for the purchase of the bankrupt's share in the partnership assets at a price to be ascertained, and in pursuance of this agreement the value of the bankrupt's interest was fixed by accountants on behalf of all parties at 14,038*l.*, which, by an order made in Chambers, was directed to be paid and an assignment executed by the assignees. The purchase-money was paid, and the creditors received 20*s.* in the pound. At a subsequent meeting of the creditors the assignee was removed and new assignees appointed, upon whose application the Chief Judge, being of opinion that the sale was collusive, ordered it to be set aside and the business to be sold by auction. But upon appeal it was held that the Court of Bankruptcy had no jurisdiction under the 72nd section of the Bankruptcy Act, 1869, to make the order, and it was discharged accordingly; and the Court being of opinion on the merits that the sale was bona fide, but not being satisfied that there was not material error in the mode in which the value of the bankrupt's interest had been arrived at, directed, with the consent of the purchaser, an enquiry whether any further sum ought to be paid by him to make up the proper value of the bankrupt's interest.

The 137th section of the Bankrupt Law Consolidation Act, 1861, which makes it necessary that an assignee should have the sanction of the Court of Bankruptcy to justify him in selling by private contract all or any of the book debts due or growing due to the bankrupt, and the books relating thereto and the goodwill of his trade or business, relates to the sale of book debts, &c., belonging to the bankrupt only, and

not to the book debts, &c., of a dissolved partnership, of which only one partner is bankrupt, such book debts, &c., not being assets distributable or saleable in the bankruptcy.

This was an appeal from an order of the Chief Judge in Bankruptcy setting aside a sale by the assignee of the bankrupt's share in a partnership business to the solvent partners under the following circumstances, which are mainly taken from his Honour's judgment.

In August, 1863, George Motion, the bankrupt, entered into partnership with John Hay and Edward Netterville Briggs in the business of a distillery known as Grimble & Co., in Albany Street, which had then recently been purchased by Robert Burdett from William Hay, and assigned by him to Motion. In the articles of partnership, Motion's share of the capital was stated to be 12,000*l.*, and the shares of the other two partners 10,000*l.* and 12,000*l.* respectively, and the profits were to be divided into twentieths, of which Motion was entitled to nine, John Hay to five, and Briggs to the remaining six. Disputes, however, very shortly arose between the partners, and in January, 1864, John Hay filed a bill in Chancery against his partners praying for a dissolution of the partnership, seeking to charge George Motion with a sum of 6,000*l.* in taking the partnership accounts, and praying that the property and business of the partnership might be sold as a going concern, with liberty for each of the partners to bid.

In April, 1864, another, or cross bill, was filed by George Motion against his partners, also praying for a dissolution of the partnership; and in the same month a decree was pronounced in both suits, whereby it was declared that the partnership should be dissolved as from the 30th of April, 1864. Accounts were directed of the partnership dealings and transactions, and it was ordered that the property and effects of the partnership should be sold as a going concern, with the approbation of the Judge, and each of the partners was to be at liberty to bid at the sale. A receiver was appointed to

collect the debts and manage the business of the partnership, and it was ordered that out of the moneys received by him he should pay the debts of the partnership. In pursuance of the decree Henry Marston was appointed receiver.

At the time when William Hay, the former proprietor of the distillery, sold his business to the new partnership there were debts due to him from his customers and others which were not included in the sale. The collection of these debts was entrusted by him to the partners, his successors, and in respect of sums received by them they became indebted to him to a considerable amount. In November, 1863, he filed a bill against them, and Robert Burdett, with whom the original contract for sale had been made, but who had retained no beneficial interest in the purchase, and in July, 1864, he obtained an order directed against Robert Burdett, George Motion, John Hay and E. N. Briggs, for the payment to him of the sum of 6,000*l.* This order not having been obeyed, attachments were issued to enforce it. One only of the attachments was executed, and that was against Motion, who, in March, 1865, was arrested and lodged in Whitecross Street Prison. Whilst he was in prison, in May, 1865, he was adjudicated bankrupt upon a debt alleged to be due to Robert Burdett, but to which debt Frederick Moojen, an attorney, who had before and after the formation of the partnership acted as the solicitor of George Motion, and was also the brother-in-law of Mr. Briggs, one of the partners, was beneficially entitled. He had appeared for, and acted as the solicitor of Motion in the partnership suits down to some time before the arrest, when, as Motion alleged, at the suggestion of Mr. Moojen, Mr. King was substituted for him, and acted for a short time as his solicitor. Shortly afterwards Mr. King was removed and Mr. Oliver, who was selected for that purpose, became and acted as Motion's solicitor. Whilst he was in prison, and before the adjudication in bankruptcy, Motion was desirous that the sale directed by the decree, the conduct of which had been committed to John Hay, should be prosecuted, and with

this view he pressed on the sale before the chief clerk; and in May, 1865, the advertisements for the sale were prepared, and were about to be settled in Chambers, when upon attending a summons for that purpose on the 31st of May, Mr. Moojen appeared before the chief clerk and objected that the matter could not further proceed in consequence of Mr. Motion having been, as the fact was, upon that day adjudicated bankrupt.

On the 15th of July, 1865, James Johnstone was appointed creditors' assignee in the bankruptcy. He accepted that office at the request of Mr. Moojen, at whose request he appointed Mr. John Robert Chidley as his solicitor. Being dissatisfied with the conduct of Mr. Chidley, who was said to have prevented the completion of an offer which had been made to purchase the partnership business, Mr. Johnstone desired to remove him. This desire was, however, resisted by Mr. Moojen, who, in July, 1866, called a meeting of the creditors with a view of removing Mr. Johnstone. This attempt failed; but at a subsequent meeting of creditors held in November following Mr. Moojen succeeded in effecting Mr. Johnstone's removal, and procured Robert Burdett to be nominated assignee in his place. The confirmation of this appointment was objected to by creditors before the commissioners, who declined to confirm the appointment, and recommended Mr. Burdett to withdraw, which he did. At a meeting held in June, 1867, Thomas Cooper Coxon, who represented Messrs. Bass, creditors of the bankrupt for a large amount, was appointed assignee by the votes of the creditors present, and the appointment was confirmed by the Commissioner, and Messrs. Linklater were appointed solicitors to the new assignee. Upon Mr. Coxon's appointment the proceedings for the sale directed by the decree in Chancery were resumed, Mr. Coxon being added as a party in the suits. An offer was made on behalf of Messrs. J. Hay and Briggs to purchase the bankrupt's interest for 15,000*l.*, but this offer was rejected by the assignee.

In July, 1868, Messrs. J. Hay & Briggs carried into Chambers a proposal to purchase the entirety of the partnership

property for 30,000*l.* That offer being opposed by Mr. Coxon, on the ground that it was inadequate, the summons was adjourned into Court, and a further order of the Court was thereupon made in the two causes bearing date the 31st of July, 1868, whereby it was ordered that the whole of the partnership moneys, plant and effects should be sold by public auction as a going concern, that John Hay should have the conduct of the sale, but that neither he nor Mr. Briggs should have liberty to become purchasers, and that John Hay should sell the debts due to the partnership, with the approbation of the Judge; the proceeds to be paid into Court to the credit of the causes.

In August, 1868, a suggestion was made that all matters in difference might be settled without the interference of legal advisers, and it was proposed that Mr. G. Maule should act as arbitrator on behalf of John Hay, and that some person, not a lawyer, should represent the bankrupt, and that Mr. Maule should hold an authority from Messrs. Briggs and J. Hay to settle all matters without control. A draft of an instrument for the purpose of carrying this proposal into effect was prepared; meetings between Messrs. Maule, Moojen and R. W. Motion, a brother of the bankrupt, took place in or about September, 1868, at which it was arranged that Mr. Moojen should prepare a proper agreement, which he did, but some further stipulations being afterwards proposed by him and not assented to on the part of the bankrupt or his assignee, the intended reference went off, and nothing further was done in it. At the latter part of the year 1868 the subject was revived, and discussions took place between Messrs. Linklater, the then solicitor for the assignee, and also for some of the principal trade creditors of the bankrupt and for the bankrupt and Mr. Moojen and Mr. Cridland, the then solicitor of John Hay, and it was arranged between them that the value of the partnership property and of the interest of the partners, should be referred to arbitration, Mr. Maule being again named as arbitrator for Messrs. John Hay & Briggs and a Mr. States for the assignee of the bankrupt. It was arranged that an

agreement for this purpose should be prepared by Messrs. Linklater, which was accordingly done. Mr. Coxon died in January, 1869, and on the 19th of February, Mr. Staunton was appointed assignee of the bankrupt's estate. He was not a creditor, and was wholly unacquainted with the bankrupt and his affairs. He had been solicited to become assignee by Mr. Moojen, who was then acting in the interests of Mr. Briggs and Mr. Maule, to whom Mr. Briggs was indebted to a considerable amount, as was also the partnership. A part of the debt owing by the partnership was represented by an acceptance of Mr. Maule for 5,000*l.*, which he took up on the 6th of February, 1869, and for which amount, at the request of Mr. Moojen, he proved under the bankruptcy. By means of this proof, which was prepared for him by Mr. Moojen, he became qualified to vote in the choice of assignees, and by these means Mr. Staunton was appointed assignee, and became a defendant in the existing suit, and by his direction Mr. Chidley became once more the solicitor in the bankruptcy, and also solicitor upon the record for Mr. Staunton in the suits. The negotiations for the reference still proceeded, and in March, 1869, a draft of the intended agreement, for reference to the arbitration of Messrs. Maule and Slater, was sent by Messrs. Linklater to Mr. Moojen, and also to Mr. Chidley, and was the subject of a correspondence between the parties. In answer to a letter of Messrs. Linklater to Mr. Moojen, the latter wrote to them on the 16th of April, 1869, a letter, in which he said, "We believe the necessary steps are being taken to pass the receiver's accounts, and when that is done, we do not see the slightest difficulty in bringing matters to a satisfactory conclusion. And on the 19th of the same month Mr. Chidley returned to Messrs. Linklater the draft agreement with an intimation that he could not advise the assignee to consent thereto. Down to this time the bankrupt and his adviser had been led to believe that the reference would proceed; but it appeared that on the 15th of April, 1869, and before either of the last-mentioned letters was written, Mr. Staunton, the

assignee, had entered into an agreement with Messrs. Briggs and J. Hay for the sale to them by private contract of the bankrupt's interest in the partnership property. By that agreement, which contained a recital that Mr. Staunton had agreed, at the request of the majority of the creditors of the said G. Motion, notwithstanding the said order of the 31st of July, 1868, to enter into the agreement thereafter expressed, Mr. Staunton agreed with Messrs. J. Hay and Briggs that he would, subject to the approbation of the Court, sell to Messrs. J. Hay and Briggs, and that J. Hay and Briggs should purchase all the estate and interest of Mr. Staunton as assignee of and in the partnership assets at the price and in manner therein mentioned; that in the event of the amount of the purchase-money not being agreed upon by mutual consent between the parties, the accounts of the partnership should be taken by the chief clerks in the two suits; and that the amount which the chief clerks should ascertain and fix as the value of the estate and interest of Mr. Staunton as assignee in the partnership should be deemed and taken to be the price in sterling money, which should be paid to him by Messrs. J. Hay and Briggs for such estate and interest, and that a deposit of 2,000*l.* in part payment of the purchase-money should be paid to Mr. Staunton by them upon the execution of the agreement, and the balance within one month from the time when the value of the estate and interest should have been ascertained and fixed by the chief clerks in manner aforesaid.

Consequent upon the agreement Messrs. Good & Daniel, accountants, were employed to make a valuation of the bankrupt's interest in the partnership estate and effects. In July, 1869, they made a report, in which they stated that the value of the bankrupt's interest was 13,025*l.* 3*s.* 1*d.*, and upon this report and upon certain affidavits made in support of it, an order in the two suits was obtained in Chambers upon the application of Mr. Staunton on the 15th of July, directing the payment of the sum last-mentioned, and that Mr. Staunton should thereupon execute, as in fact

he did, an assignment of the bankrupt's estate and interest to J. Hay and E. N. Briggs. The order was obtained upon an affidavit made by Mr. Chidley, in which he stated at length the previous agreement of April, 1869, and his belief that it would be for the benefit of all parties, particularly those interested in the estate of the bankrupt, that the sum of 13,025*l.* 3*s.* 1*d.* should be accepted for the purchase of the share and interest of the bankrupt and his assignee in the partnership. In another affidavit made at the same time by Mr. Good there was a statement in the like terms. The 2,000*l.* deposit mentioned in the agreement was raised by means of a security given for the purpose by Mr. Maule and received by the assignee, and the balance was paid to him in due course.

At a meeting of the bankrupt's creditors held shortly afterwards a dividend of 20*s.* in the pound was declared, and was afterwards paid to the creditors. On the 7th of April, 1870, the bankrupt, Motion, filed his bill against Frederick, Moojen, J. Hay, E. N. Briggs and T. Staunton, praying for a declaration that the order of the 15th of July, 1869, was obtained by fraud or misrepresentation on the part of the defendants, and that the same was void and of no effect as against the plaintiff, and that the sale was fraudulent and void, with consequential relief.

None of the defendants demurred to the bill, but some of them by their answers took an objection to the plaintiff's right to sue, he being a bankrupt, and at the hearing of the cause the bill was dismissed upon this ground by Vice-Chancellor Bacon. See *Motion v. Moojen*, 41 Law J. Rep. (N.S.) Chanc. 596.

At a subsequent meeting of the creditors Mr. Staunton was removed from his office of assignee, and in August, 1872, Messrs. Davis and Wigginton were appointed assignees of the bankrupt's estate, and in July, 1873, they moved before the Chief Judge for a declaration that the sale of the bankrupt's share and interest in the partnership for 13,025*l.* 3*s.* 1*d.*, and the agreement of the 15th of April, 1869, were, on the part of Messrs. Staunton and John Hay and E. M. Briggs, void, and that the bankrupt's estate was en-

titled to nine-twentieths of all the profits of the business of the partnership from the commencement thereof down to the final winding up of the same, that the partnership property and the debts owing to the concern might be sold by public auction as a going concern as directed by the order of the 31st of July, 1868, and that Maule and all other necessary parties might be ordered to join in the sale, and that proper directions might be given as to the application of the money arising from the sale, that the affairs of the partnership might be wound up, and the rights and interests therein of the bankrupt and his estate, and of John Hay and E. M. Briggs ascertained; that Hay, Briggs and Maule might be restrained from dealing or intermeddling with the assets or affairs of the partnership, that a receiver might be appointed, and that if necessary it might be declared that the order of the 15th of July, 1869, was procured by fraud or misrepresentation on the part of Staunton, J. Hay and Briggs, and was void and of no effect as against the bankrupt's assignees.

Mr. J. Chitty and *Mr. W. Romer*, for the motion.

Mr. Swanston and *Mr. Stirling*, for the respondents.

In delivering judgment on July 28th, BACON, C.J., said—"The substance of the complaint, which is made in this case by the present assignees of the bankrupt, is that his estate which, if it had been duly administered would have produced more than enough to satisfy all his debts, and would have left for him a considerable surplus, has been unlawfully dealt with by the late assignee and by the other persons who are parties respondent on this motion, inasmuch as it has been transferred for less than its real value, and without regard to the rights of the creditors and the bankrupt.

"On the part of some of the respondents it was objected in the first place that, without reference to the facts, this Court does not possess jurisdiction over the subject, and if this objection could have been sustained the time which the discussion has occupied would have been wholly misemployed.

But inasmuch as the motion now made relates to and involves questions both of law and fact arising in a case of bankruptcy coming within the cognizance of the Court, and which the Court does deem it expedient and necessary to decide for the purpose of doing complete justice and making a complete distribution of property, I am of opinion that by the express terms of section 72 of the Bankruptcy Act, 1869, this Court has full power to decide the questions raised; and moreover that by the general provisions of the statute and by the rules and practice of the administration of the law in bankruptcy, the duty of deciding such questions is imperative on the Court.

"It has been insisted, on behalf of the respondents, that this Court has no power to set aside the order made by the Court of Chancery; and if there were no means of giving such relief as the applicants are entitled to but by setting aside that order, the objection might prevail, because I have no more the authority than I have the inclination to set aside that order; but if it shall appear that the order has been obtained by unjust and unlawful means, and if under colour of that order and under colour of the proceedings in bankruptcy a wrong has been done, I am of opinion not only that I have the power, but that it is my duty to declare that, notwithstanding that order, the acts which have been done shall be treated as null and void, and to restore the rights that existed before that order was made.

"A judgment at law, the decision of any Court domestic or foreign, may be in all cases examined into, and it would be opposed to every principle of justice if it were to be held that a judgment or order of a Court competent to make it should be so conclusive that by whatever means it has been obtained its mere tenor should be operative and effectual, and preclude all investigation and enquiry. Although, therefore, I have no intention to dispute the formal validity of that order, or to impeach or interfere with the authority by which it was made, I feel myself bound to consider the circumstances under which it was made, the conduct of the parties by whom it was procured, and the acts which have been done under its colour, and to

prevent its being made the instrument of injustice and a protection and indemnity to the person by whom it was obtained, if it is shewn to have been improperly obtained and used. Those parties were John Hay, E. N. Briggs and Mr. Staunton, the assignee. The two former, the bankrupt's partners, had evinced upon several occasions a desire to acquire the bankrupt's interest; they had proved debts in the bankruptcy, which debts were afterwards expunged; they had made an offer for the purchase of the entirety of the partnership effects, and their offers had been rejected; they were in the possession and occupation of the partnership premises, notwithstanding the appointment of a receiver; they were acquainted with the several proceedings in the bankruptcy and in the suits, and they knew that their rights and the rights of the assignee in bankruptcy had been settled and defined by the decrees which had been made; and especially they knew that the amount and value of the bankrupt's interest must depend upon the just execution of those decrees, by which a sale by auction had been directed of the joint property and a sale of the debts due to the partnership, but that such sales were not to be made without the sanction of the Court and the taking of the partnership accounts; and it was under these circumstances and with this knowledge that they became parties to the agreement of April, 1869, and to the subsequent transactions by which they acquired the whole of the bankrupt's interest in the partnership property for 13,025*l.* 3*s.* 1*d.*

"At the time when Mr. Staunton was appointed assignee, and when the estate of the bankrupt, consisting of his interest in the partnership, became vested in him by virtue of that appointment, the decrees of 1864 and 1868 were in operation. As assignee he had been made a party to the suits, and he knew and must be taken to have known, that it was by means of those decrees alone that the extent and value of the bankrupt's interest could be properly ascertained. The law in bankruptcy, by which the rights and duties of an assignee are conferred and regulated, has long been established, and is open to

no question or doubt. The assignee was for all purposes a trustee of the rights and property that became vested in him; a trustee for the creditors to the amount of their several debts, and not in any degree less a trustee for the bankrupt of any surplus which might remain after satisfaction of the debts. He was not a creditor of, nor in any way connected with the bankrupt. He had assumed the duties of this office gratuitously and officiously, and at the instance and request of Mr. Moojen, who was then representing interests adverse to those of the bankrupt, and he must have known that the duties which he had undertaken required that he should not permit the interests of the creditors or the bankrupt to be dealt with in any other way than had been prescribed by the decrees. I take it to be clear upon his own evidence that all these duties were neglected by him. He has said that he had no communication with, and gave no instructions to, Messrs. Good & Daniel, although they may have been instructed by his solicitor. It is not suggested that he made any examination of the accounts of the partnership, or took any steps whatever to ascertain the value of the bankrupt's interest, which he nevertheless sold for the sum of 13,025*l.* 3*s.* 1*d.* beyond the adoption of Messrs. Good & Daniel's report. In a matter of so much importance it would at least have been proper that he should have communicated with the creditors or have applied for the sanction of the Commissioner before he gave up the rights which the decree had conferred upon him, and he was by the statute of 1861 prohibited from selling the bankrupt's book debts and the goodwill of the business without the approbation of the Commissioner. But although he knew that the bankrupt protested against the sale which had been contemplated by the agreement of April, 1869, he at no time communicated with him or gave him any reason for or explanation of the course which he intended to pursue, and when in July, 1869, the bankrupt remonstrated with him on the subject, and whilst there was yet time to withdraw from the ill-advised agreement, and before anything had been done upon the footing of that

NEW SERIES, 43.—BANKR.

agreement beyond the formal payment of the deposit of 2,000*l.*, Mr. Staunton answered, through his solicitor, that the sale had been ordered by the Court of Chancery. In short, Mr. Staunton appears not only to have wholly neglected his duty as assignee, but to have surrendered himself and his power to Mr. Moojen and Mr. Chidley.

"The other respondent, Mr. Maule, is the present owner of the whole of what was the partnership property; he was acquainted with all the partners, was cognisant of all the proceedings in which they had been engaged, had undertaken to act as arbitrator between them, had proved a debt in the bankruptcy for the express purpose of procuring Mr. Staunton's appointment as assignee, and was in frequent communication with Mr. Moojen respecting the affairs of the bankruptcy and of the partnership, and was perfectly well acquainted with the means by which Messrs. Hay and Briggs had made themselves the ostensible owners of the partnership property. He not only lent them the 2,000*l.* to pay the deposit upon the agreement, but he procured by means of his own security 5,000*l.* towards the residue of the purchase money. The order confirming the sale to them being dated the 15th of July, 1869, by a deed dated the 17th of the same month, Messrs. Hay and Briggs mortgaged to him the partnership property and effects for securing payment of the two last-mentioned sums. During the pendency of the suit instituted by the bankrupt, and in April, 1870, an agreement was entered into between Messrs. J. Hay, Briggs and Maule, by which it was stipulated that John Hay should retire from the partnership, and that Mr. Maule should purchase his interest at a valuation, to be made by arbitration, and it was one of the stipulations in that agreement that John Hay should prosecute his defence of the bankrupt's suit, but that Mr. Maule should take the risk of the result of that suit. The award of the arbitrators having been made in January, 1872, John Hay assigned all his interest in the partnership property and business to Mr. Maule, who at the same time acquired all the interest of Mr. Briggs in the same, and thus became,

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and is, the sole owner of all the partnership effects, and has ever since carried on, and still carries on, the business for his own benefit. By the deed executed by Mr. Briggs on that occasion he covenanted that he would continue to defend, at the request and at the cost of Mr. Maule, the bankrupt's then pending suit, and conduct or cease such defence as Mr. Maule should require.

"I should here notice an argument which was much pressed on behalf of Mr. Maule. He was, during all the transactions which I have mentioned subsequently to the appointment of Mr. Staunton, a creditor, who had proved in the bankruptcy for 5,000*l.*, and he so remained until the 6th of August, 1872, when, upon the application of the bankrupt, the proof was expunged, it being then admitted by Mr. Maule that the debt so proved had been taken into account in the settlement of the purchase by him of the interest of John Hay in the estate of Grimble & Co. It was insisted that by this proceeding the assignees were precluded from questioning the validity of the transfer to Mr. Maule. I am, however, of opinion that this transaction, which was between Messrs. Maule and Hay alone, although it had the effect in law of extinguishing the debt which had been proved, cannot in any degree affect the right now asserted by the assignees. Evidence upon the subject I have mentioned and upon several others which I have not thought it necessary here to notice has been gone into at very great length, and numerous affidavits have been filed. Most of the deponents, all whose evidence was material, have been cross-examined, and the examinations of the parties in the Court of Bankruptcy have been read and referred to, and the case has been argued and discussed by counsel at great length, with great minuteness and earnestness, and, I need not say, with great ability. Mr. Moojen, who has been a principal actor in the several matters which I have mentioned, has not been called as a witness, but amongst the documents which have been put in evidence is a voluminous bill of costs, made out and delivered by him. It has been somewhat freely referred to by both

sides for the purpose of examining several of the witnesses upon matters mentioned in it, but for no other purpose; and I have refused to admit it, or any part of it, as evidence of any of the facts or circumstances mentioned or referred to in it. I have, however, heard and read the whole of the printed and written evidence, and I have bestowed the best consideration in my power on the matters submitted to me. In the result I am satisfied that all that has been done by the several parties respondent on this application, subsequent to the appointment of Mr. Staunton as assignee, has been unlawful; that none of them have acquired any right or title which can be recognised by a Court of Equity to so much of the bankrupt's estate as formed the subject of the agreement of April, 1869, and was comprised in the subsequent assignment by Staunton. When that agreement was entered into, Mr. Staunton was a mere trustee of the bankrupt's rights, without any interest, and with no other power than the Bankruptcy statutes conferred on him; and John Hay and Briggs dealt with him, not only knowing all the circumstances to which I have adverted, but knowing also that he was such trustee, and that he could only lawfully act within the terms and limits of the decrees in the suits to which he and they were parties, and in accordance with his duties as assignee in bankruptcy; and they all knew that the recital in the agreement of April, 1869, to the effect that Staunton had agreed, at the request of the majority of the creditors of George Motion, notwithstanding the order of July, 1868, to enter into the agreement, was wholly untrue. Upon that agreement all the subsequent dealings were founded, and in pursuance of that agreement, I find that each of the respondents has acted in violation of the equitable principles by which he was bound, and that they have all done so with a full knowledge of all the facts by which the impropriety and illegality of their respective dealings, so far as the bankrupt's estate is concerned, are established.

"The report of Messrs. Good & Daniel, by which the amount of the purchase money was ascertained, is shewn to have

been made at the instance of Moojen, by whom and in whose handwriting the draft was revised and corrected. But the present assignees have shewn not only that that report could not have been adopted by an assignee who intended to discharge his duties to the creditors, for whom he was a trustee, but that it is plainly inaccurate in several important particulars, for Messrs. Good & Daniel had charged a sum of 2,000*l.* against the partnership in respect of interest supposed to be due to Wm. Hay, for which they had no authority, and for which there appears to be no good reason. They had also deducted from the supposed value of the partnership assets 15*l.* per cent. for bad debts, being double the rate at which bad debts had been deducted by the receiver during the period of his management. In the value which they ascribed to the lease and plant they had adopted a valuation made by a former valuer in 1869; they had taken the estimated value of the stock in July, 1869, at the amount at which the receiver had taken it the year before, although its value is said to have been considerably increased in the interval; they had given the bankrupt's estate credit for one third only of the profits since the period of the dissolution fixed by the decree, although under the terms of the partnership the bankrupt was entitled to nine-twentieths of such profits; they had made no allowance for the bankrupt's share of the profits since December, 1868, and July, 1869, although the partnership business had been carried on without any interruption, and, as it would seem, at a profit, and they had charged against the partnership 3,500*l.* for costs supposed to be due to Mr. Moojen, none of which costs had been taxed, nor did the agreement provide that they should be taxed.

"By means of the charges and deductions contained in this report, which was part of the materials on which the order of July, 1869, was procured sanctioning the sale by Staunton, it was made to appear that the value of the bankrupt's interest amounted to 13,025*l.* 3*s.* 1*d.*, while the present assignees contend that upon taking the accounts in the manner directed by the decree and by the due execu-

tion of the decree, that value amounted to and would have produced 20,000*l.* at the least.

"The evidence before me does not enable me to ascertain the particulars of the partnership accounts, or to decide to what extent the objections taken by the assignees to the items in Messrs. Good & Daniel's report can be sustained, but sufficient is proved to satisfy me that the matter requires further investigation, and as, if the decree had been properly carried into execution, the true result would have been ascertained, I think that it must now be declared that the sale and assignment which Staunton purported to make to John Hay and Briggs was void, and must be set aside, and that the subsequent assignments by the latter to Mr. Maule are equally void, and must also be set aside. It must also be ordered that the sale by auction of the partnership distillery premises, plant and effects, directed by the order of the 31st of July, 1868, shall now be made, and that the debts owing to the partnership business shall be sold as directed by that order, and that the accounts of the partnership dealings and transactions be now taken, and that in taking those accounts credit be given to the bankrupt's estate for nine-twentieths of the profits made by the partnership concern.

"I am quite aware that in proceeding to work out the rights of the parties by the means I have suggested many difficulties may arise, but those difficulties, all of which have been occasioned by what I consider the unlawful acts of the respondents, whatever they may be, do not furnish any reason why justice should not be done nor have I any reason to doubt that the power of this Court will be found sufficient to cope with the difficulties, and to arrive at a result which will be just to all parties.

"The sum which has been paid and distributed among the creditors must be considered as a first charge upon the proceeds of the sale and upon any balance which may appear to be due to the bankrupt's estate upon taking the accounts. I have heard nothing from the respondents as to the manner in which, or the shares in which that sum ought to be

distributed as between them, and for that reason I will reserve liberty to them to make any application they may be advised respecting it.

"The only other order I can make at present is with regard to the costs, and as in my judgment this application and the order now made have arisen solely from the unlawful manner in which the respondents have dealt with the bankrupt's estate, I must order the respondents to pay the costs."

Mr. Maule appealed from this order.

The suit of *Maule v. Davis* was instituted by Mr. Maule against Messrs. Davis and Wiggington, submitting to have the sale set aside as not being binding on the defendants, but praying for a declaration that he was entitled to a charge on the business or on the bankrupt's interest therein for the sum of 13,025*l.* 3*s.* 1*d.* and 1,008*l.* 7*s.* 6*d.* which he had advanced to J. Hay and Briggs to enable them to make the purchase, with interest, and that the suit might be taken as supplemental to the suits of *Hay v. Motion* and *Motion v. Hay*.

The cause came on for hearing before the full Court, together with the bankruptcy appeal.

Mr. Swanston and Mr. Stirling, for Mr. Maule, contended that the sale having been ordered by the Court of Chancery, the Court of Bankruptcy had no jurisdiction to set it aside—

Allen v. Kilbre, 4 Madd. 464;

Fraser v. Kershaw, 2 Kay & J. 496;
s. c. 25 Law J. Rep. (N.S.) Chanc. 445.

The Chief Judge considered that the 72nd section of the Bankruptcy Act, 1869, gave him this jurisdiction. But

Ellis v. Silber, 42 Law J. Rep. (N.S.)
Chanc. 666; s. c. Law Rep. 8
Chanc. 83,

shews that the jurisdiction of the Court of Chancery is not ousted by the powers conferred on the Court of Bankruptcy by that section, and in this case the sale having taken place under an order of the Court of Chancery the Court of Bankruptcy has no power to interfere with it.

They contended also upon the merits

that the sale was perfectly proper and *bona fide*, and the purchase money having been applied in payment of the creditors it would be difficult, if not impossible, to replace the parties in the position in which they were before. The appellant was willing to pay any further sum, if any, which the Court upon enquiry might think he ought to pay in order to make up the full value of the bankrupt's interest in the concern.

Mr. J. W. Chitty and Mr. Romer, for the respondents, contended that the Court of Bankruptcy had full power under the 72nd section of the Act to set the sale aside, and that power was properly exercised under the circumstances—

In re Anderson, 39 Law J. Rep.
(N.S.) Bankr. 49; s. c. Law Rep. 5
Chanc. 473;

White v. Simmons, 40 Law J. Rep.
(N.S.) Chanc. 689; s. c. Law Rep.
6 Chanc. 555.

No reply was called for.

THE LORD CHANCELLOR (on Dec. 16).—In order to prove that the agreement for the sale of the interest of the bankrupt Motion in the distillery concern to his co-partners, Briggs & Hay, which was made on the 15th of April, 1869, and carried into effect under the order of the Court of the 15th of July following, was the result of a fraudulent scheme on the part of the purchasers to obtain the bankrupt's share at an undervalue, the respondents, the present assignees of Motion, have gone into an elaborate examination of the whole history of the partnership, and the subsequent litigation in Chancery, and the bankruptcy, from the formation of the partnership in August, 1863, downwards. In our opinion they have failed to prove any such fraudulent scheme. It is, indeed, sufficiently clear that Motion and his co-partners were greatly at variance with each other; that the co-partners were anxious to extricate themselves from their connection with Motion without sacrificing their own interests in the business; that they considered (a view in which Motion himself and his friends appear to have concurred) that an amicable settlement in some other way than by working out adversely the decree of

the Court of Chancery made on the 30th of April, 1864, would be more beneficial than the sale by auction directed by that decree; and that after Motion's bankruptcy they were desirous of influencing, and did influence, so far at least as they lawfully could, the choice of the assignees and of their solicitors. It is also clear that they desired, as the best way of arriving at a settlement and separating their interests from those of the bankrupt, to purchase the bankrupt's share from his assignee, and that with this object in view they made at different times several proposals, once, at least, offering a price which had been suggested to them by the bankrupt's own professional advisers, who were then also the solicitors of the assignee, as one which, if offered, would probably be accepted. One of them, Mr. Hay, objected in 1865 to an offer by a stranger who was really an agent of the bankrupt himself to buy the bankrupt's share for a price considerably higher than that at which four years afterwards it was valued to themselves. They also entered from time to time, until shortly before April, 1869, into negotiations for a reference to arbitration which proved fruitless. How far any of these offers or negotiations may have been frustrated by the objections or interference of the bankrupt we do not stop to enquire, nor is it necessary for the present purpose to say that everything said or done during the whole course of these transactions by the solvent partners or by their solicitor, Mr. Moojen, was right and commendable. It is sufficient to say that in April, 1869, five years had elapsed from the date of the decree for the sale by auction of the partnership business as a going concern and no progress towards a settlement had been made, nobody had taken any effective step with a view to enforce that decree or Vice-Chancellor Giffard's subsequent order of July, 1868, which with some unimportant variations directed its prosecution, and the solvent partners were perfectly entitled to come to any honest and fair arrangement with the assignee of the bankrupt's estate for the purchase of his interest if they were able so to do. Nothing which had taken place before April, 1869, seems to us to require

or warrant the inference of a fraudulent purpose.

What then are the objections to the agreement of the 15th of April, 1869? *Prima facie* it is honest and fair. It provides for the sale by Staunton, the assignee, of the bankrupt's share of the partnership assets at such a price, in the event of the purchase money not being agreed upon by mutual consent, as the chief clerk in the Chancery suit should ascertain and fix as its value after taking the partnership accounts.

The first objection is that Mr. Staunton, the assignee, and Mr. Chidley, his solicitor, had been nominated by a majority of creditors' votes which the solvent partners and their solicitor, Mr. Moojen, had been able to command or influence under the bankruptcy, and that under these circumstances Mr. Staunton ought to be regarded as a passive instrument in the hands of the purchaser, or in the hands of Mr. Moojen and not as a real vendor in a *bona fide* contract of sale. This is a charge against the assignee and his solicitor much too grave to be lightly entertained. It by no means follows that because an assignee and his solicitor may have been nominated through a particular influence, they would not when appointed endeavour to do their duty. They have both in this case positively sworn that they did so; the agreement on the face of it furnishes no proof or presumption to the contrary, and upon the whole evidence before us we do not doubt that they acted in making it with an honest purpose.

It is next said that the agreement was made secretly without consulting the bankrupt or his solicitors, Messrs. Linklater, and before a correspondence as to a proposed arbitration had been brought to a close. But on the 19th of March, Messrs. Walter and Moojen wrote to Messrs. Linklater that the parties were then in negotiation with reference to a settlement, and before the 30th of April Motion himself knew and had informed Messrs. Linklater that an agreement had been prepared providing for a reference and a sale of his interest to the other partners, and a copy of the agreement itself was very soon afterwards in Messrs. Linklater's hands. Notwithstanding this, no appli-

cation was made to the Court of Bankruptcy on the subject either by the bankrupt or by any creditors friendly to him (and there were such creditors) till after the order of the Court of Chancery of the 15th of July, 1869, soon after which an *ex parte* application was made by the bankrupt himself only to Mr. Commissioner Holroyd, who was not satisfied that there was any sufficient reason to interfere. The explanation offered is that Mr. Moojen, Mr. Maule and Mr. Chidley had led Messrs. Linklater to believe that nothing would be done without previous communication with them; but this statement, made by Mr. Addison, is contradicted by Mr. Chidley and Mr. Maule, and although Mr. Moojen is not a witness it seems to us far more likely that there may have been some misconception as to this point on Mr. Addison's part than that the assignee and the purchaser should have fettered themselves by such a promise which they were certainly under no obligation either legal or moral to give, and which, considering the history of the preceding five years, might probably have tended to create fresh difficulties and delays in the way of the settlement at which they had practically arrived.

The next objection, and the one which seems to have had most influence with the Chief Judge in Bankruptcy is that it was in itself a breach of trust on the assignee's part, and absolutely inconsistent with his duty to sell the bankrupt's share otherwise than by public auction in the manner directed by the decree of 1864, and the order of Vice-Chancellor Giffard of July, 1868. This view appears to be in a great measure, if not altogether, founded on the 137th section of the Bankruptcy Act, 1861, which makes it necessary that an assignee should have the sanction of the Court of Bankruptcy, which in this case was not asked or obtained, to justify him in selling by private contract all or any of the book debts due or growing due to the bankrupt and the books relating thereto, and the goodwill of his trade or business. We think that this section relates to the sale of the book debts, books and goodwill belonging to the bankrupt only, and which as such formed part of his distributable assets. The book debts,

books and goodwill of a dissolved partnership, of which only one partner is bankrupt and the others continue solvent, are not assets distributable in the bankruptcy, and a sale of the bankrupt's share in such property is not in our opinion a sale of book debts, books or goodwill within the meaning of that enactment. It follows in our judgment that there is nothing in the statute which makes it contrary to the duty of an assignee to sell by private contract, if he thinks it for the benefit of the estate, such a share in such a partnership, especially to the other partners who generally have the greatest inducement to offer for it, if so sold and not otherwise, the most advantageous terms. Nor does it appear to us to make any difference that there was in this case a pending litigation, and that there were existing orders of the Court of Chancery, made while the parties were unable to agree, for a sale of the whole business as a going concern by public auction. If in such a case the Court of Chancery was satisfied to act on the agreement of the parties to the suit, and to authorise a sale by private contract, we cannot see why an order of that Court should be a difficulty in bankruptcy, which in the Court which made it was none.

In connection with this point it seems right also to advert to the recital in the agreement of the 15th of April, which is not proved, that it was made by Mr. Staunton at the request of the majority of the creditors of Motion. It was not necessary at all that there should be any consent of creditors, and in the affidavits on which the order of the 15th of July was made, it is not represented that there was, in fact, any such consent. We cannot hold the agreement to be vitiated by this unnecessary recital, whatever may have been the reason for its introduction. The parties to the agreement themselves cannot have been misled by it, nor are we able to suppose that the Judge in chambers placed reliance on such a bare recital, unsupported by evidence, as a reason for giving effect to the contract of all the parties to a litigation in which no person under disability was concerned.

But it is further said that the price actually paid was fixed by Daniel &

Good, the valuers, who were introduced in May, 1869, with a view to the settlement of the price by agreement, considerably below the proper amount, and that this was wholly or in part due to the want of proper attention on the part of the assignee and to erroneous instructions which the valuers received affecting the principle of their calculations, particularly as to the division of the profits made by the distillery after the dissolution of the partnership. As to this, while we are satisfied that no case of fraud is made out, we are by no means satisfied that there was not material error. The profits after the dissolution do not appear to us to have been divided by the valuers on a principle consistent either with the proportions of profit and loss fixed by the partnership articles, or, if these ought not to have furnished the rule, with the relative amounts of the capital belonging to the bankrupt and the other partners in the concern; nor can we say that this part of the valuation stands on the footing of a fair compromise of a disputed question, seeing that the opinion of one eminent counsel, said to have advised in a contrary sense to another, is not produced, and that the communications with the valuers, though employed on the part of the assignee only, were left more than they ought to have been, if any compromise was intended, to Mr. Moojen, and that it does not clearly at all appear by the evidence when or how the supposed compromise was made, or who told Mr. Good, as he says he was told, that it had been arranged that George Motion or his estate was to receive nine-twentieths of the profits up to the dissolution, and one-third since, certain points of contention being given up by Mr. John Hay. The only point in contention which John Hay had to give up had been decided against him in the Chancery suit by Vice-Chancellor Wood, and although he might still have been able to appeal from that decision, and although we do not even now hold the appellant bound by it, considering the present position of that suit in which no certificate ever has been, or ever will be made, the arguments addressed to us have not as yet produced upon our minds the impression that this contention was

sufficiently substantial to be the basis of a fair and reasonable compromise. The manner also in which the items which were reserved for further consideration by Daniel & Good's report were afterwards dealt with, and the further sum of 1,008*l.* 7*s.* 6*d.* payable to the bankrupt's estate was ascertained, is, to say the least, too imperfectly explained to be at all satisfactory to our minds. We are relieved, however, from any difficulty which we might otherwise have felt in dealing with this part of the case by the submission of the appellant to pay, in addition to the two sums of 13,025*l.* 3*s.* 1*d.* and 1,008*l.* 7*s.* 6*d.* already paid, such further sum (if any) as upon prosecution of the inquiry which we now propose to direct, may appear to be requisite in order to make up the full and fair value of the bankrupt's interest in the concern. We do not think we ought to set aside the whole sale on account of any mere error not amounting, in our judgment, to fraud, in working out that mode of calculating the value which the parties, subsequently to the agreement of the 15th of April, agreed to adopt; but we think it would be proper, while discharging the order of the Chief Judge, to direct an enquiry by one of the registrars of the Court of Bankruptcy whether any and, if any what, further sum ought to be paid by the appellant to make up the just and proper value of the bankrupt's interest on the footing of the partnership accounts referred to in the agreement of the 15th of April, 1869, in making which inquiry the registrar is to proceed, in the first instance, on the report and valuation made by Daniel & Good, and agreed to between the parties, so far as the same extends, but with liberty to either party to surcharge and falsify the same. Further consideration must necessarily be reserved, and then may be taken before the Court of Appeal.

We think it our duty to add that if we had agreed with the Court below as to the merits of this case we should have been unable to concur in the propriety of the order made, which seems to have proceeded upon the view that if the sale of the bankrupt's share of the partnership assets to his partners was set aside, it

would then be competent and proper for the Court of Bankruptcy, under the 72nd section of the Bankruptcy Act of 1869, to work out in bankruptcy the decree and order made in the Chancery suit for the sale of the whole distillery, including the original shares and interests of the two solvent partners now sold by them to Maule as a going concern, and for taking all the partnership accounts. With this interpretation of the power given to the Court of Bankruptcy by the 72nd section of the Act of 1869 we cannot agree. That section gives the Court a very large authority to decide such questions as it may be found necessary or convenient to determine for the proper purpose of administration in bankruptcy; but it does not, as we understand it, at all enable the Court of Bankruptcy to draw compulsorily within the sphere of its jurisdiction, property or the owners of property, not vested in the assignee, and not originally subject to the administration in bankruptcy. Still less does it authorise that Court, when a decree for sale and accounts has been made in a Chancery suit against solvent partners of a bankrupt, to treat such a decree as giving rights to be worked out in bankruptcy and not in chancery. If indeed the Court of Bankruptcy finds property of the bankrupt, whether a share in partnership assets, or of any other kind, in the hands of a purchaser, with notice of fraud, to whom it has come by a fraudulent conveyance from the assignee in bankruptcy, the Court might well hold that it has power to order such purchaser to reconvey and revest in a substituted assignee the property so fraudulently acquired, and we are very far from saying that the effect of such a conveyance having been virtually by consent under the order of the Court of Chancery in a suit between the parties would be any serious obstacle to the exercise of that jurisdiction; but if that were done in a case like the present where the purchaser has actually paid the agreed amount of the purchase-money to the assignee, and such purchase-money has been actually distributed in paying dividends (in this case 20s. in the pound) to the bankrupt's creditors, we think relief could only be given on the usual equitable terms

on which redress in similar cases is afforded by the Court of Chancery. If such a sale is set aside in either forum at the instance of assignees proceeding, as they must necessarily do, for the interest of the creditors, or of those who have received those dividends, or of the bankrupt in respect of a surplus which, if it exists, arises from the payment of his debts by those dividends, they are in our judgment as much bound, as any other plaintiff before any other forum, to repay the whole purchase money *bona fide* and actually paid, and also, unless there is a waiver of accounts on both sides, to repay it with interest, the purchasers accounting for any profits which they may have received.

It remains for us to dispose of the Chancery suit instituted by Mr. Maule against the assignees in which he claims to be treated not as purchaser but as mortgagee entitled to foreclosure or redemption. We think that whether he could or could not maintain his title as purchaser against the equity alleged by the assignee, it was certainly impossible for him to maintain this suit. If his title was voidable, it was so not at his own option, but at the option of the assignees in bankruptcy, and the terms upon which, if at all relief ought to be given to those assignees, were proper to be decided by the Court which might give that relief. This bill, therefore, must be dismissed with costs, but Mr. Maule must receive the costs of the proceedings in bankruptcy, so far as they have been occasioned or augmented by the attempt to set aside the agreement of the 15th of April, 1869, for fraud, and the costs payable by him will be set off against those which he is to receive. As to the rest of the costs of the proceedings in bankruptcy we think that they ought to be reserved until the result of the enquiry which we direct is known, and to be disposed of on further consideration after that enquiry is answered.

THE LORDS JUSTICES concurred.

Solicitors—Messrs. H. F. & E. Chester, for appellants; Messrs. Linklater, Hackwood, Addison & Brown, for respondents.

BACON, C.J. *Ex parte* THE MANCHESTER
1874. AND LIVERPOOL DISTRICT
April 20. BANKING COMPANY; *Re*
LITTLER.

Composition—Deposit of Deeds—Collateral Security—Jurisdiction.

A bank allowed T. and J., partners, to overdraw their account, having good security from deposit of deeds relating to separate property of T. The two partners presented their petition, and the bank voted in favour of resolutions for composition, the resolutions saying nothing about their security. Afterwards, in accordance with resolutions, a deed was executed, and this distinctly reserved to the bank their collateral security. The composition was paid to all the creditors, including the bank. On the application of T. the County Court Judge declared the securities forfeited, and directed the bank to deliver them up to T.:—Held, on appeal (reversing the decision of the County Court Judge), that in a composition the County Court Judge had no jurisdiction to make such an order, and that the bank were entitled to retain their securities.

This was an appeal from a decision of the Judge of the Cheshire County Court holden at Nantwich.

In June, 1870, Thomas and James Brotherton Littler were in partnership as bone grinders and manure dealers at Nantwich. At that time, being anxious to have a larger credit with their bankers, Thomas Littler deposited with the Manchester and Liverpool District Banking Company certain deeds relating exclusively to his private estate, and at the same time gave to the bank a memorandum that the deeds were deposited to secure the account of Thomas and J. B. Littler, and that he would execute a legal mortgage if required. He also gave to the bank a personal guarantee for 300*l*.

In October, 1872, Thomas Littler retired from the firm. It was, however, found that the firm was then insolvent, and on the 9th of December, 1872, the debtors filed their petition for liquidation.

The first meeting of joint creditors was held on the 30th of December, 1872, when resolutions were passed in favour of ac-

cepting a composition of ten shillings in the pound, five shillings at the expiration of two months from the registration of the resolutions, and five shillings at the expiration of six months, security to be given for the latter payment; and also that the terms of the composition be embodied in a deed to contain proper covenants for carrying into effect the resolutions and for releasing the debtors.

No mention was made in the resolutions of the securities held by the bank, but the manager of the bank, who on behalf of the bank claimed to be a creditor of the partners in the sum of 1,686*l*., voted in favour of the resolutions.

A deed was drawn up in accordance with the resolutions and contained a special clause that the bank should be in no way prejudiced in realizing their securities by accepting the composition. This deed was executed by the manager on behalf of the bank and by some but not all the creditors.

There was a conflict of evidence as to the intention of the parties when the resolutions were passed, the debtors stating that it was understood at the meeting that the bank were willing to accept the composition, and that having done so, no clause in the deed would afterwards revive their claim. The manager of the bank, however, stated that it was clearly understood at the meeting that he voted in order that the resolution for composition might not fall through, and that the bank were to realize their securities for the balance due to them after the composition was paid. The composition was duly paid to all the creditors, including the bank.

Meetings were called of the separate creditors of Thomas Littler, and it appeared that all his separate creditors were satisfied.

Thomas Littler then applied to the County Court Judge for an order directing the bank to deliver up to him the deeds he had deposited with them, and the bank made a counter application asking that they might be declared to be equitable mortgagees. The County Court Judge ordered the deeds to be delivered up, and it was from his decision the present appeal was brought.

L

Mr. Little and Mr. E. Bury, for the appellants, contended that the Court had no jurisdiction in a composition to make the order, and also that the bank did not forfeit their securities by accepting the composition and voting at the meeting.

Mr. De Gez and Mr. R. Griffiths, for the respondents.—A creditor holding securities must clearly stipulate that he intends to have the benefit of them in addition to the amount of the composition offered to him or the securities will be forfeited—

Cullingworth v. Loyd, 2 Beav. 385 ;
s. c. 9 Law J. Rep. (N.S.) Chanc. 219.

Here there is a simple resolution to accept a composition of ten shillings in the pound, and the bank cannot go behind that.

As a matter of fact the bank were the largest creditors ; they came forward and induced the other creditors to accept this composition, and then afterwards, it appears, they were fully secured, and had no interest in the composition at all.

The right of the bank to realize their securities was lost by their accepting the composition, and it could not be revived by any clause in a deed subsequently executed—

Ford v. Beech, 11 Q.B. Rep. 852 ;
s. c. 5 Dowl. & L. P.C. 610 ; s. c.
17 Law J. Rep. (N.S.) Q.B. 114.

By accepting a composition from the joint debtors without any reservation of rights the bank lost their rights against the separate estate of Thomas Littler, and a reservation of any rights in a subsequent deed was inoperative—

Wilson v. Lloyd, 42 Law J. Rep.
(N.S.) Chanc. 559 ; s. c. Law Rep.
16 Eq. 60.

BACON, C.J.—This is a very simple case. The applicant is Thomas Littler, and he asked the learned Judge of the County Court to order that the deeds which he had deposited with the bank should be delivered to him. I cannot tell what jurisdiction the County Court Judge had to make any such order on any such application. But assuming that every word I have heard from the respondents is good law, and as just as it is good, what has the County Court Judge to do with the

delivery of the deeds by the bank to Thomas Littler? If they are his, the Court has no jurisdiction over the estate of a bankrupt. In a composition the estate is not meddled with ; it does not vest in anybody but the true owners of it. They come calling a meeting of their creditors, and making a certain proposition which is to supersede and to prevent all jurisdiction in bankruptcy, and the only jurisdiction the Court has over a composition is to see that the resolutions are duly enforced, to see that they are regularly passed, to correct any errors that there may have been in them, and ultimately to enforce the composition by the Court's own order. That I take to be the limit of the jurisdiction of the Court in matters of composition. Everything that takes place under the composition is, of course, to be inquired into and scrutinised to see that it is right to be done. But what right had the County Court Judge, I ask again, to make any order whatever that the bank should deliver to Thomas Littler deeds upon the ground that Thomas Littler's debt for which he had pledged them had been satisfied? I have heard no authority cited, I read nothing in the Act of Parliament, I can conceive nothing in the nature of the case which could have justified any such application. But since the matter has been gone into at such length, I do not propose to deal with the case only upon that ground, but upon what are called the merits of it. I ought perhaps to say I will go no further than I have done, but I do not think that that would be satisfactory to the parties or respectful to the learned Judge who has considered this case. When the case comes to be considered, it is this : Thomas Littler was sole owner of a certain property ; being in partnership with another man, and they being not able to pay their joint debts, Thomas Littler deposits the deeds relating to his separate estate with the bank as a security for the joint debts and for any other debt for which they might be liable. After that, some time in 1872, the partnership having been dissolved, the firm being unable to discharge its debts in full, a meeting is called, of what? Of the joint creditors. Nothing

about separate creditors. A meeting is called of the joint creditors, and of the joint creditors alone. And the bank being invited to attend that meeting goes. There come the two joint debtors, and Thomas Littler especially presents to that meeting, as by the statute he is required to do, a statement of his affairs; and he states, "We owe so much money to such and such people, among others, to the bank, and I have deposited (I do not say that he used these words, but words to this effect) my title deeds relating to a part of my separate estate with them for the purpose of securing that debt." That is the first step. Next the bank come, and they present what is called their proof, and they state in the most distinct and explicit terms what the amount of their debt is, what securities they hold, from whom they hold them, shewing that it is not a part of the joint estate which is the subject of consideration at that meeting, and resolutions are come to, accepting a composition of ten shillings in the pound upon the joint debts. Resolutions are passed to that effect, by which, in my opinion, without any words of reservation—not in the least forgetting the decision in *Wilson v. Lloyd* (*ubi supra*), which I have been referred to—the separate security is by force of the proceeding itself excluded and reserved, and no security held by the bank could be in the slightest degree affected by any resolution then passed. I do not pause to consider the irregularity, the substitution of other sureties at another meeting, and the confirmation which took place; nor the irregular proceeding to call a meeting of the separate creditors which has been referred to in the course of the narrative. But the matter so stands, and it being part of the resolution that a deed to carry into effect the resolution should be prepared by the person named, how, I ask, could that deed be effectually and properly framed without reserving in terms, as the resolution did not reserve, the separate security held by the bank? And accordingly for some reason, I know not what, a deed is prepared which does state the transaction truly and justly, and does reserve to the bank their separate security—a collateral security—no part of that

joint estate which is the subject, so far as it is the subject of the deed of composition; no part of the arrangement between them and their joint creditors; and it is done as justly, and as fairly, and as properly as can be conceived. I am told that there has been—I have not heard it read, nor was it necessary that it should be read—evidence to shew that it was stated at that meeting, and evidence to shew that some gentlemen who were present said that they did not hear it. Whichever way that may be, in my opinion it does not affect the merits of the case at all, but as I read and understand the resolutions and the deed, because there is no kind of analogy between this case and the case which has been referred to as being supposed to contain a decision which has any bearing upon the subject—reading them, I say, together, the transaction is one plain, simple, just matter of business. A creditor with a collateral security says—"I enter into a composition with you, as to your joint debt, but I will not relinquish my collateral security." On the footing of that plain announcement the arrangement is carried into effect and the composition was paid; and after the composition was paid, Thomas Littler bethinks himself that the Judge of the County Court has authority, and asks him to give him back those deeds which he has pledged under the circumstances which I have mentioned. In my opinion that was a wholly improper proceeding; that there can be no justification of the proceeding on the part of Thomas Littler in point of common honesty (if that were to be introduced into the case); there can be no justification in point of law, because the Judge of the County Court had no more to do with it than any person who might be present in this Court. That application was wholly wrong; it ought to have been dismissed, and with costs, and an order dismissing it with costs must now be made. With reference to the bank's application that they might be declared to be equitable mortgagees, that more than once has been under consideration in this Court, and upon the grounds to which I have already adverted, namely, that this Court exercises no jurisdiction

over the estate of a compounding creditor I have refused (and I am not sure that it has not been elsewhere refused—I am not aware of that) to interfere upon that subject at all. In that case I think that the proceeding of the bank was wrong, and that the application that they might be at liberty to realize their security was one which the learned Judge had no jurisdiction to entertain.

The application of Littler to the Court below will, therefore, be dismissed with costs, and the application of the bank without costs. There will be no costs of the appeal in either case.

Solicitors—Messrs. Milne, Riddle & Mellor, agents for Messrs. Slater, Heelis & Co., Manchester, for appellants; Mr. A. D. Bird, for respondents.

[IN THE FULL COURT OF APPEAL]

MELLISH, L.J.	} <i>Ex parte</i> VILLARS; <i>Re</i> ROGERS.
1874.	
Feb. 10.	
CAIRNS, L.C.	
JAMES, L.J.	
MELLISH, L.J.	
1874.	
April 15, 22.	
May 8.	

Execution—Seizure and Sale—Trader Debtor—Refunding Proceeds of Execution paid to Creditor after fourteen days—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87.

Where the sheriff has paid to the execution creditor the proceeds of an execution for a sum of more than 50l. against the goods of a trader, after retaining the same for fourteen days, according to the provisions of section 87 of the Bankruptcy Act, 1869, the creditor is entitled to retain the amount notwithstanding the bankruptcy of the debtor within a year from the seizure and sale.

This was an appeal from an order of Mr. Registrar Spring Rice.

The debtor, J. Rogers, was a trader carrying on business in the Lowther Ar-

cade, and having a private residence at Fulham.

On the 30th of June, 1873, Mr. J. Villars recovered judgment against him for 600l. and costs, and on the 30th of June the sheriff seized in execution the goods at the Lowther Arcade, and on the 1st of July those at Fulham.

On the 4th of July he sold the goods at Fulham to the execution creditor, and on the 7th the goods at the Lowther Arcade, executing to the creditor bills of sale, which were duly registered, and under which possession was afterwards taken. The total price (which was not complained of) was fixed at 701l. 3s., being the amount of the debt and costs, 605l. 3s., plus the amount of the sheriff's fees, 96l. For these two amounts the creditor handed separate cheques to the sheriff's officer, and the first cheque, after being retained for fourteen days, was handed back by the sheriff's officer to the creditor in satisfaction of his debt.

On the 1st of August a petition in bankruptcy was presented, under which Rogers was adjudicated bankrupt, the act of bankruptcy being the above seizure and sale.

On an application by the trustee the Registrar declared the seizure and sale void as an act of bankruptcy, and ordered the creditor to deliver up or account for the goods. The creditor appealed.

Mr. Little and Mr. Robson, for the appellant.—The seizure and sale is an act of bankruptcy under section 6, sub-section 5 of the Bankruptcy Act, 1869, but section 87, which provides for the retainer by the sheriff of the proceeds of sale for fourteen days to see if notice of any petition is given, goes on to provide that after that time he may "deal" with the proceeds. Clearly that is intended to give the creditor a good title to the money when he gets it. It was so provided in the Act of 1861 (section 73), and the words are now omitted—as many others have been in the present Act—only because they are not needed. The inconvenience of keeping the matter in doubt for a whole year is obvious.

[MELLISH, L.J., pointed out that under the Act of 1861 (section 74) the sale was by auction and publicly advertised.]

But further, if the transaction is invalid, it is void *in toto* as an act of bankruptcy, and the Registrar has on this principle ordered us to give up the goods, and not merely to refund the price. The execution creditor may purchase just as any stranger may—

Hernaman v. Bowker, 11 Exch. Rep. 760; s. c. 25 Law J. Rep. (N.S.) Exch. 69;

and in no case therefore would the purchaser get a good title until a year had elapsed, and a sale would be impossible.

[MELLISH, L.J.—The sale must be good for fourteen days, for the trustee is to have the purchase money under section 87.]

Mr. De Gea and *Mr. Romer*, for the trustee, cited

Ex parte Rayner; re Johnson, 41 Law J. Rep. (N.S.) Bankr. 26; s. c. Law Rep. 7 Chanc. 325;

where goods seized but not sold before a petition in liquidation were held to come within the principle of section 87. They also argued that the selling the goods at the Lowther Arcade must be void, since the previous sale was an act of bankruptcy.

Mr. Little in reply.

MELLISH, L.J., stated the facts and read section 6, sub-section 5, and proceeded: No doubt on the 4th and 7th of July acts of bankruptcy were committed by the debtor under that clause; and supposing that provision was not qualified by anything further, I am of opinion that what is made by that section an act of bankruptcy is made entirely invalid as against the trustee in bankruptcy. If that was all, I am of opinion that the creditor would obtain no benefit under the seizure and sale as against the trustee.

But then that is qualified by section 87, and the question is, how far is it so qualified?

[His Lordship read the section.]

I am of opinion in the first place that that justifies the sheriff in selling, and as he is to go on to a sale, I am clearly of opinion that it must be the intention of the legislature that the sale should carry the property to the purchaser under the sale, because it proves that the sheriff is to retain the proceeds, and if a petition is pre-

sented within fourteen days he is to hold the proceeds of the sale, after deducting expenses, in trust to pay the same to the trustee. It cannot be intended that if the creditors think it for their benefit to do so, they could go to the purchaser and say that the goods are the goods of the trustee. In that case the purchaser would surely have had some remedy given to him over against the sheriff, who does not warrant the title. I think therefore the trustee is only entitled to the proceeds of the sale after deducting expenses. That must have been the intention, otherwise the sheriff would not be able to sell at all. And then I do not think it can make any difference that the creditor is himself the purchaser. The section in the Act of 1861 (section 78) requiring the sale to be by auction is now repealed, and there is nothing to prevent the sale being made to the execution creditor.

If, therefore, the sheriff receives notice of a petition within fourteen days, I am of opinion that the trustee only succeeds to the proceeds of sale, and though the creditor might be in a better position after the fourteen days have expired, he cannot be in a worse; and the trustee cannot be entitled to more than if the petition had been presented within that period.

Neither do I think it makes any difference that the sale was made by two separate bills of sale. I am of opinion that on the true construction of section 87 the sheriff is to go on selling till enough has been realized to satisfy the debt and costs; and if the goods are in two different places and some are sold on one day and the rest on the day after—and so on, without limiting the number of sales—all the sales would be to satisfy a single execution, and would, I think, come within section 87 of the Act.

I now come to the real question—Who is entitled to the proceeds of the sale? I think that by section 6, sub-section 5, the seizure and sale are made void as regards the execution creditor. Then section 87 says that the sheriff is to be protected, but it does not say that the creditor is; because if a petition is presented within fourteen days the money is to be paid to the trustee, and therefore the execution

is, in that case, void as against the execution creditor, and the money is the money of the trustee. The real question is as to the meaning of the remaining words of the section, that in case no notice of a petition is served within fourteen days, the sheriff may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a petition been served. I have no doubt, in the first place, that they protect the sheriff, and that he is not liable if he pays the money due. Then ought they to be held to mean that the money, which, while it was in his hands, was the property of the trustee, is made the property of the creditor. Is that the effect, or does it only mean that the sheriff may hand over the money, but that it remains the money of the trustee? I am of opinion that if the legislature had intended to make that valid which was otherwise void, it would have done so in express terms, and that the money remains the money of the trustee.

Reference was made to the corresponding section (section 73) of the Act of 1861. It provides that after seven days the sheriff may hand over the proceeds of sale to the execution creditor, "who shall be entitled thereto, notwithstanding such act of bankruptcy, unless the debtor be adjudged bankrupt within fourteen days from the day of the sale." That, of course, is plain enough, but there are no similar words in the present section, and we are left to infer the intention of the legislature. On the one side it is said they did not intend to alter the law, but left out the words as superfluous. On the other side it is said that they did intend to alter the law. I do not think the leaving out of the words is conclusive, because in many instances in the Act of 1869 words have been altered without any intention of altering the meaning. But in this case I think express words were required to render valid what a previous section had rendered invalid as an act of bankruptcy. And I do not think the consequences of this view so alarming as to render it undesirable to adopt this view. A petition may be presented after the fourteen days have expired at any time within a year, and that invali-

dates all transactions subsequent to the seizure and sale with notice of that act of bankruptcy. I do not see therefore why the legislature should not render the act of bankruptcy itself invalid. I do not see why that seizure and sale should be made a test of insolvency, and yet that the execution creditor should himself be protected. It is true that that was done under the Act of 1861; but I think it is more reasonable to hold that the transaction with the execution creditor should be invalid as well as any subsequent transaction, and there being no contrary provision in the present Act, I think the creditor is not entitled to keep the money. As there is a substantial alteration in the order there will be no costs of the appeal.

Discharge the order of the Registrar, directing the goods to be delivered up, and order payment by the creditor of the amount received for his debt. No costs of the appeal.

The execution creditor was desirous of appealing from so much of this decision as determined that he was not entitled to keep the money, and by special leave the matter was reheard before the full Court.

Mr. Little and Mr. Robson, for the appellant.

Mr. De Gex and Mr. Romer, for the trustee.

The following additional authorities were referred to—

Slater v. Pinder, 40 Law J. Rep. (N.S.) Exch. 146; s. c. Law Rep. 6 Exch. 228;

Edwards v. Scarsbrook, 3 B. & S. 280; s. c. 32 Law J. Rep. (N.S.) Q.B. 45;

Ex parte Roche; re Hall, 40 Law J. Rep. (N.S.) Bankr. 70; s. c. Law Rep. 6 Chanc. 795;

Belcher v. Magnay, 12 Mee. & W. 102; s. c. 1 Dowl. & L. P.C. 441; 13 Law J. Rep. (N.S.) Exch. 49;

Ex parte Pearson; re Mortimer, 42 Law J. Rep. (N.S.) Bankr. 44; s. c. Law Rep. 8 Chanc. 667.

In the absence of the Lord Chancellor LORD JUSTICE JAMES (on May 8), read his Lordship's judgment as follows—

The facts in this case are very simple and may be stated without detail; but the question raised is one of great general importance under the Bankruptcy Act of 1869. The bankrupt is a trader. The appellant on the 30th of June, 1873, recovered judgment against him for a debt exceeding 600*l.*, and on the same day a *fi. fa.* issued and the sheriff seized under the judgment. The goods seized were assigned to the appellant, the execution creditor, who paid the sheriff the purchase money; and the sheriff, after deducting rent and poundage, paid back to the appellant the sum for which the levy was made. All this occurred more than fourteen days before the petition in bankruptcy was presented on the 1st of August, 1873. There is no attempt now made to impeach the regularity or good faith of the assignment to the execution creditor, and the case is practically the same as if the goods seized had been sold to a stranger and the execution creditor had been paid his debt out of the proceeds. The question is, under the circumstances I have stated, can the execution creditor retain the amount which has been paid to him, and is the trustee in bankruptcy entitled to recover either that amount or the goods seized? The 6th section of the Bankruptcy Act, 1869, provides that one of the acts or defaults which shall be deemed to be an act of bankruptcy shall be when "execution issued against the debtor, or any legal process for the purpose of obtaining payment of not less than 50*l.* has, in the case of a trader, been levied by seizure and sale of his goods;" and the 11th section provides that "the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt." It is necessary to consider whether these sections, making the suffering of a levy by seizure and sale an act of bankruptcy, avoid or make inoperative the seizure and sale itself; and in my opinion they do not. It is true that under this, as under previous statutes of bankruptcy, two acts are specified which, if done by the bankrupt, are not only acts of bankruptcy,

but are also, if followed by bankruptcy, void. One is a conveyance or assignment of the bankrupt's property for the benefit of creditors, and the other is a conveyance or assignment fraudulent, or by way of fraudulent preference. It is to be observed that as to one of these acts—namely, a conveyance or assignment by way of fraudulent preference—special provisions have always been made in bankruptcy legislation, making such a conveyance or assignment void by express enactment and reducing it accordingly; and as to the other—namely, a conveyance in trust for all creditors—it has been held from the earliest times of bankruptcy law that, as the effect of such a conveyance must be to delay or defeat creditors, the law will presume an intention to delay or defeat creditors, and the conveyance would therefore be invalid as against, and perhaps even without reference to the policy of the Bankruptcy Laws; while, as regards both these acts, it is to be observed that they are the voluntary acts of the bankrupt, and, on the same principle that they were originally styled "acts" of bankruptcy, may fairly be avoided and reduced so as to bring back into the general estate the property affected by them. An execution, on the other hand, levied against the goods of a trader by his creditor is the act, not of the trader, but of the creditor; and the creditor, on his part, is doing nothing which is censurable either morally or legally. He is simply using the process of law which he is entitled to use; and nothing short of express words would, in my opinion, be adequate to cut down or deprive him of the effect of an execution which *ex concessis* he was entitled as of right to put in force. But there is another consideration which, as it seems to me, makes a marked difference between the case of a general or fraudulent conveyance by a bankrupt and the case of an execution levied adversely upon his goods. In the case of a general conveyance or assignment which defeats or delays creditors, the conveyance or assignment must either be wholly set aside or must remain entirely effective; there is no *via media*. Bankruptcy, if the conveyance is not set aside, would have nothing to operate upon, and would be a mockery.

So also in the case of a fraudulent preference; if the fraudulent preference is not avoided it remains valid, and the property is absolutely withdrawn. There is no qualified or conditional mode or measure of redress pointed out. But in the case of a seizure and sale it is altogether different. The Act of 1869 has expressly provided, by the 87th section, that, in the case of such a sale, the sheriff is to hold the proceeds of sale in his hands for fourteen days, and if he has notice during that time of a bankruptcy petition presented against the trader he is to hold the proceeds, after deducting expenses, for the trustee in bankruptcy; and it is only in case during these fourteen days he has no such notice that he may, at the end of the time, hand over the proceeds to the execution creditor, which is, in fact, what was done in this case. This appears to me to be the very clear and sufficient machinery given by the Act itself for the purpose, not of rendering invalid the execution or seizure or sale, but of giving to creditors of a trader a limited and qualified right to arrest the proceeds of sale, if they choose to do so with diligence. The convenience of such an arrangement is obvious, and if it had been intended by the Legislature, in making seizure and sale of the goods of a trader an act of bankruptcy, to make the seizure and sale always, and *ipso facto*, invalid as against a bankruptcy supervening, it would, in my opinion, have been much better and much more natural—and it would certainly have been much more simple—to have enacted at once that there should be no process by seizure and sale against the goods of a trader in any case whatever. The conclusion which I draw from the sections of the Act to which I have referred is fortified by the other provisions of the Act. I cannot find in the 15th and 17th sections any words which would vest in the trustee either the property itself (the completed sale of which to a third party is made the commencement of the bankruptcy) or the proceeds of the sale which never belonged to the bankrupt. The 95th section also appears to me to assume that the seizure and sale of the goods of a trader had not been made invalid by the earlier portion of the statute, but that

certain qualified provisions only had been made with regard to the proceeds of sale. On the whole, I am of opinion that the trustee in bankruptcy has in this case no right to recover either the goods or the proceeds, and that the summons before the registrar ought to have been dismissed with costs.

Lord Justice James then proceeded as follows—

Speaking for myself I entirely concur in the conclusions arrived at by the Lord Chancellor. Even if the case had rested entirely upon the language of the 5th sub-section of the 6th section of the Act of 1869 it would have been the duty of the Court if possible to construe the words of that section in such a way as not to invalidate the act of the sheriff done in strict obedience to the law. I am of opinion that we can so construe the Act as not to make the title of the purchaser, which is derived from the sale thereby authorised to be made, invalid, by calling in aid the language of the 11th section of the Act, and treating the seizure and sale as the act of bankruptcy to the completion of which the bankruptcy is to be deemed to have relation back, and at which it is to be deemed to commence. If the act of bankruptcy is the act of the bankrupt himself, then the title of the trustee relates back to the doing of the act which preceded the adjudication so as to avoid the act itself. But where, as in this case, the act is not the voluntary act of the bankrupt, but a proceeding *in invitum*, the title of the trustee relates back to the completion of the transaction only. It is not, however, in my opinion, necessary to rely upon this distinction. In spite of the subsequent bankruptcy of the execution debtor the seizure remains good, the sale remains good and the legal consequences of the seizure and sale must remain good, except so far as the law interferes with those legal consequences. The law itself (section 87 of the Act of 1869) provides that the sheriff shall hold the proceeds of sale for fourteen days, and if no notice of the presentation of a bankruptcy petition against the debtor is served upon him within the fourteen days, he is to deal with the proceeds of sale in the usual

way. In other words, he is to hand over the proceeds of sale to the execution creditor, unless they are intercepted by the presentation within the fourteen days of a bankruptcy petition against the debtor. It is only within that period of fourteen days that the rights of the execution creditor are liable to be interfered with, and that period is the limit of the rights of the general creditors.

LORD JUSTICE MELLISH said that sitting alone he could not, consistently with what was said by Martin, B., in *Slater v. Pinder* (*ubi supra*), hold that seizure and sale, which were made an act of bankruptcy by the 5th sub-section of section 6, were not rendered absolutely void by a subsequent adjudication of bankruptcy by the operation of the doctrine of relation back. He was glad that a fuller examination of the Act justified the conclusion that the seizure and sale were not rendered void by the provision which made them an act of bankruptcy.

Solicitors—Mr. G. L. Norman, for the appellant;
Mr. A. E. Sydney, for the trustee.

BACON, C.J. }
1874. } *Ex parte LOWENTHAL*;
Jan. 19. } *Re LOWENTHAL.*

Debtor's Summons—Particulars of Demand—Registered Officer of Banking Company—Bankruptcy Act, 1869, s. 7—Bankruptcy Rules, 1870, r. 15.

B. filed an affidavit, on which a debtor's summons was issued, and therein stated that he was the public registered officer of a company, and that he was duly authorised by the company to make the affidavit, but he did not say that he was authorised to sue out the summons; an objection was taken to this, but the Court held that rule 15 of the Bankruptcy Rules, 1870, had been sufficiently complied with, and dismissed the appeal.

This was an appeal from an order made by the County Court Judge at Manchester.

NEW SERIES, 43.—BANKR.

Emil Lowenthal, the appellant, formerly carried on business at Sierra Leone, but had since been a merchant at Liverpool. The Sheffield Banking Company were creditors of Lowenthal as indorsees for value of two bills of exchange amounting together to 2,483*l.* 14*s.* 9*d.*, which became due in January and March, 1873, and which had been dishonoured.

On the 24th of October, 1873, James Henry Barber filed an affidavit in which he stated that he was "duly authorized by the Sheffield Banking Company to make this affirmation on its behalf," and then set out the dates of the two bills and the names of the respective drawers and acceptors, and further stated that on the previous 6th of October he had caused applications to be made to Lowenthal personally for payment of the debt, but he did not state that he was authorised to sue out the summons. On the same day a debtor's summons was issued demanding payment to the Sheffield Banking Company of the above amount.

Lowenthal filed an affidavit denying the debt, and raising various technical objections to the affidavit filed by Barber. On the 14th of November, 1873, the matter was heard before the County Court Judge, who overruled the objections and ordered Lowenthal to enter into a bond with two sureties for payment of the amount which should be found due. From this order the present appeal was brought.

Mr. Little and Mr. Yate Lee, for the appellant.—The affidavit of Barber is insufficient because it does not comply with the requirements of rule 15 of the Bankruptcy Rules, 1870, by stating that he is authorised to sue out the summons—

Ex parte Gratton, 2 Mont. D. & D. 401;

Re Hodges, Law Rep. 8 Chanc. 204.

The affidavit is imperfect because it does not shew at what time the liability of Lowenthal arose, or whether he was an indorser of the bills, or from whom the company were indorsees for value—

Ex parte Smith, 6 Law J. Rep. (N.S.) Chanc. 869.

There is no evidence that the bills of exchange were presented for payment to the drawer and acceptor. This is neces-

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sary at common law and must be so in bankruptcy.

On the merits of the case it was very doubtful whether the claim would succeed, and therefore the debtor ought not to have been asked to give security—

Ex parte Weir, Law Rep. 7 Chanc. 319.

Mr. De Gex and *Mr. Winslow*, for the company, were not called upon.

BACON, C.J.—In my opinion the only objection that has been taken cannot be sustained. The Act of Parliament requires that the summons shall be in the prescribed form, as here unquestionably it is, resembling as nearly as circumstances will admit a writ issued by one of her Majesty's superior Courts. The summons here requires the debtor to pay the Sheffield Banking Company the sum in question, being the sum claimed according to the particulars thereunder annexed, and states that in default of his doing so he will have committed an act of bankruptcy. The Act of Parliament further provides that any debtor served with such summons, admitting that the summons is sufficient, may apply to the Court in the prescribed manner, and within the prescribed time, to dismiss such summons upon the ground that he is not indebted to the creditors serving such summons, or that he is not indebted to such an amount as will justify the creditor in presenting a bankruptcy petition against him, and the Court may dismiss the summons with or without costs if satisfied with the allegations made by the debtor, or it may, upon such security being given as the Court may require for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all proceedings upon the summons, and have the matter inquired into before this or any other Court of competent jurisdiction. Now in this case the demand is made by a person who calls himself the public registered officer of the bank—that is to say, the officer appointed under the Act of Parliament to represent this joint stock company, which is entitled to sue or be sued by the officer. The demand is, "I, the registered officer of the com-

pany, apply to you and demand payment from you of the sum mentioned owing by you to the Sheffield Banking Company, as the indorsee for value of the bills of exchange specified in the schedule." Now the schedule specifies that he is the drawer of the two bills of exchange, and adopting the ruling read from one of the cases cited he did in the most explicit manner convey to the debtor the nature of the demand made against him, and the transaction out of which the liability arose. The summons is still more explicit, if possible, than it should necessarily be, because it sets out the sum claimed for the banking company by its registered officer, and requires the payment thereof to be made to them. The affidavit of the registered officer in support of it describes the registered officer as duly authorised to make that affidavit. Every requisition of the Act of Parliament is properly complied with, and there is no possibility of saying that the alleged debtor could be in the least misled.

[His Lordship, after making some remarks on evidence, continued:]

The case of *Re Hodges* (*ubi supra*) is totally different. If I might take the liberty of saying so I should say, that I concur entirely with the observations there made, that the creditor suing must comply with the statute, and in all proper forms strictly comply with it. There the case was that Leathley who sued was the secretary of a joint-stock company, limited. He was not holding the office of a public registrar or registered officer conferred or at least recognised by that statute. He described himself only as secretary; the demand was that, unless the debtor paid the 162*l.* claimed by the secretary within the specified time, he would have committed an act of bankruptcy. But when that was looked into it was quite clear that the requisitions of the Act of Parliament were not complied with.

It is said that there were in this case some laches on the part of the creditor, because he did not produce the bills of exchange. I cannot admit that as a reason. If the Judge then dealing with the matter had to try whether or not there was a liability upon the bills of

exchange the production of the bills would be absolutely necessary. But he had no such question to try, or any authority to look into such matters. All he had to consider was whether the provisions of the statute were complied with by having upon the oath of the public registered officer on behalf of the company a statement that this sum was due upon these bills of exchange. The case then being within the 7th section of the Act of Parliament, if the Court is satisfied with the allegations made by the debtor, the Judge is to dismiss the summons, but if not he is bound to require security in order to put the matter into train for investigation. The production of the bills of exchange is not necessary, and would not be attended to as an answer to the demand. That was not the question. It may have been that there was no presentation or acceptance, or it may happen that they were duly presented, and no notice had been given to the drawer, and the drawer may therefore be discharged. All that comes within the order of the learned Judge, and all that the debtor is open to try for himself, but only upon the conditions stated; and, notwithstanding what has been said about the difficulty of getting security, I must think that those conditions were reasonable since they are prescribed by the statute itself. If the debtor entered into the requisite security he might try the action, but he cannot without doing so. In my opinion all the requisite formalities were complied with. The objections which the learned Judge overruled at the time must be overruled, and this appeal be dismissed with costs.

Solicitors—Mr. H. G. Field, agent for Mr. Etty, Liverpool, for the appellant; Messrs. Phelps & Sidgwick, agents for Messrs. Sale & Co., Manchester, for the respondents.

LORDS JUSTICES. }
 1874. } *Ex parte* LOWENTHAL;
 May 29. } *Re* LOWENTHAL.

Foreign Bill—Notice of Dishonour.

Though a foreign bill of exchange must be presented by a notary public and protested, to render the drawer liable, notice to the drawer that the bill has been "duly presented for payment and dishonoured," is sufficient without specific notice of protest.

This was an appeal from an order of the Chief Judge, affirming an order of adjudication of the Judge of the County Court at Liverpool.

The act of bankruptcy on which the adjudication was made was non-compliance with a debtor summons to pay or secure the amount of a bill of exchange, drawn by the debtor, Emil Lowenthal, which had been dishonoured. The circumstances are more fully stated in the report (*ante*, p. 81) of the refusal of the Chief Judge to discharge the order for security made on the debtor-summons. The Court then intimated that any defence to the claim on the bill might be raised as a defence to the adjudication.

Accordingly, amongst other grounds urged for annulling the adjudication, it was alleged that the claim on the bill against Lowenthal as drawer was not sustainable, because notice of protest was not given, as well as notice of dishonour, the bill being a foreign bill, drawn in Sierra Leone. The letter of notice was sent by the Bank of Sheffield, the holders of the bill, by a letter of the manager, partly printed and partly written, as follows:—

"I have to inform you that your draft on Southam, Wyke & Co., of Manchester, dated the 23rd of September, 1872, at ninety days' sight, accepted on the 21st of October, 1872, due on the 22nd of January, 1873, for 1,497l. 13s., has been duly presented for payment, returned dishonoured, and now lies at this bank, amount with charges, 1,502l. 7s. 8d., to which I request your immediate attention."

On this objection the Chief Judge expressed his opinion, that notice of protest as well as dishonour was necessary in the case of a foreign bill, but that

Lowenthal had, in conversation with the solicitor of the petitioning creditor, recognised his liability on the bill in such a way as to waive the objection.

Mr. Little and *Mr. Yates Lee*, for the appellant.—It is laid down in *Byles on Bills* (9th ed.), p. 379, that a foreign bill must be protested, and notice of protest as well as dishonour must be given to the drawer in order to render him liable—

Robins v. Gibson, 1 M. & S. 288; citing a dictum of Lord Holt in

Brough v. Parkins, 2 Ray, 993.

[*Mr. De Gez*.—The case itself contains no such dictum.]

Goodman v. Harvey, 4 Ad. & E. 870; s. c. 6 Nev. & M. 372; 6 Law J. Rep. (N.S.) K.B. 260,]

decides that a copy of the protest need not be sent if notice of the protest is sent, but notice of the protest is necessary. It does not even appear on the notice that the bill was presented, as a foreign bill should be, by a notary public.

Mr. De Gez and *Mr. Lawrence*, for the respondents, were not called upon.

LORD JUSTICE JAMES, having stated the circumstances, and disposed of some other objections, proceeded.—Then, it is said, that the notice did not say in terms that the bill had been presented by a notary public and protested. I suppose that as a colonial bill this bill must be treated as a foreign bill, and that it was essential that it should be presented and protested accordingly; and there seems to be authority in some of the old cases that notice of dishonour must be accompanied by a copy or memorial of the protest. But the first time the clear question arose in the Court of Queen's Bench in *Goodman v. Harvey* (*ubi supra*) it was treated as clear that a letter which stated the fact of dishonour and protest did contain sufficient notice of dishonour and protest. There there was no statement as to how and by whom the bill was presented or protested, but only that it was presented for acceptance, refused and protested for non-acceptance. So here, sending a notice to a person abroad, he says the bill has been duly presented for payment, and returned dishonoured. The drawer to whom notice is sent must be

presumed to know the law, and he knows the object with which the letter is sent, and under those circumstances the letter contains quite sufficient information that everything has been done in due form to enable the holder to take proceedings against the person to whom the notice is sent.

If the matter stood there I think it would be sufficient, but there is something further.

His Lordship then proceeded to refer to the evidence of the solicitor of the bank in which he stated that in a conversation on the subject Lowenthal had admitted his liability. In the absence of any contradiction or explanation by Lowenthal, that was sufficient to shew a waiver of any objection for want of notice, if such objection had existed. The appeal must be dismissed with costs.

LORD JUSTICE MELLISH concurred.

Solicitors—*Mr. H. G. Field*, agent for *Mr. Ety*, Liverpool, for the appellant; *Messrs. Phelps & Sidgwick*, agents for *Messrs. Sale & Co.*, Manchester, for the respondents.

[IN THE FULL COURT OF APPEAL.]

SELBOENE, L.C.
JAMES, L.J.
MELLISH, L.J.
1873.
Dec. 19.
1874.
Jan. 16.

Ex parte LINSLEY;
Re HARPER.

Bankruptcy Act, 1869, s. 127—*Sufficiency of Composition*—*Benevolent Motives*—*Order of Discharge*—*Dissentient Creditor*.

All the creditors of H., except one, agreed to accept a composition, and, having the necessary majority, gave the debtor his discharge. The dissentient creditor applied to the County Court to have the order of discharge rescinded, on the ground that it had been granted without proper care and from motives of benevolence. From the evidence it appeared that the creditors did not wish

to see the debtor ruined, and also that the main part of the debtor's property consisted of an equity of redemption which might have taken time to realize. No case of fraud having been proved the County Court Judge refused the application, and this decision was affirmed both by the Chief Judge and on appeal by the full Court.

This was an appeal from an order of Bacon, C.J., dismissing an appeal from the decision of the Judge of the County Court of Yorkshire, holden at Kingston-upon-Hull.

The case is reported in 42 Law J. Rep. (N.S.) Bankr. 109.

Mr. Yate Lee appeared for the appellant, the only dissentient creditor.

Mr. De Gez and *Mr. Bagley*, for the debtor, were not called upon.

THEIR LORDSHIPS were of opinion upon the evidence that no sufficient ground had been shewn for disturbing the decision of the Court below, and dismissed the appeal with costs.

Solicitors—*Mr. J. L. Morris*, agent for *Mr. T. Spurr*, of Hull, for appellant; Messrs. Frankish and Buchanan, agents for Messrs. Rollit and Sons, of Hull, for respondent.

IN THE FULL COURT OF APPEAL.

CAIRNS, L.C.	} <i>Ex parte</i> HOLLAND ; <i>Re</i> HENEAGE.
JAMES, L.J.	
MELLISH, L.J.	
1874.	
Feb. 27.	

Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 12—*Debt contracted before Marriage—Separate Estate.*

A married woman having no separate estate is not liable under the 12th section of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), to be made bankrupt in respect of debts contracted before marriage.

Whether if she had separate estate she could be made bankrupt, quære.

The question in this case was whether a married woman could under the 12th section of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), be made a bankrupt in respect of debts contracted before marriage.

Judgment had been recovered against *Mrs. Heneage*, who was married on the 19th of December, 1872, for 106*l.* 5*s.* debt and costs in respect of money borrowed by her shortly before her marriage from the wife of the present petitioner, and she had been served with a debtor's summons for the amount. Upon non-compliance with this the creditor filed his petition for adjudication in bankruptcy. *Mrs. Heneage* had no separate property.

Mr. Registrar Hazlitt sitting for the chief Judge dismissed the petition and the petitioning creditor appealed.

Mr. De Gez and *Mr. E. Pollock*, for the appellant.—By the 12th section of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), it is enacted that "a husband shall not by reason of any marriage which shall take place after this Act has come into operation be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried." Under this section we contend that in respect of debts contracted before marriage a married woman is in the same position as a *feme sole*, and the liability to be sued carries with it all the consequences of such liability, one of which is a liability to be made bankrupt. The case is like that of a married woman who by the custom of London carries on a trade on her sole account in respect of which she may be made a bankrupt—

Lavis v. Philips, 1 Bl. 570; s. c. 3 Burr. 1776.

It is not necessary to shew that she has separate property—

Bush v. Martin, 2 Hurl. & C. 311; s. c. 33 Law J. Rep. (N.S.) Exch. 17;

Beynon v. Jones, 15 Mee. & W. 566; s. c. 15 Law J. Rep. (N.S.) Exch. 303.

If a married woman could not be made bankrupt one creditor might possess himself of the whole of the separate property of a married woman, and pay his own debt in full before the other creditors took anything—

Johnson v. Gallagher, 3 De Gex, F. & J. 495; s. c. 30 Law J. Rep. (N.S.) Chanc. 298.

They referred also to—

Ex parte Franks, 7 Bing. 762;

Morgan v. Knight, 15 Com. B. Rep. N.S. 669; s. c. 33 Law J. Rep. (N.S.) C.P. 168;

Chubb v. Stretch, 39 Law J. Rep. (N.S.) Chanc. 329; s. c. Law Rep. 9 Eq. 555;

Sanger v. Sanger, 40 Law J. Rep. (N.S.) Chanc. 372; s. c. Law Rep. 11 Eq. 470.

Mr. Roxburgh and Mr. Robertson Griffiths, for Mrs. Heneage, were not called upon to support the decision of the registrar.

THE LORD CHANCELLOR.—It is very properly admitted that the application in this case must be founded entirely on the Married Women's Property Act, 1870, and the only provision of that Act which is material to the present question is contained in the 12th section which enacts that "a husband shall not by reason of any marriage which shall take place after this Act has come into operation be liable for the debts of his wife contracted before marriage." That no doubt is a very strong and novel provision. And then the section addresses itself to the consideration of what is to be done with regard to debts of that kind, and provides that "the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried." Now the words "liable to be sued" are technical words, and relate *prima facie* to a suit at law or in equity, and I should be disposed to read the section as meaning that, although the husband shall not be liable for these debts, the wife may be sued at law or in equity as if she were unmarried. That has been done in the present case; the creditor has brought his action against

the wife, and recovered judgment against her which has been unproductive. But Mr. Pollock has argued, and it is the only argument which could avail him, that the words must be held to include all the ordinary consequences which attach to a suit at law or in equity, and one of these is no doubt that the debtor may be served with a debtor's summons, the non-compliance with which would form the ground for an adjudication in bankruptcy; but he was obliged to admit, when I put the question to him, that property not settled to the separate use of a married woman could not be taken in execution, and therefore it is clear that all the consequences of a suit at law or in equity do not follow in the case of a married woman. It appears to me that the words "shall be liable to be sued" have been introduced into the section for the purpose merely of being connected with the words which immediately follow, making property belonging to her for her separate use liable for those debts as if she were unmarried, and that for the purpose of reaching it she is to be subject to the ordinary process of a suit at law or in equity.

The objection that this interpretation would allow a single creditor to possess himself of the whole of the separate property to the exclusion of the other creditors admits of a very simple answer. It may be that the Legislature has overlooked that result; to be logically consistent it ought perhaps to have provided some means, by bankruptcy or some analogous process, of reaching a married woman's separate property, and making an equitable distribution of it among her creditors. But in my opinion it has not done so, and it would be a violent straining of words which have a technical meaning to hold that it has altered the status of all married women by making them subject to the law of bankruptcy to which they were not previously subject merely for the sake of carrying out the Act to a consistent logical conclusion. I am not prepared to do this. I think, therefore, that the registrar was right, and the appeal must be dismissed with costs.

JAMES, L.J., concurred.—There were various ways of making a married

woman's separate property liable to her debts in this Court, but it was never supposed that such property could be dealt with in bankruptcy.

MELLISH, L.J., concurred. He thought the Act only made a married woman liable in respect of her separate property, and in this case she was not shewn to have separate property. If this had been shewn he was not satisfied that it might not have made a difference.

Solicitors — Messrs. Clennell & Fraser, for appellant; Mr. W. Kelly, for respondent.

[IN THE FULL COURT OF APPEAL.]

SELBORNE, L.C.

JAMES, L.J.

MELLISH, L.J.

1874.

Jan. 16.

Ex parte BARNETT;
Re DEVEZE.

Bankruptcy Act, 1869, s. 39—*Mutual Credits—Set-off—Lien.*

The 39th section of the Bankruptcy Act, 1869, enacting that where there have been mutual credits, &c., between the bankrupt and any other person claiming to prove under the bankruptcy, the sum due from one party shall be set off against any sum due from the other party and the balance only shall be claimed or paid, establishes an absolute statutory rule, and the fact that one party holds a lien or security for his debt will not affect the operation of the rule.

Messrs. Barnett & Co. appealed from an order of Mr. Registrar Pepys, sitting as Chief Judge.

The debtor, M. Jean Louis Deveze, carried on business in London as a general merchant under the firm of Heitz & Deveze, and he also carried on business at Lyons, but he had no partner in either business. He filed his petition for liquidation on the 17th of January, 1873. At that time there were outstanding bills of exchange, drawn by Messrs. Barnett &

Co., upon and accepted by Deveze, which, being dishonoured at maturity in consequence of the liquidation, Messrs. Barnett & Co. were themselves obliged to take up. The balance due from the estate in respect of these bills was 3,010*l.* Messrs. Barnett & Co. claimed to set off a debt of 88*l.* due from them to the estate of the debtor, and for which the trustee in liquidation had a lien on certain parcels of silk in his possession, against the 3,010*l.* due to them in respect of the dishonoured bills, and to have the silk delivered up to them, and to prove against the estate for the difference.

The registrar held that Messrs. Barnett must first pay the 88*l.* in full before the silk was delivered up, and then prove for the whole 3,010*l.* Hence the appeal.

Mr. Winslow and Mr. R. T. Reid, for the appellants.—The case is provided for by the mutual credit clause in the Bankruptcy Act, 1869, s. 39—

Naoroji v. The Chartered Bank of India, &c., 37 Law J. Rep. (N.S.) C.P. 221; s. c. Law Rep. 3 C.P. 444,

and

Astley v. Gurney, 38 Law J. Rep. (N.S.) C.P. 357; s. c. Law Rep. 4 C.P. 714, reversing s. c. 38 Law J. Rep. (N.S.) C.P. 111,

which were decided upon the corresponding section (sect. 171) of the Bankrupt Law Consolidation Act, are authorities in our favour, and the fact of either party holding security can make no difference.

Mr. H. Davey and Mr. Finlay Knight, for the trustee, supported the registrar's decision. There could be no set-off where either party had a lien for his debt—

Clarke v. Fell, 4 B. & Ad. 404; s. c. 1 Nev. & M. 244; s. c. 2 Law J. Rep. (N.S.) K.B. 84;

Pinnock v. Harrison, 3 Mee. & W. 532; s. c. 7 Law J. Rep. (N.S.) Exch. 137.

The 39th section of the Bankruptcy Act, 1869, has not established a different rule in bankruptcy from what would have applied in case there had been no bankruptcy.

THE LORD CHANCELLOR.—We all think that the order of the registrar is wrong.

The 39th section of the Bankruptcy Act, 1869, establishes a somewhat different rule in bankruptcy from that which prevails if there is no bankruptcy. It says that, "where there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively." This is, as I understand it, an absolute statutory rule that the amount to be proved for is to be ascertained by writing off the smaller debt from the larger; and as the Act says nothing about security, it seems to me that the existence of security or lien one way or the other was not intended to affect the operation of the rule.

The case of *Clarke v. Fell* (*ubi supra*), which was cited by Mr. Davey, appears to me to be an authority against his argument. In that case the plaintiffs had sent a stanhope to be repaired to a tradesman, who, before the repairs were completed, became bankrupt, on a contract to pay ready money for the repairs to be done; they afterwards became the holders of a bill of exchange accepted by the bankrupt for a larger amount than the sum to which the bill for repairs, which were completed by the assignees, amounted; and though the Court held that the plaintiffs could only entitle themselves to have the stanhope delivered, the action being one of trover by tendering in ready money the amount of the bill for repairs, Mr. Justice Littledale said expressly, "If there had not been a contract to pay ready money, I should have been of a different opinion; for although in that case there would still have been a lien on the carriage for the work done by the bankrupt, yet, as the bankrupt was also indebted to the plaintiffs, the question would have been on which side the balance lay, and that was in favour of the plaintiffs." Here there is no contract to pay ready money; and if this had been a

case of mutual debt at the time of the bankruptcy, and not of mutual credit which the statute makes equivalent to debt, I should have thought *Clarke v. Fell* (*ubi supra*) an authority that even trover would have lain. And Mr. Justice Taunton, in the same case, thought that if the question had arisen upon the proof in bankruptcy the account must have been taken upon the footing of set-off notwithstanding the special contract. All the other authorities are in favour of the right of set-off.

It seems to me that the plain language of the statute meets the case, and the order of the registrar must be discharged.

MELLISH, L.J.—I am of the same opinion. The simple question is upon the construction of this clause, whether the set-off is not made equivalent to payment? I doubt whether it does not affect it even before either party has come in to prove; but at any rate when the party does come in to prove, the statute sets one debt against the other, and that is equivalent to payment. It is equivalent in fact to saying that where there are mutual debts, a party, by coming in and claiming to prove, necessarily causes a payment or satisfaction of his debt so far as the set-off extends; and of course when the debt is put an end to, the lien also is at an end. It appears to me that this construction of the section is altogether in accordance with the general scope of the Bankruptcy Act, because it would be very unjust and contrary to the spirit of the bankruptcy law to hold that where there are mutual debts the one creditor should be paid in full, and the other should only receive a dividend.

JAMES, L.J., concurred.

Solicitors—Messrs. Murray & Hutchins, for appellants; Mr. W. A. Crump, for the trustee.

LORDS JUSTICES.
 1874.
 April 24. }

Ex parte NEW;
Re CHILDS.

Bankruptcy Act, 1869—Liquidation by Arrangement—Two Estates—Two distinct Trades—Settlement affecting One—Proof—Joint and Separate Creditors.

A., a liquidating debtor, at the date of filing his petition, was carrying on a trade at Brighton in his own name, and a completely distinct trade under another name in London. Three-fourths of the profits of the London business were settled upon A.'s wife for her separate use free from his debts. The other fourth of the profits belonged to A. The Brighton business was hopelessly insolvent:—Held, that the assets of the two businesses constituted distinct estates, the one the separate estate of the debtor, the other the joint estate of him and the trustee of the settlement, and that accordingly the ordinary rule in bankruptcy for the payment of the joint and separate creditors out of the debtor's joint and separate estates respectively would apply, and the London creditors were entitled to be paid the full amount of their debts out of the assets of the London business before the separate creditors of the debtor received anything out of that estate.

This was an appeal from a decision of Mr. Registrar Murray sitting as Chief Judge.

The debtor, William Childs the younger, filed his petition for liquidation of his affairs by arrangement on the 6th of May, 1873. He was then carrying on business at Brighton as a toy manufacturer and fancy warehouseman in his own name, and in Regent Street, London, the business of a tailor under the style or firm of Linney & Co.

Three-fourths of the profits of the London business were settled in trust for the debtor's wife, under the circumstances and in the manner hereinafter stated. The said business was formerly carried on by Linney (since deceased) & Robinson, on premises belonging to Linney. The partnership deed contained the following material provisions—The partnership was to be for twenty years determinable on notice as therein mentioned. It was to be carried on under the style

or firm of Linney & Co. The capital was to be 8,000*l.*, of which Linney's share was to be 6,000*l.* and Robinson's 2,000*l.* The partners were to be interested in the business, Linney as to three-fourths, and Robinson as to one-fourth. Neither partner was to engage in any other business, nor assign his share without consent. After the death of Linney the term of partnership was not to be determinable, and Linney's widow was to be entitled to three-fourths of the net profits, subject to certain annual payments. In case of Linney's death in the lifetime of Robinson, his share of the profits was to be ascertained, and the amount to be continued as a loan to the partnership from his executors, at interest, with liberty to the executors to withdraw any portion of such capital exceeding Linney's original share of 6,000*l.*

In March, 1862, Linney died, having by his will bequeathed to his widow, who survived him, the premises in Regent Street during her life, and given all his real and personal estate to trustees upon trust for his widow for her separate use for life, with remainder to her children.

A suit for the administration of Linney's estate was subsequently commenced in the Court of Chancery, and in March, 1866, a Mr. Hogg was appointed a trustee of the will jointly with Mrs. Linney, the widow, who was one of the executors and trustees appointed by the testator's will. Robinson continued after Linney's death to carry on the business under the style of Linney & Co., and in accordance with the provisions of the partnership deed, Robinson being entitled to one-fourth and Mrs. Linney to three-fourths of the profits.

In July, 1867, Mrs. Linney married the debtor Childs, and on the 6th of July, 1869, an arrangement by deed was come to, with the sanction of the Court of Chancery, whereby Robinson agreed to sell, and Childs agreed to buy, all the share and interest of Robinson and his wife and children (Robinson's share having been settled) upon the terms therein mentioned, namely, that Childs was to pay a sum of 2,184*l.*, the ascertained amount of Robinson's share, and to take upon himself certain liabilities to which

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Robinson had become liable, under a judgment recovered against him by the executors of Linney, and for the balance of which it was provided by the deed that Childs should give his bond to the executors.

By another deed dated the 15th of July, 1869, and made between Childs of the first part, Mrs. Childs of the second part, and Hogg, the trustee of the will and also the trustee of this deed for Mrs. Childs, of the third part, after reciting that, upon the treaty for the sale to Childs of Robinson's share, and for the arrangement effected by the deed of the 6th of July, 1869, and as the consideration for Elizabeth Emma Childs (lately Mrs. Linney) and Hogg consenting to such sale and arrangement, it had been agreed that Childs should enter into the covenants thereafter contained, Childs covenanted with Hogg, as trustee for Mrs. Childs, and also as trustee under Linney's will, for payment of the instalments due on the judgment against Robinson and also that the three equal fourth parts or shares of the profits of the said business, and all other the part, or share or interest of or in the said business to which Mrs. Childs, or Childs in her right was entitled, should be for the sole and separate use of Mrs. Childs, free from the debts, control or engagements of her husband. And it was thereby provided that the other provisions of the original partnership deed should be binding upon Childs, except that he was to be at liberty to carry on any other business he might think fit.

For many years previously to the liquidation proceedings, and to his marriage with Mrs. Linney, Childs had been carrying on the business at Brighton, and at the date of the liquidation he was indebted to various creditors in respect of that business, in respect of dealings wholly unconnected with the Regent Street business.

Childs' petition resulted in a liquidation by arrangement, and trustees having been appointed, an application was made in September, 1873, on behalf of Mr. Hogg, the trustee of the deed of the 15th of July, 1869, and a creditor of Childs, for an order that the trustees of the liquidation should keep distinct ac-

counts of the assets realised by the London business and the Brighton business respectively. On that application an order was made by consent, but without prejudice to any question which might affect the different classes of creditors.

An application was made on the 11th of February, 1874, by Mr. Lake, one of the London creditors, on behalf of himself and all others of the same class, that they might be declared entitled to be paid their debts exclusively out of the assets of the London business, in exoneration of the general estate of the debtor, and that all questions of priority might be decided between the creditors of the London firm and the general creditors.

On the 25th of February the Registrar granted the application.

The Brighton creditors appealed.

Mr. Roxburgh and *Mr. Bagley*, in support of the appeal.—The rule for keeping two estates distinct for the purposes of paying creditors had always been confined to cases of partnership. In this case Childs was the legal owner of the London business, and no one but he could be sued in respect of it. The settlement was a voluntary settlement, and void against creditors—

Thompson v. Webster, 4 Drew. 628; a. c. 4 De Gex & J. 600; a. c. 28 Law J. Rep. (N.S.) Chanc. 700.

Mr. De Gex and *Mr. Finlay Knight* appeared for the London creditors.

Mr. Eddis and *Mr. Woodroffe*, for Mr. Hogg.

Mr. Winslow and *Mr. H. Davey*, for the trustees under the liquidation.

LORD JUSTICE JAMES said that the case was a very simple one. The settlement of July, 1869, was beyond all question unimpeachable. It was part of an arrangement sanctioned by the Court of Chancery. There was nothing in it morally wrong or calculated to injure anybody. The three-fourths of the London business thereby became a trust estate in favour of the wife. There were two estates—one the debtor's own, the other a trust estate. The order appealed from was in fact merely the application of the general principle of equity, which was the basis of the doctrine of proof by joint

and separate creditors against joint and separate estates. The Registrar's order was right and did justice to all parties. Of course, if there should be any surplus of the London estate the debtor's one-fourth of it would go over to his general estate.

LOED JUSTICE MELLISH.—I am entirely of the same opinion.

Solicitors—Messrs. Lawrence & Co., agents for Messrs. Stevens & Haslewood, Brighton, for appellant; Messrs. Robinson & Preston, agents for Messrs. Halse, Trustram & Co., for respondents.

BACON, C.J. }
1874.
June 8. }

Ex parte TINKER;
Re FRANCE.

Liquidation—Sale by Trustee of the whole of Debtor's Estate—Order of Discharge—Earnings of Debtor after Liquidation—Bankruptcy Act, 1869, ss. 13 & 125, subsect. 9—Bankruptcy Rules, 1870, r. 260.

Creditors agreed to dispose of the whole of a debtor's estate to a purchaser in consideration of a sum agreed to be paid by the purchaser by instalments, the debtor himself agreeing to pay a small part of such sum out of his future earnings. The debtor's business was then continued by the purchaser and himself. All the instalments were duly paid, but the creditors having become hostile to the debtor, refused to grant him his order of discharge, and attempted to possess themselves of the profits he had acquired in his business since the agreement:—Held (affirming the decision of the County Court Judge), that it would be inequitable to allow the creditors to claim the profits of the business merely because the order of discharge had not been formally granted.

This was an appeal from an order made by the Registrar of the County Court at Huddersfield, sitting as Judge.

The debtor, John William France, was a manufacturer near Huddersfield. In February, 1873, he presented a petition for liquidation, and on the 19th of February the creditors resolved on liquidation, and appointed a trustee and a committee of inspection. The debtor was very desirous of continuing his business,

and a Mr. Blackburn came forward and offered to purchase the whole of the debtor's estate from the creditors, with the intention of allowing the business to be continued under the management of France. Accordingly, on the 13th of March, 1873, the creditors at a general meeting resolved that Henry Tinker, the trustee, should accept an offer made by Blackburn, James Robinson (who was the landlord of the mills worked by the debtor), and the debtor, and should sell to Blackburn the whole of the debtor's estate and effects for 6,000*l.*, to be paid by three instalments at four, eight and twelve months, the first and second of such instalments of 2,000*l.* each to be secured by promissory notes under the hand of Blackburn, and the third instalment of 2,000*l.* to be secured by a mortgage of certain property at Huddersfield and Llandudno, and by three other promissory notes, one of Blackburn for 1,600*l.*, one of Robinson for 200*l.*, and one of France for 200*l.* Affidavits were filed, shewing that France had no property of his own, and that it was fully understood that he was to pay his 200*l.* out of the future profits of the business.

These resolutions were embodied in a deed which was duly executed, by which the trustee assigned to Blackburn all the estate which had passed to him under the proceedings, or which he, as such trustee, had in any way power to dispose of. Blackburn and France then carried on the business together, and all the instalments were paid at the times when they respectively became due.

The arrangement embodied in the above resolutions and deed was entered into by the desire of all the creditors, and it seemed probable that if the debtor had then applied for his order of discharge, it would have been granted; the solicitor, however, who acted for both the debtor and the trustee, neglected to obtain the debtor's discharge, and subsequently disputes arose between the debtor and several of the principal creditors, which rendered them hostile to each other.

Subsequently, in March, 1874, a meeting of the creditors was called, and resolutions in favour of releasing the trustee and granting the debtor his order of discharge

were proposed. There were present at the meeting thirty-nine creditors, whose debts amounted to 9,352*l.*, and of these thirty creditors, representing 5,461*l.* in amount, voted in favour of the discharge being granted. An application was made on behalf of the debtor for registration of this resolution, but the Court held that as there had not been a majority of three-fourths in amount, the resolution was not properly carried, and could not be registered.

Some of the creditors then attempted to acquire the profits made by France in the business subsequently to the sale to Blackburn, for the purpose of distribution amongst the creditors, and to prevent this, France, on the 20th of May, 1874, made a further application to the County Court. Upon this application the registrar sitting as Judge made an order declaring that the effect of the arrangement for sale of the debtor's property was to vest in the purchaser from the trustee all such property as was vested in the trustee at the commencement of the liquidation, or which might devolve upon him during its continuance, and he also restrained the creditors from acquiring or in any way interfering with the profits then made, or thereafter to be made, by Blackburn or France, or from commencing, continuing or enforcing any proceedings against the debtor or his property in respect of their debts.

Against this order the trustee and some of the creditors appealed.

Mr. De Gex and *Mr. Jordan* appeared for the appellants.—As the statutory majority of the creditors refused to grant the debtor his discharge, the Court had no right to interfere with their discretion, and make an order which, if it did not grant a discharge in terms, did so in effect.

The Court had no power under the Bankruptcy Act of 1869 to make such an order—sections 13 and 125, sub-sect. 9, and Bankruptcy Rules, 1870, r. 260. The order of discharge not having been granted, we have a right to this after-acquired property—

Ex parte Piercy, ante, 9; s. c. Law Rep. 9 Chanc. 33.

Mr. Roxburgh and *Mr. Beaumont*, for France, were not called upon.

BACON, C.J.—In this case I must say, in the first place, it does not seem to me that there is any conflict of statement on any material fact necessary to consider here, or which it was necessary to consider in the Court below. The facts, which are not in dispute, are plain enough. This man is insolvent, his creditors are assembled, his affairs are discussed, the value of his estate is ascertained, and ascertained I must take it at 6,000*l.* and no more, although there is an affidavit which is now put in on the part of *Mr. Tinker*, in which it is valued at 6,800*l.*, but which *Mr. Tinker*, acting with all his authority as trustee, does not confirm. I cannot doubt that, after careful investigation of the bankrupt's means of paying his debts, the creditors satisfied themselves that 6,000*l.* was the utmost value of his assets, and then in their own interests they propose to sell all that he is worth in the world, and they desire to get 6,000*l.* for it. *Mr. Blackburn*, who is called a capitalist, but who was not a manufacturer, but a merchant or financial person, offers a smaller sum, and there is a great deal of dispute about it, and under the circumstances that took place it seemed as if at one time the bargain would have gone off, but the debtor was very desirous that the trade in which he was engaged should be preserved, because he believed it was a lucrative one. The landlord, who was also interested, agreed, rather than this matter should go off, that *Mr. Blackburn's* 5,600*l.* should be made up to 6,000*l.* It is no bye arrangement, no side consultation, all open and above-board, fully, fairly and plainly stated to the creditors, and known to them at the meeting just as well as it is known now, and they come to a resolution that all that the trustee has or can have by this liquidation proceeding should be transferred to *Mr. Blackburn* for 6,000*l.* The mode of payment is consistent with the whole negotiations that are stated in the affidavit, that *Mr. Blackburn* is to pay 5,600*l.* by instalments, and it was then provided that the other 400*l.* was to be paid, 200*l.* by the debtor, and 200*l.* by the landlord, and it was perfectly notorious to the creditors and everybody else concerned in it, that the only chance by which the

debtor could get 200*l.* to make up the sum the creditors insisted upon having, as the value of all he was worth in the world, was by his being engaged in partnership, or as manager or clerk, or as something else, to Mr. Blackburn, who is to become the owner. It is on that footing that the matter proceeds, and, as I have said, there is not a single circumstance in the case which amounts to suspicion. Now, however, it is said that these creditors (notwithstanding their plain resolutions, and notwithstanding the deed by which the trustee has with their sanction transferred to the present proprietor all that the bankrupt had got), are entitled, because the debtor has been engaged as a clerk or partner carrying on this business, to thrust themselves into the partnership, if partnership there be, at all events to resort to their rights, as they call them, in their utmost rigour, notwithstanding this liquidation. In my opinion it is a case which was properly brought before the notice of the learned Judge below, a case in which on all the most ordinary principles that regulate the administration in bankruptcy as between the debtor and the creditor (in which the debtor must have as much fair play as the creditors), it was within the jurisdiction of the Court below to consider the true nature of the transaction between the vendor and purchaser on this occasion, and to make an order that should not give to the vendors any more than they had bargained for, and not take away from the purchaser, (the debtor himself who becomes a *quasi* purchaser with their full sanction and knowledge) what he had by the contract or bargain. Now the deed is in very plain terms, and does not go a particle beyond the agreement on which it is based. It is an assignment of the machinery, of all the mills, and all the stock-in-trade, household furniture, utensils and effects, and all the reversionary and contingent interests, and the benefits of guarantees and all other property, estate and rights whatsoever which passed to the said Henry Tinker, and which he had any power to dispose of, subject to the claims of the creditors, with full power at all times to sell. Those are the terms on

which the trustee, with the sanction of the committee of inspection and the knowledge of all the creditors, transfers certain interests to Mr. Blackburn when the agreement is made, and among the contingent interests which pass is the carrying on of the business. And yet this trustee not being himself a creditor, is the person who now at the instance, I suppose, of the committee of inspection, comes with this multitude of affidavits, each of them repeating the statements contained in the others, at the cost of somebody (the cost of the bankrupt's or debtor's estate, in most instances, I am sorry to say) to prove that which nobody ever disputed, because they all agree that there was a bargain, and that Mr. France was to carry on the business, and it was only by carrying on the business that he could obtain the means of paying the sum for which the trustee stipulated, and they say now notwithstanding, that they have a right to take possession of Mr. France's after-acquired property, and *Ex parte Piercy* (*ubi supra*) is referred to. But neither *Piercy's* nor any other case contains any law or authority which can be dealt with so as to apply to this case. That order was made on a consideration of the whole of the evidence, and it is that order which is now appealed from. [His Honour then referred to one of the affidavits to shew that at the time the resolutions were passed and the deed executed it was the intention of all the parties that if the instalments were paid the debtor should have his order of discharge, and continued—] Something has taken place since the deed was executed, as I gather from the statements contained in the affidavits, which has caused a degree of animosity or hostility on the part of the creditors who are bound by this transaction against the debtor; but I have nothing to do with that. I have only to see that the administration of bankruptcy law is not perverted, and made an instrument of oppression, which, in my opinion, it would be if these creditors were at liberty to say, "Because the bankrupt has not had his discharge, we have a right to undo what was done in this liquidation, what was plainly agreed to at the meeting, plainly expressed in

the agreement, and plainly and distinctly expressed in the order." [His Honour then referred to the terms and the words of the order made in the County Court, and continued—] It appeared to the Court below, that the creditors claimed, as they have claimed here to-day, such profits as have already accrued or may hereafter accrue to the debtor, and we have seen that the Court has restrained the creditors who have entered into this agreement from acquiring or interfering in any way with the profits which are now made, or may hereafter be made, by Messrs. Blackburn or France in connection with the business purchased from the above-named trustee, or the profits to be acquired therefrom by France. In my opinion that is a very proper order, and the Court having jurisdiction over the administration of this liquidation could not properly see such an unfair attempt as has been made on the part of the creditors without doing its part to check it. I think, therefore, the order is in that respect right, and as the fact is uncontradicted that these gentlemen have thought fit to threaten or take some proceedings against the debtor's property, they must be restrained from so doing. In my opinion the appeal is wholly unreasonable and unnecessary, and it must be dismissed with costs.

Solicitors—Messrs. Shum, Crossman & Co., agents for Messrs. Sykes & Son, Huddersfield, for appellants; Messrs. Learoyd, Learoyd & Peace, London and Huddersfield, for respondent.

LORDS JUSTICES. }
 1874. } *Ex parte* LOVERING;
 May 29. } *Re* JONES.

Disclaimer of Lease—Extension of Time for Disclaimer—Practice—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 24—Bankruptcy Rules, 1871, r. 28.

Where an extension of the twenty-eight days after request within which a trustee must (under section 24 of the Bankruptcy

Act, 1869), declare his option of disclaiming a lease, is required in order to obtain the sanction of the Court under the rules of 1871 (rule 28), the practice of the Court is to grant the extension if the application is made within the twenty-eight days, but not otherwise.

The Court can extend the time afterwards, Semble; but it would only do so under very special circumstances.

Circumstances under which such an order was refused.

This was an appeal from an order of Mr. Registrar Spring Rice.

The solicitors of the trustee having written to the solicitors of the landlord of certain leaseholds to which the bankrupt was entitled (subject to a mortgage) asking whether the landlord was disposed to purchase the bankrupt's interest, the solicitors of the landlord wrote on the 23rd of March, 1874, to decline, and enclosed a notice of that date formally requiring the trustee to declare whether he intended to disclaim all interest in the premises.

In answer the solicitors of the trustee wrote on the 26th of March to the landlord's solicitors—"We beg to acknowledge receipt of notice calling upon the trustee to elect whether he will disclaim or not. He intends to disclaim his interest in the leases 36 and 38, Fulham Road, and we will send you notice of motion which we presume you will accept on behalf of your client, but we shall not be able to get a day for hearing the motion until after the Easter vacation. We believe the party who holds the leases is Mr. Serjeant, of York Road, Lambeth."

The trustee took no further step until the 24th of April, 1874, when he served notice of motion for the 2nd of May, for an order that the trustee be at liberty to disclaim the lease, and "for such other order affording such other or further relief in the premises as to the Court may seem proper to be granted under the circumstances."

The registrar refused to give the leave desired on the ground that the twenty-eight days had expired.

He was asked to extend the time, but held that he had no jurisdiction to do so

on an application made after the time had expired.

The trustee appealed.

It was stated at the bar that the substantial question was as to the trustee's liability to the rent accrued due since the bankruptcy.

Mr. De Gez and *Mr. Robertson Griffiths*, for the appellants.—By section 23 of the Bankruptcy Act, 1869, the trustee may disclaim a lease. Then by section 24, it is provided that the trustee shall not disclaim where an application in writing has been made by any person without requiring him to decide whether he will disclaim or not, "and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the same or not." And then the difficulty has been caused by rule 28 of the Bankruptcy Rules, 1871, that the trustee shall not disclaim a leasehold interest without the leave of the Court being first obtained.

We say the letter amounted to an actual disclaimer, and that the time occupied in obtaining the sanction of the Court ought not to be reckoned in the twenty-eight days. At all events the landlord had full notice of what we intended to do, and that we thought some delay unavoidable, and he should have objected if he thought otherwise, and not have put us off our guard. It is a fair case for extending the time, and the registrar was wrong in thinking he had no power to do so—

Banner v. Johnston, 40 Law J. Rep. (N.S.) Chanc. 730; s. c. Law Rep. 5 E. & I. App. 157.

Mr. Finlay Knight, for the respondent, urged that there had been ample time. The Court sat through the vacation; and at all events an application to enlarge the time could have been made within the twenty-eight days.

Mr. De Gez in reply.

[In the course of the argument their Lordships consulted the registrar, *Mr. Murray*.]

LORD JUSTICE MELLISH after a reference to sections 23 and 24 of the Act and

the rule above cited, and after reading the landlord's notice and the reply of the trustee's solicitors, laying some emphasis on the word "intends," proceeded.—The first question is, whether that itself amounts to an actual disclaimer? Whether the trustee had power to execute an actual disclaimer notwithstanding the rule, though he would be violating the law by so doing, might be a question. But looking at the fact that he states, that he intends to disclaim, and that he speaks of serving notice of motion for the leave of the Court to the disclaimer, there can be no doubt at all that the writer of the letter knew, and that he assumed that the person to whom the letter was written was also well acquainted with the law, that the leave of the Court was requisite, and that he only meant to intimate his intention to disclaim and to apply to the Court for that purpose, and I am of opinion that it would be wrong to construe the latter as an actual disclaimer.

Then the trustee took no further step within the twenty-eight days after the landlord's notice nor for three days after they had expired. The registrar held that it was too late to extend the time. Having regard to the case of *Banner v. Johnston* (*ubi supra*), I should not wish to lay down that the Court has not jurisdiction to extend the time after the twenty-eight days have expired, and possibly there might be circumstances under which it would be right to do so. But the practice, as *Mr. Registrar Spring Rice* has decided, and as *Mr. Registrar Murray* has now informed us, is not to do so. If the trustee wishes to disclaim and finds he cannot get his application heard within the twenty-eight days, the practice requires that he should take some step within the twenty-eight days for the purpose of enlarging the time. That seems to be a wholesome practice, and it would be dangerous to depart from it. Here the delay is three days. In another case it will be a week. Then a fortnight, and a month. And it may cause the greatest possible inconvenience to persons interested in property not to have the question settled within the prescribed time after their formal notice. In my opinion, unless there is some extraordinary cause—what

is called the act of God—illness, or death, or something on the part of the landlord to put the trustee off his guard—unless something of that kind happens—we ought not to allow the time to be enlarged unless the application is made within the twenty-eight days. Here something was said as to the Easter vacation having intervened, but there was still time after the Easter vacation, and there is no real ground for enlarging the time. I do not think the trustee was personally bound by the letter. If at any time before the leave of the Court was given he had discovered that it was for the interest of the estate not to disclaim, that the lease was really valuable, it would have been his duty to withdraw from his intention and to ask the Court not to give the leave, and the Court would have refused leave accordingly.

The letter therefore did not bind him, and the landlord is entitled to enforce his strict rights; and there having been no disclaimer within the prescribed period, I do not think the time should be enlarged. The appeal must be dismissed.

LORD JUSTICE JAMES.—I am of the same opinion.

Solicitors—Messrs. Piesse & Son, for appellant;
Mr. J. D. Thomson, for respondent.

JAMES, L.J. }
1874. }
June 19. }

Ex parte ROWAN;
Re KIDDELL.

Bankruptcy—Debtor's Summons—Disputed Claim—Affidavit denying Debt—Part of Debt claimed admitted—Dismissal of Summons—Staying Proceedings—Security—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 7—Bankruptcy Rules, 1870, Rules 17, 22, 24—Bankruptcy Forms, 1870, Nos. 4, 8, 9.

When the person summoned by a debtor's summons merely denies by his affidavit that he is indebted to the summoning creditor in the amount claimed, but it appears that he admits a debt of more than 50l., there being

a bona fide dispute as to the amount, the summons ought not to be dismissed, but the proceedings upon it ought to be stayed pending the trial of the validity of the debt claimed.

An affidavit in the above form, though not strictly in accordance with the provisions of section 7 of the Bankruptcy Act, 1869, yet, as it is in accordance with No. 8 of the Bankruptcy Forms, 1870, is sufficient to give the person summoned a locus standi upon an application to dismiss the summons.

This was an appeal from an order made by Mr. Registrar Hazlitt, acting as Chief Judge in Bankruptcy, dismissing a debtor's summons.

The summons was issued on the 8th of May, 1874, by Rowan, Croft & Co., shipwrights at Liverpool, against J. D. Kiddell, a merchant in London. The summons was in the form prescribed by the Bankruptcy Rules of 1870, and it claimed the sum of 3,168*l.* 1*s.* 5*d.* as due from Kiddell to Rowan, Croft & Co., according to the particulars annexed, for repairs done to a ship called the *Laura Ann*, belonging to Kiddell. Kiddell gave notice of an application to the Court to dismiss the summons, and filed an affidavit, in which he deposed, "I am not indebted to W. H. Rowan and Ralph Croft in the amount of the sum claimed in the summons." When the application came on to be heard it appeared that there was a dispute between the parties as to the amount due for the repairs of the ship. An action at law had been commenced by Rowan & Co. against Kiddell, to recover the 3,168*l.* 1*s.* 5*d.*, and Kiddell had made an application in that action to stay the proceedings on payment of 650*l.*, which he asserted was all that was in fact due from him. The plaintiffs in the action refused to accept this sum, and the application was dismissed. The registrar came to the conclusion that even if the proceedings upon the debtor's summons were ordered to be stayed, no security ought to be given by Kiddell, and ultimately he dismissed the summons without costs. Rowan & Co. appealed.

Mr. W. C. Gully for the appellants.—The affidavit of Kiddell is not a sufficient

compliance with section 7 of the Act, since it only categorically denies that he owes Rowan & Co. the sum mentioned in the summons. Consistently with that he might owe them a farthing less. He does not say that he is not indebted at all, or that his debt is under 50*l*. Therefore, according to section 7 (1), he has no *locus standi* to apply to have the summons dismissed. At any rate, as it appeared upon the hearing of the application, that a debt to the extent of 650*l*. was admitted, the summons ought not to have been dismissed. The proceedings should have been stayed, and the debtor should have been required to give security.

Rule 22 and Form No. 8 are inconsistent with section 7 of the Act.

Mr. De Gez and *Mr. Clement Higgins*, for Kiddell.—The affidavit is in accordance with Form No. 8, which has been used ever since the Act of 1869 came into operation. It is therefore sufficient to give the person summoned a *locus standi* on his application to dismiss the

(1) Section 7 provides, "A debtor's summons may be granted by the Court on a creditor proving to its satisfaction that a debt sufficient to support a petition in bankruptcy is due to him from the person against whom the summons is sought, and that the creditor has failed to obtain payment of his debt, after using reasonable efforts to do so."

"Any debtor served with a debtor's summons may apply to the Court, in the prescribed manner and within the prescribed time, to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a bankruptcy petition against him; and the Court may dismiss the summons, with or without costs, if satisfied with the allegations made by the debtor, or it may, upon such security (if any) being given as the Court may require, for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt."

Rule 22.—"There shall be endorsed on the debtor's summons, in addition to an intimation of the consequences of neglect to comply with the requisitions of the summons, a notice to the debtor that if he disputes the debt, and desires to obtain the dismissal of the summons, he must file an affidavit with the registrar, within seven days in the case of a trader, and three weeks in the case of a non-trader, stating that he is not so indebted, or only so to a less amount than 50*l*."

NEW SERIES, 43.—BANKR.

summons. But the truth is, that a debtor's summons was not intended to apply to the case of a disputed claim; it was only meant as a test of solvency. The summoning creditor ought, when there is a dispute as to the amount, to state in his summons only the amount which is not in dispute, otherwise a perfectly solvent man may be compelled to pay an unjust demand, or to have his credit seriously damaged—

Oldfield v. Dodd, 8 Exch. Rep. 578; s.c. 22 Law J. Rep. (N.S.) Exch. 144.

Mr. Gully, in reply.—

Oldfield v. Dodd (*ubi supra*)

was a case under the Bankruptcy Act of 1849. Under the present Act the *onus* is thrown on the person summoned to shew that he does not owe 50*l*. to the creditor. The form of "bond on stay of proceedings" (No. 19) is "to secure such sum or sums as shall be recovered;" it is not limited to the precise sum mentioned in the summons.

LORD JUSTICE JAMES.—I am of opinion that the registrar would have done better in this case if he had simply adjourned the summons, leaving the creditor to take such proceedings as he might be advised. The objection is rather a formidable one to the form of the debtor's affidavit, and it is very difficult indeed to reconcile that form with the language of the Act of Parliament. But there is the form, and it is the one that has been in use. No doubt attention will be drawn to it now, and some attempt will be made to make the Act of Parliament and the Rules and Forms harmonious under the change that is about to take place in bankruptcy. Probably some attempt will be made to put those forms right. That is a very desirable thing. But the form is that which has been in use ever since the year 1870. It is a printed form, and the debtor used it, and took it before the registrar, and therefore I think the registrar was quite right in saying that the debtor had a *locus standi*.

I do not think, however, having regard to the Act and the Rules, that it is absolutely essential that the registrar should be satisfied that every farthing of the debt mentioned in the summons was due,

and that the debtor's summons must fail if it is shewn that the debt due is one shilling or one penny less than the sum mentioned. I do not think that has been acted upon, or has been the practice, and I do not think it would be consistent with the Act of Parliament to introduce that as the rule;—that is to say, if the debt differs by any fraction from the debt alleged, then the whole proceeding must be void. For the bond (No. 19) required to be given as security on stay of proceedings is a bond for such sum as shall be recovered against the debtor. There is no harm done, as it seems to me, in allowing the thing to stand over for trial, because it will not necessarily result in bankruptcy if the summons is adjourned in that way. It is always competent for a man, if the verdict is found against him, to get rid of bankruptcy proceedings by paying the debt, and if he cannot pay the debt then no particular harm will happen. It is always competent to him to get rid of it, and if security is given by way of bond, then the obligors of the bond will have to satisfy the terms of the bond, and pay the amount. If no security is required either by bond or otherwise, then the man has simply to pay the debt before any proceedings are taken to adjudge him a bankrupt. Therefore I do not think any great harm could ensue by allowing the thing to stand over, there being a *bona fide* debt. This may be a very hard claim. I will not say it is an extortionate one, but it is rather a heavy claim of more than 4,000*l.* for a debt which the man had estimated at 1,600*l.* It would be for the jury to decide whether there was any alteration in the circumstances by which the amount was enlarged, or whether there was a bargain to do the work for 1,600*l.*, or a bargain to do it for a reasonable price, and, there being that *bona fide* dispute between the parties as to what the amount is, I think the registrar was quite right in not requiring any security to be given. At the same time I think it would have been right to have allowed the whole thing to stand over, to have adjourned the summons, and to have left the creditor to see what a jury would say with regard to the amount, and when the jury

had determined that question, further proceedings might be taken as the parties might be advised. I quite agree with the registrar's view that it was not a case for requiring security of any kind, but simply a case for leaving the creditor to bring an action. There was evidently good ground on the part of the alleged debtor for disputing the amount beyond the 1,600*l.*, but 600*l.* was due at the time, and probably the creditor would have been better advised if he had confined his summons to the 600*l.* But, as he has not done so, I think the only way is to leave him to bring his action. I quite agree with Mr. De Gex that it is not quite the object of the Bankruptcy Act, when there is a *bona fide* dispute between the parties, that a debtor's summons should be issued to try a question whether 1,600*l.* or 4,000*l.* is due; but the Act does not enable me to dispose of the case on that ground. Therefore the order of the registrar will be varied by staying the proceedings, but without security.

Solicitors—Messrs. Cunliffe & Beaumont, agents for Messrs. Woodburn, J. Pemberton & Sampson, of Liverpool, for the appellant; Messrs. Gamlen & Son, for the respondent.

LOKDS JUSTICES.

1874.

May 22.

June 5.

Ex parte BUTCHER;
Re MELDRUM.

Fraudulent Preference—Payee in good faith—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 92—Appeal to House of Lords.

The concluding words of section 92 of the Bankruptcy Act, 1869 (as to fraudulent preferences), which protect the rights of "a purchaser, payee or incumbrancer in good faith, and for valuable consideration," apply to persons preferred by the bankrupt, who are ignorant that they are being preferred, and not merely to third parties dealing for value with persons so preferred.

This construction is not to exclude from

protection third parties innocently dealing for value with persons who have knowingly accepted a preference.

Appeal to House of Lords not allowed in the case of a small debt on the ground that it would determine the right to larger sums.

This was an appeal from an order of the Chief Judge, reversing a decision of the Judge of the County Court at Manchester. In October, 1873, Messrs. J. S. Meldrum and A. Wylder were carrying on business in co-partnership together at Manchester, as dyers and calico printers. They had purchased the business from a Mr. Souchè, who had since died, and mortgaged the property to pay for it, but they were largely indebted to his executrix, Mrs. Souchè, for the balance of the purchase-money, and for advances made by him to enable them to carry on the business, and they were also considerably indebted to their bankers, and others who were not trade creditors.

At their annual stock-taking, in the middle of October, 1873, it appeared that they were insolvent to the amount of, at least, 22,000*l.*, and they gave notice to determine the lease of the premises where their business was carried on, and instructed their confidential clerk to sell all the rollers, trade machinery and stock-in-trade, and pay the trade debts, but not to pay the sums due from them to Mrs. Souchè or their bankers, or other creditors not being trade creditors. Afterwards, between the 25th of October and the 25th of November, 1873, they purchased from Messrs. Stead, from whom they had frequently purchased goods, goods to the value of 190*l.* These goods were purchased on what are known as "Manchester" terms, which are, that goods bought before the 25th day of a month are to be paid for on the first Tuesday in the following month; but if bought after the 25th day of the month, then on the first Tuesday in the next month but one; the purchaser, however, having the option to pay earlier, and receiving, in that case, discount at the bank rate. According to these terms, payment for the goods bought between the 25th of October and 25th of November became due on the 3rd of December. On the 22nd of November

the debtors, without solicitation, paid Messrs. Stead 186*l.* 13*s.* 9*d.* for these goods, the difference (between that sum and 190*l.*) being the discount above-mentioned. It was admitted that Messrs. Stead had no knowledge, when they received this money, that the debtors were insolvent. On or about the 22nd of November, 1873, the debtors also paid at least 3,000*l.* for trade debts, not enforceable till the January or February following, and, in some cases, without receiving any discount for the earlier payment.

On the 3rd of December, 1873, Messrs. Meldrum & Wylder filed a petition for liquidation, and Mr. Butcher, the appellant, was appointed trustee. On his application, the County Court Judge decided that the payment by the debtors on the 22nd of November to Messrs. Stead was a fraudulent preference, it being admitted that the debtors intended to prefer their trade creditors to their other creditors. The Chief Judge reversed this decision, and the trustee brought the present appeal.

Mr. Herschell and Mr. Taylor, for the appellant.—This payment was made without demand and before it was due, and it was admittedly made with a view of preferring the creditors. It therefore clearly comes within section 92 of the Act (1).

The only question is whether it comes within the concluding clause protecting the rights of "a purchaser, payee or incumbrancer in good faith, and for valuable consideration."

Before the present Act a payment, by

(1) Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 92—"Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due, from his own moneys, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same, become bankrupt within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt, appointed under this Act; but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith, and for valuable consideration."

way of preference, was voidable only, and not void—

Stevenson v. Newnham, 13 Com. B. Rep. 285; s. c. 22 Law J. Rep. (N.S.) C.P. 110.

And a transfer by the person preferred to a purchaser for value was therefore protected. By the present Act the payment is made absolutely void if bankruptcy takes place within the three months, and therefore some protection was required for any third party dealing for "valuable consideration" with the person preferred. That was the sole object of the provision, which is not intended to refer to the person preferred at all.

There is a dictum against us in

Ex parte Tempest, Law Rep. 6 Chanc. 70;

but there there was a demand on the part of the creditor, and the point that now arises was not argued or decided.

[They also referred, as to the old law, to the judgment of Parke, B., in

Kynaston v. Crouch, 14 Mee. & W. 266; s. c. 14 Law J. Rep. (N.S.) Exch. 324.]

Mr. Benjamin and Mr. Marten, for the respondents.—No doubt, under the old law, the fact that the bankrupt contemplated bankruptcy was sufficient to constitute a fraudulent preference, but now this motive is immaterial. The object of the clause is to protect *bona fide* dealings with the bankrupt. The words, "for valuable consideration," are to exclude payments on any merely voluntary debt or contract. Our construction of the statute has been already adopted—

Ex parte Tempest (ubi supra);

Ex parte Blackburn, Law Rep. 12 Eq. 358.

Payee must mean payee of the bankrupt. It was only proper to pay this debt—contracted to keep the business going—in full.

They also referred to section 94 of the Act.

Mr. Herschell, in reply.—If the law is altered as contended, an insolvent can distribute his property as he pleases.

MELLISH, L.J. (on June 5) delivered the written judgment of the Court—

The question to be determined on this

appeal is whether the trustee of Messrs. Meldrum & Wydler, liquidating debtors, is entitled to recover the sum of 186*l.* 13*s.* 9*d.* from Messrs. Lawrence & Henry Stead, upon the ground that it was paid to them by the debtors by way of fraudulent preference within three months of the liquidation. The County Court Judge of Manchester held that the trustee was entitled to recover the money, but his judgment was reversed by the Chief Judge.

Messrs. Stead have been for several years in the habit of supplying the debtors with goods, and they sold them the goods of which the price is now in question in October, 1873.

In October and November, 1873, the debtors having become aware that they were hopelessly insolvent, gave orders to one of their clerks to sell their stock-in-trade and other property, and with the proceeds to pay their ordinary trade creditors, but not to pay certain particular creditors, to whom they were largely indebted for advances. On the 22nd of November, 1873, the 186*l.* 13*s.* 9*d.* was paid by one of the clerks, in pursuance of these instructions, to Messrs. Stead.

It is unnecessary to describe the facts in greater detail, because we are clearly of opinion, on the evidence, that the payment was a payment made by persons unable to pay their debts as they became due from their own moneys in favour of Messrs. Stead, with a view of giving Messrs. Stead a preference over their other creditors, within the 92nd section of the Bankruptcy Act, 1869. But we are at the same time of opinion that Messrs. Stead received the money in the ordinary course of business, and without any notice that Messrs. Meldrum & Wydler were insolvent, or that they (Messrs. Stead) were being preferred to the other creditors. The question to be determined is whether, under these circumstances, Messrs. Stead are protected by the proviso at the end of the 92nd section, by which it is enacted—"But this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith, and for valuable consideration."

On the part of the appellant, it was argued that the object of this proviso was

simply to protect purchasers and mortgagees to whom property was transferred by creditors who had received the same from their debtors by way of fraudulent preference, and that the creditors themselves were not included in the proviso at all. It was said that the conveyance and transfer of property being made absolutely void and not merely voidable, it was necessary to protect such purchasers and mortgagees, and *Stevenson v. Newnham* (*ubi supra*) was referred to. On the part of the respondents, it was contended that, although the proviso might have the effect of protecting purchasers and mortgagees claiming under the creditors preferred, yet the main object of the proviso was to protect the creditors preferred themselves if they were no party to any fraud upon the general body of the creditors; that the legislature have thought it unjust that a creditor who has done nothing except receive payment of his debt, apparently made to him in the ordinary course of business, should be obliged to return the money. The Chief Judge has always been strongly of this opinion. In *Ex parte Blackburn* (*ubi supra*), he says—"It is provided that the enactment, making void the payment, shall not affect the rights of a payee in good faith and for valuable consideration, a provision which was obviously just, and not more just than necessary, in order to avoid the inconveniences which would arise in the commercial world, and even beyond its pale, if persons receiving payment of their just demands, received such payment at the risk of having to refund it, in consequence of the improper motive actuating their debtor, but of which motive they had no cognisance, and in which they had in no degree participated."

In the still earlier case of *Ex parte Tempest* (*ubi supra*), we both expressed an opinion that a creditor, who had received a conveyance of property in consideration of a sum of money, which was to be set off against a debt, would, even if the transfer had on the part of the debtor been a fraudulent preference, have been protected by the proviso as a purchaser in good faith and for a valuable consideration. It is true that the opinion we so expressed was not necessary for the de-

cision of the case then before us, and that neither in this case, nor in *Ex parte Blackburn* (*ubi supra*), was the construction now contended for—viz., that the words purchaser, payee or incumbrancer do not apply to the creditor preferred at all, but only to third persons claiming under him, suggested either by counsel or by the Court, and we think, therefore, that we are not absolutely protected by authority from adopting the construction contended for by the appellants, if we come to the conclusion that it is the correct one. At the same time we must give considerable weight to the fact that the construction of the section by which the creditor preferred is entitled to the benefit of the proviso has been acted upon for several years. It was argued that, if the creditor preferred was entitled to the benefit of the proviso, the law respecting fraudulent preference would be practically repealed. We think this statement is an exaggeration. In a large number, probably the majority, of cases in which a creditor, or a class of creditors, is preferred by a debtor on the eve of bankruptcy, the creditor preferred is perfectly well aware that the debtor is insolvent, and that he is being preferred over the other creditors. We think, indeed, that both the constructions contended for are in themselves perfectly rational, and that there is no reason for rejecting either of them on account of any consequences which would follow from adopting it.

The real question to be determined is, what is the natural construction of the words used by the legislature? Now, it was argued for the respondents, that the creditor preferred is not in terms excluded, and that, if he is to be excluded, words must be inserted in the proviso which are not there. On the other hand, it was said that the words, "purchaser, payee or incumbrancer," are themselves words which naturally apply rather to a transferee from the creditor than to the creditor himself. The words "purchaser" and "incumbrancer" seem certainly apt words to describe a person who has purchased the property transferred from the creditor, and a person with whom the property transferred has been pledged. They are not, however, necessarily con-

fined to such a person. A debtor wishing to prefer a particular creditor might offer to sell part of his stock to him in the ordinary way of business, and the creditor might agree to purchase it, and so obtain a set-off, without the least knowledge on his part that the debtor was insolvent, or that he was being preferred over the other creditors. The legislature may well have thought that such a purchaser ought to be protected. There was a good deal of argument on the meaning of the word "payee." We think it is clearly opposed to the word "payer," as "vendee" is to "vendor," "mortgagee" to "mortgagor," "indorsee" to "indorser;" and that, as "payer" means a person who makes a payment, so "payee" means a person to whom payment is made. Now, this being the meaning of the word, it is very difficult to exclude the creditor preferred who receives payment of his debt. It was said that it was intended to protect a person to whom the creditor preferred might transfer a bill or cheque given in payment of his debt. This is not a very natural meaning of the word. Possibly, if the creditor preferred used a cheque given to him by the debtor in payment of a debt of his own, the person receiving the cheque might be described as a payee; but we can hardly think that the word "payee" was inserted in the proviso for the sole purpose of describing such a person. It was also argued that the words "for valuable consideration" were perfectly useless if the object was to protect creditors, as every creditor must necessarily be a creditor for valuable consideration. There may, however, be creditors by bond or covenant who have given no consideration, and these words may also have been inserted to prevent persons to whom the creditor preferred may have made an assignment without consideration obtaining the benefit of the proviso; for we think it by no means follows that if the proviso extends to the creditors preferred it may not also extend to protect purchasers from such creditors, in cases where the creditors themselves are not protected from having had notice of the fraudulent nature of the transaction as respects the general body of the creditors.

On the whole, we are of opinion that the judgment of the Chief Judge ought to be affirmed, and that the appeal must be dismissed with costs (2).

Solicitors—Messrs. Grundy & Kershaw (Manchester), for appellant; Messrs. Pritchard, Englefield & Co., agents for Messrs. Boote & Edgar, Manchester, for respondents.

JAMES, L.J. }
1874.
March 20.

Ex parte TATE;
Re KEYWORTH.

Bankruptcy—Action on Bill of Exchange—Money paid into Court to abide the Event—Liquidation of Affairs of Defendant—Right to Money in Court.

The defendants in an action upon a bill of exchange paid a sum of money into Court to abide the event. The matters in dispute were subsequently referred to arbitration, and before any award had been made by the arbitrator, the defendants went into liquidation of their affairs by arrangement. The trustee in the liquidation claimed the money in Court:—Held, that the plaintiff in the action was entitled to be paid thereout the amount of his debt and costs, and there must be an inquiry to ascertain this amount.

This was an appeal from the decision of the Chief Judge in Bankruptcy.

Messrs. Keyworth & Co., shipowners of Liverpool, were the acceptors of a bill of exchange for 1,200*l.*, drawn upon them and indorsed to Messrs. Tate & Co. The bill having arrived at maturity and been dishonoured, Tate & Co., in July, 1873, commenced an action at law against

(2) Subsequently (on June 12) Mr. Herschel made an application for leave to appeal to the House of Lords, on the ground that although only 168*l.* was the subject of the present proceedings, yet that really more than 3,000*l.* depended upon the decision. Their Lordships refused the application, saying that it would be very hard upon Mr. Stead, who had succeeded in two appeals, and whose costs, if an appeal was allowed, would be more than the debt, whether he was successful or not in the appeal. If it was wished to settle the point of law for the benefit of the public, it must not be done at the suitor's expense.

Keyworth & Co. for the amount. The defendants obtained an order under section 2 of the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), that on payment into Court by them of 880*l.* to abide the event, they should be at liberty to appear and defend the action. The 880*l.* was paid into Court, and the defendants shortly afterwards obtained an order referring the matters in dispute in the action to arbitration.

In September, 1873, before the arbitrator had made his award, Messrs. Keyworth & Co. filed, in the Liverpool County Court, a petition for liquidation of their affairs by arrangement. A liquidation was resolved upon, and a trustee therein appointed.

On the 5th of November, 1873, the trustee applied to the Judge of the County Court for an order to restrain the proceedings in the action and arbitration, and for a declaration that the 880*l.* in Court belonged to him. The County Court Judge made an order that the 880*l.* belonged to the trustee, and that the plaintiff in the action should consent to the payment out of that sum to the trustee. Upon appeal from this order, by Messrs. Tate & Co., the Chief Judge in Bankruptcy reversed the order; and being of opinion that Messrs. Tate & Co. were entitled to have the amount of their debt and costs paid out of the 880*l.*, directed an inquiry as to the amount so payable. The trustee appealed.

Mr. Benjamin and *Mr. Bigham*, for the appellant.—The respondents were not secured creditors, within the meaning of the 16th section of the Bankruptcy Act, 1869.

[JAMES, L.J.—Where did the Court of Bankruptcy obtain jurisdiction to make an order that the parties to an action should consent to the payment of any money out of Court?]

The Queen v. Roberts, 43 Law J. Rep. (N.S.) M.C. 17; s. c. Law Rep. 9 Q.B. 77;

Ex parte Greenway, 42 Law J. Rep. (N.S.) Bankr. 110; s. c. Law Rep. 16 Eq. 619,

were cited.

[JAMES, L.J.—The money in Court is a deposit *in medio*, to abide the event of the

action. It is in the same position as where, under an order of this Court, in a suit for an injunction to restrain an action at law, the amount claimed in the action is paid into Court by the plaintiff. It belongs to the party eventually found to be entitled to the sum in dispute.]

Mr. Benjamin said if that was his Lordship's view, he could not press the case further.

Mr. North appeared for the respondents.

JAMES, L.J.—The appeal must be dismissed, with costs.

Solicitors—*Mr. J. H. Lydall*, agent for Messrs. Martin, of Liverpool, for appellant; *Mr. W. Wynne*, agent for Messrs. Simpson & North, of Liverpool, for respondents.

BACON, C.J. }
1874.
April 27. }

Ex parte TAYLOR;
Re MORRISY.

Liquidation—Receiver—Action by Debtor—Registration of Resolutions—Bankruptcy Rules, 1870, r. 260.

M. filed his petition for liquidation and a receiver was appointed. At the first meeting of creditors the principal debtor, *T.*, was not allowed to vote, because *M.* stated that *T.* was indebted to him in a larger sum than he owed to *T.* The Registrar refused to register the resolutions passed at this meeting because *T.* had not been allowed to vote. *M.* then brought an action against *T.* for the amount of his debt. *T.* applied to the County Court to restrain the action but the application was refused because the liquidation proceedings were at an end. *T.* appealed:—Held that, as the receiver had not been discharged, the proceedings were still pending.

Held, also, that the injunction to restrain the action would be granted, but only on *T.*'s undertaking to revive the proceedings.

This was an appeal from a decision of the Registrar of the Salford County Court.

By a contract dated the 26th of February, 1873, *Morrisy*, a builder, agreed with *George* and *John Taylor* to convert some dwelling-houses into shops for 986*l.* *Morrisy* failed to complete the contract

by the time appointed, and in accordance with one of the stipulations in the contract, Messrs. Taylor completed the works themselves.

In January, 1874, Morrissey filed a petition for liquidation, and a receiver of his property was at once appointed.

At the first meeting of creditors a proof was tendered on behalf of Messrs. Taylor for 250*l.* at the least, for damages for breach of contract. Morrissey, however, claimed that a larger amount than this was due to him under the contract for work done, and at the meeting Messrs. Taylor's proxy was forcibly turned out of the room and was not allowed to vote. Resolutions were then carried in favour of liquidation.

On the 11th of February an application to register the resolutions was opposed by Messrs. Taylor, and refused by the Registrar on the ground that Messrs. Taylor had not been allowed to vote.

On the 16th of February Morrissey commenced an action against Messrs. Taylor to recover the balance due to him under the contract. Messrs. Taylor then applied to the County Court for the appointment of a receiver and manager of Morrissey's estate, and for an injunction to restrain him from proceeding with the action.

The Registrar, however, declined to grant the application on the ground that the petition was at an end when he had refused to sign the resolutions, and that he had therefore no jurisdiction.

From this decision Messrs. Taylor appealed.

Mr. De Gez and *Mr. Brough*, for the appellant.—The proceedings were not at an end by the refusal of the Registrar to register the resolutions; they were still pending—

Ex parte Jeffery; re Hawes, ante, 27; s. c. Law Rep. 9 Chanc. 144.

A receiver had been appointed and had not been discharged, and it was his duty to take any necessary proceedings—

Ex parte Jay; re Powis, ante, 54; s. c. Law Rep. 9 Chanc. 138.

The proceedings might have been renewed on the application of any creditor that a fresh first meeting should be called—

Ex parte Cobb; re Sedley, 42 Law J. Rep. (N.S.) Bankr. 63; s. c. Law Rep. 8 Chanc. 727.

Mr. Jordan, for the debtor.—The Court has no power to restrain the debtor from bringing an action; rule 260 only gives power to restrain actions against debtors. The real object of the debtor in bringing this action is to enforce his claim against the creditor who is now appealing, and he wants to recover the money due to him that he may distribute it among his creditors. An undischarged bankrupt may sue till some one interferes, and perhaps in this case no one will interfere; the receiver cannot, and no trustee has been appointed—

Herbert v. Sayer, 5 Q.B. Rep. 965; s. c. 12 Law J. Rep. (N.S.) Q.B. 286;

Robson on Bankruptcy, p. 451.

It was too late to call a fresh first meeting of creditors.

BACON, C.J.—A receiver has been appointed and no order has been made by the Court to discharge him, and so long as he remains undischarged the liquidation proceedings cannot be said to be determined. The debtor, moreover, has committed an act of bankruptcy which is available against him for adjudication, and he is therefore disqualified from suing for any debt owing to him, because it would not be safe for any person to pay him. It would be impossible to allow a debtor who avows himself insolvent to have a right to bring actions. When a receiver has been appointed it is his duty to do this. Something, however, must be done to revive the proceedings, and I think the appellant should undertake to apply for leave to summon a fresh first meeting within a fortnight, or to present a petition for adjudication. Upon his doing so I will discharge the order of the Court below. There will be no costs.

Mr. De Gez gave the undertaking.

Solicitors — Messrs. Hughes & Son, agents for Messrs. Vaughan & Son, Manchester, for the appellant; Messrs. Edwards, Layton & Jaques, agents for Mr. Hampson, Manchester, for the respondent.

BACON, C.J. }
 1874. }
 May 4. } *Ex parte WILLIAMS;*
 Re WILLIAMS.

Bankruptcy Rules, 1870, r. 273—Composition—Right to take Proof off the File.

W. tendered a proof of a debt, and voted at a first meeting in favour of a composition. At the second meeting, being advised that his proof might prejudice a security he held, he desired to withdraw it. The composition fell through, and therefore the vote at the first meeting had no effect. The Registrar declined to allow the proof to be taken off the file:—Held, that under the circumstances the proof might be taken off the file.

This was an appeal from the County Court of Buckinghamshire, holden at Aylesbury.

James Williams, by his will, gave his property to his wife for life, and then to his children living at the death of his wife, or their children in case they died in the lifetime of his wife, leaving children. Under this will R. C. Williams became entitled to a reversionary interest in a share of his father's property contingent on his surviving his mother.

In 1871 and 1872, the trustees of the will advanced R. C. Williams 459*l.* on account of his reversionary interest.

On the 24th of January, 1874, R. C. Williams filed his petition for liquidation or composition. At the first meeting of creditors held on the 7th of February, George Williams, one of the trustees, tendered a proof for 509*l.*, being the amount of the advance and interest. He then voted at that meeting, and a resolution was passed in favour of accepting a composition of ten shillings in the pound.

The proof was tendered by George Williams without the advice or consent of his co-trustee, and he was afterwards advised that the proof would prejudice his right to repayment out of the reversionary interest of the debtor under the will.

At the next meeting of creditors held on the 27th of February, George Williams, by his solicitor, stated his intention to withdraw the proof, and he took no part in the proceedings at that meeting.

The composition fell through and the creditors resolved on liquidation; the

NEW SERIES, 43.—BANKR.

votes, therefore, which George Williams gave in favour of composition could have had no effect at all.

The Registrar refused to allow the proof to be withdrawn, and from this decision George Williams appealed.

Mr. Robson, for the appellant.—No one can be prejudiced by this proof being withdrawn, whereas the co-trustee may be prejudiced by its being retained on the file.

There can be no reason why it should not be withdrawn as the appellant's votes exercised no influence—

Bankruptcy Rules, 1870, r. 273;

Re Sir W. Russell, 22 Law Times Rep. N.S. 451.

Mr. Bagley, for the trustees.

BACON, C.J., considered that under the circumstances, he should do no good by retaining the proof on the file, but that it would be an advantage to all parties that it should be withdrawn. He therefore gave the appellant leave to take the proof off the file on payment of all the costs caused by the mistake, including the costs of the appeal.

Solicitors—Messrs. Allen & Edwards, agents for Mr. Bedford, of Amersham, for appellant; Messrs. Denton, Hall & Barker, agents for Mr. H. C. Cheese, Amersham, for respondents.

SELBORNE, L.C. }	
MELLISH, L.J. }	<i>Ex parte MACKAY;</i>
1873. }	<i>Re JEAVONS.</i>
Dec. 19. }	
CAIRNS, L.C. }	
JAMES, L.J. }	<i>Ex parte BROWN;</i>
MELLISH, L.J. }	<i>Re JEAVONS.</i>
1874. }	
Feb. 27. }	

Practice—Rehearing.

A registrar sitting as Chief Judge has a discretion to rehear a case even after an appeal from his decision, if the point upon which a rehearing is desired is unaffected by the appeal. But an application for a rehearing ought, in ordinary cases, to be made within the time fixed by the 143rd

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of the Bankruptcy Rules of 1870 for entering an appeal; and where a long delay is unaccounted for a rehearing will not be granted.

In these cases, which will be found reported in 42 Law J. Rep. (N.S.) Bankr. 68, on appeal from an order of Mr. Registrar Spring Rice, sitting as Chief Judge, an order had been made on the 15th of March, 1873, the correctness of which was not disputed upon the appeal, declaring that Messrs. Brown & Co. and Messrs. Cammell & Co. were entitled, under a mortgage of the factories of the liquidating debtor in the Isle of Dogs, which he held under an agreement for a lease, with the fixed machinery and trade fixtures, but which mortgage was not registered as a bill of sale under the 17 & 18 Vict. c. 36, to a charge on such machinery and fixtures. On the 25th of July, 1873, the case of *Ex parte Daglish; re Wilde* (42 Law J. Rep. (N.S.) Bankr. 102) was decided, overruling *Boyd v. Shorrocks* (37 Law J. Rep. (N.S.) Chanc. 144; s. c. Law Rep. 5 Eq. 72); and holding that a mortgage by a leaseholder of his tenant's fixtures with his lease required registration as a bill of sale of fixtures. The solicitors for the trustee in liquidation, shortly after that decision, on the 28th of July, 1873, wrote to the solicitors for Messrs. Brown & Co. and Messrs. Cammell & Co., drawing their attention to it, and claiming that the trade fixtures were covered by the decision, and some correspondence ensued, but nothing was done till the 21st of November, when the solicitors for the trustee gave notice to the solicitors for Messrs. Brown & Co. and Messrs. Cammell & Co. of their intention to apply to the registrar for a rehearing of the order of the 15th of March so far as related to the trade fixtures. The application was accordingly made to the registrar, but he considered that the matter having been before the Lords Justices upon appeal he had no power to rehear it, although the order upon the appeal did not affect the part of the order which was the subject of the present application. He therefore declined to rehear the case without the direction of the Court of Appeal.

Mr. De Gex and Mr. Finlay Knight accordingly (on Dec. 19) mentioned the matter to

THE LORD CHANCELLOR (LORD SELBORNE) and LORD JUSTICE MELLISH, who held that the registrar was entitled to exercise his discretion and to rehear the case notwithstanding the previous appeal.

Thereupon the registrar, in the exercise of his discretion, made an order directing that so much of the order of the 15th of March, 1873, as declared that Messrs. Brown & Co. and Messrs. Cammell & Co. were entitled to a valid charge on the machinery engines and plant, in the nature of trade fixtures belonging to the debtor, should be reheard before him.

Messrs. Brown & Co. and Messrs. Cammell & Co. appealed from this order.

Mr. Fry and Mr. Henderson, for the appellants.—The application for a rehearing is made too late. If it had been an appeal it would have been necessary, under the 143rd Rule of 1870, to enter it within three weeks after the decision or order was made, and the rule as to rehearings ought to be the same.

Mr. De Gex and Mr. Finlay Knight, for the respondent.—The rule limiting the time within which an appeal must be entered has no application to a rehearing before the same Judge, the question being entirely one for his discretion. There has been no unreasonable delay. We should not have been justified in applying before the case of *Ex parte Daglish (ubi supra)* was decided.

THE LORD CHANCELLOR (LORD CAIRNS).—I have no doubt that a rehearing in this case would be extremely improper. The order of the registrar was made on the 15th of March, 1873, and was not challenged by any notice of application to vary or reverse it until the 21st of November following, that is, eight months afterwards. I will assume, in favour of Mr. De Gex's client, that the Court has jurisdiction, by means of a rehearing, to operate upon and vary the order if necessary, and I will assume that the decision in *Ex parte Daglish, re Wilde (ubi supra)* gave him a new period of departure.

But even assuming this, which is only an assumption, the case cannot be put higher than if the decision in this case had been given on the 26th of July, the day after the decision in *Ex parte Daglish* (*ubi supra*), in which case he would have had only twenty-one days for appealing. It cannot be said that his attention was not drawn to that case; for on the 28th of July his solicitors wrote to Messrs. Ashurst, Morris & Co. referring to it; and it appears to me that we should be departing from our duty if we did not adopt as our guide the intention of the legislature shewn in fixing the limit in the case of appeals. I do not say the Court is bound by any express enactment because rehearings are not mentioned in the Act, but the granting of a rehearing is a matter of indulgence, and must be carefully guarded, otherwise parties would gain indirectly, by means of a rehearing, the benefit of an appeal after the expiration of the time for appealing. The trustee has not accounted for the delay from the 26th of July to the 21st of November, and I think the rehearing ought not to be allowed.

THE LORDS JUSTICES concurred.

Solicitors—Mr. E. M. Hore, for the appellants;
Messrs. Wilkinson & Howlett, for the trustees
in bankruptcy.

LORDS JUSTICES. }
1874. } *Ex parte JAMES; In re*
July 10. } CONDON.

Trader—Execution Creditor—Liquidation Petition—Notice to Sheriff—Failure of Creditors to pass Resolutions—Trustee in Bankruptcy—Payment under Mistake of Law—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 87, 125—Bankruptcy Rules, 1870 (rules 266, 267).

Execution for a debt above 50l. was levied on the goods of a trader on the 17th of November. On the 18th of November the debtor filed a liquidation petition. On the 22nd of November the sheriff sold, and the same day notice of the petition was served on him. On the 16th of December the cre-

ditors met, and separated without passing any resolutions. On the 17th of December the sheriff paid the proceeds of the sale to the execution creditor. On the 19th of December a petition in bankruptcy was presented against the debtor, stating the filing of the liquidation petition and the proceedings thereunder, and on the 10th of January an adjudication was made:—

Held, that the proceedings under the liquidation petition came to an end on the 16th of December, and that, consequently, the execution creditor was entitled to the proceeds of the sale.

On the 23rd of February the execution creditor, upon the authority of a decision of the Court of Appeal, which was afterwards reversed, paid the proceeds of the sale to the trustee under the bankruptcy:—

Held, that though this was a voluntary payment made under a mistake of law, yet the trustee, being an officer of the Court, was bound to repay the money to the person properly entitled to it.

An application for an adjudication under rule 267 ought to be made by petition.

This was an appeal from a decision of Mr. Registrar Roche, acting as Chief Judge in Bankruptcy.

On the 14th of November, 1873, Henry Bradshaw signed judgment in an action at law against John Condon, a coal merchant, for 274*l.* 3*s.* 5*d.* debt and costs. On the 15th of November a writ of execution on the judgment was lodged with the sheriff of Middlesex, who, on the 17th of November, seized some goods belonging to Condon. On the 18th of November Condon filed a liquidation petition. On the 22nd of November, notice of the petition was given to the sheriff, who, on the same day, sold the goods which he had seized, realising thereby the sum of 142*l.* 15*s.* 6*d.* On the 5th of December the first meeting of the creditors under the petition was held, and it was adjourned to the 16th of December. On the 16th of December the adjourned meeting was held. Neither the debtor nor his attorney was present, and no resolution was passed by the creditors. In fact, no resolution was put to the meeting. On the 17th of December the sheriff paid the proceeds of the sale to

Bradshaw. On the 19th of December a petition in bankruptcy was presented against Condon, the act of bankruptcy alleged being the filing of the liquidation petition, the proceedings under that petition being also stated; and on the 10th of January, 1874, he was adjudicated a bankrupt, and R. E. James was subsequently appointed trustee. On the 23rd of February Bradshaw having been advised that, according to the decision of Lord Justice Mellish, on the 20th of February, in

Ex parte Villars, 43 Law J. Rep. (N.S.) Bankr. 76,

he was not entitled to retain the proceeds of the sale, paid the 142*l.* 15*s.* 6*d.* to the trustee. The decision in

Ex parte Villars (*ubi supra*), was, on the 8th of May, reversed on a rehearing by the Full Court of Appeal (43 Law J. Rep. (N.S.) Bankr. 78), and Bradshaw then claimed to have the 142*l.* 15*s.* 6*d.* repaid to him by the trustee. The trustee refused to repay it, and an application was made to the Court. The Registrar ordered the money to be refunded, and from this order the trustee appealed.

The Hon. A. Thesiger and Mr. E. O. Willis, for the appellant.—This case is not covered by the decision in

Ex parte Villars (*ubi supra*).

There the sale by the sheriff was before the act of bankruptcy on which the adjudication was made. Moreover, in the present case, the adjudication was made under the power given to the Court by rules 266 and 267 of 1870 (1). The Chief

(1) Rule 266: Where proceedings have been instituted for liquidation or composition, the Court may adjudicate the debtor bankrupt if, in the opinion of the Court, the property of the debtor cannot be sufficiently protected by the exercise of the power hereinbefore given to restrain suits and actions, and the appointment of a receiver or manager; but in any such case all proceedings under such order of adjudication shall be stayed immediately upon the making thereof, and until the creditors shall have passed some special or extraordinary resolution in reference to the liquidation or composition; and in the event of any such resolution being duly passed, the adjudication shall be forthwith annulled. Rule 267: In the event of any neglect on the part of the creditors to pass such resolution the Court may, on the application of any of the creditors, and after notice to the

Judge has decided that the application mentioned in rule 267 must be made by petition, stating the filing of the liquidation petition and the proceedings under it—

In re Jones, Law Rep. Weekly Notes, 1870, p. 71;

and this course was adopted in the present case. The proceedings under the liquidation petition, of which the sheriff had notice within the fourteen days, were not finally at an end when the creditors failed to pass any resolutions at the meeting on the 16th of December, and the subsequent adjudication of bankruptcy must be taken to be a continuance of the same proceedings which were commenced by the liquidation petition—

Ex parte Jeffery, *ante*, p. 1; s. c. Law Rep. 17 Eq. 61; s. c. (on app.) *ante*, p. 27; s. c. 9 Chanc. 144;

Ex parte Taylor, Law Journal, Notes of Cases, 1874, 82; *ante*, p. 103; Bankruptcy Rules, 1870, Rule 292.

The act and the rules are to be construed together, and the rules which regulate the procedure under a liquidation petition must be looked at to determine whether liquidation proceedings were pending at a particular time. At any rate the execution creditor having voluntarily paid the money to the trustee under a mistake as to the law, cannot recover it back from him—

Brisbane v. Dacres, 5 Taunt. 143;

Steele v. Williams, 8 Exch. Rep. 625; s. c. 22 Law J. Rep. (N.S.) Exch. 225.

Mr. De Gex and Mr. Finlay Knight, for the execution creditor.—Under a liquidation petition the appointment of a trustee is the equivalent to an adjudication under a bankruptcy petition—Bankruptcy Act, 1869, sect. 125, sub-sect. 7. Here, at the meeting on the 16th of December, the whole thing came to an end. No resolution was passed, or was even put to the meeting. A trustee could never have been appointed. There could not be a fresh meeting summoned—

Ex parte Cobb, 42 Law J. Rep. (N.S.)

debtor, make an order of adjudication against the debtor, or direct the bankruptcy to be proceeded with, as the case may be.

Bankr. 63; s. c. Law Rep. 8 Chanc. 727.

The adjudication afterwards made was in no sense made under the liquidation petition, but under a wholly independent petition, presented after the liquidation proceedings were at an end. The adjudication was made upon the act of bankruptcy committed by filing a declaration of insolvency which happened to be contained in the liquidation petition—

Ex parte Duignan, 40 Law J. Rep. (N.S.) Bankr. 33, 68; s. c. Law Rep. 6 Chanc. 605.

The bankruptcy petition was, in fact, nothing but a petition alleging the declaration of insolvency as an act of bankruptcy. The debtor was not adjudged bankrupt on any petition of which the sheriff had notice when he paid the money over, and therefore the execution creditor was entitled to retain it. Any creditor might have intercepted the money by filing a bankruptcy petition before the expiration of the fourteen days and giving the sheriff notice, and the creditors are bound to use diligence if they wish to deprive an execution creditor of his legal rights—

Ex parte Villars (ubi supra).

As to the other point, the cases cited do not apply, for a trustee in bankruptcy is an officer of the Court, and is bound to pay the money to the person who is really entitled to it—

Re Saxon Life Assurance Society, 2 J. & H. 408;

Stone v. Godfrey, 5 De Gex, M. & G. 76; 1 Sm. & G. 590; s. c. 23 Law J. Rep. (N.S.) Chanc. 796;

Ex parte Bailey, 41 Law J. Rep. (N.S.) Bankr. 1; s. c. Law Rep. 13 Eq. 314;

was also cited.

The Hon. A. Thesiger replied.

JAMES, L.J., said, I am of opinion that the order of the Registrar ought to be affirmed. I adhere to the opinion which I expressed in *Ex parte Villars (ubi supra)*, that the legal rights of the execution creditor ought to be respected, except so far as they are interfered with by the Bankruptcy Act. In levying his execution he has only done what by law

he is entitled to do, and the *onus* is clearly thrown upon the person who asserts that he ought not to be allowed to keep the fruits of his execution to shew that his legal rights have been taken away. In this case I think it is impossible to say that the adjudication was, within the meaning of section 87, made upon any petition of which the sheriff had notice before he paid the money over to the execution creditor. I agree that the result of what took place at the meeting on the 16th of December was, that the proceedings under the liquidation petition came to an end. There was nothing in the nature of a resolution of the creditors; nothing which could result in the appointment of a trustee. Any creditor might, if he had chosen to do so, have presented a bankruptcy petition within the fourteen days, and thus have intercepted the right of the execution creditor. I think that the execution creditor was entitled to retain the proceeds of the sale.

With regard to the other point, that the money was paid back to the trustee voluntarily, under a mistake of law, not of fact, I think that that principle must not be pressed too much. I am of opinion that a trustee in bankruptcy is in truth an officer of the Court. The Court regards him as its officer, and the money in his hands is subject to a trust in favour of the person really entitled to it. The Court finding that this money really in equity belongs to the applicant, ought to set an example to the world of doing equity just as it would expect it to be done, and ought to order the trustee to pay the money to the person who is really entitled to it. The appeal must be dismissed, but without costs.

MELLISH, L.J., said, I am of the same opinion. This case is not to be distinguished from *Ex parte Villars (ubi supra)*. Section 87 must be read as if a liquidation petition as well as a bankruptcy petition had been mentioned in it, and therefore no doubt when the sheriff received notice of a liquidation petition having been filed by this debtor, he was bound to keep the proceeds of the sale in his hands until he knew whether the proceedings under the petition had come to an end or not. The question is, what in the case of a liquida-

tion petition corresponds to an adjudication under a bankruptcy petition? Section 87 says, in effect, that the sheriff is to hold the proceeds of sale until it is ascertained whether the trader against whom the bankruptcy petition has been presented is or is not adjudicated bankrupt on such petition, or on any other petition of which the sheriff has notice; and section 125, sub-section 7, provides that the appointment of a trustee under a liquidation shall be deemed to be equivalent to an order of adjudication in bankruptcy. I am of opinion that when the creditors came to the meeting on the 16th of December, and at once dispersed without any resolution being put, all the proceedings under the liquidation petition at once came to an end. It was impossible then that a trustee could be appointed under the petition.

But it is argued that the debtor could be, and that he in substance was, under the provisions of the 267th rule, adjudicated a bankrupt on the liquidation petition, and it is said that the sheriff ought to have held the proceeds of the sale until he saw whether this was done or not. But this would be a very inconvenient construction to put upon section 87; for the consequence would be that the sheriff must keep the proceeds of sale in his hands for six months, because at any time within that period a bankruptcy petition, founded upon the filing of the liquidation petition, might be presented against the debtor. Then it is argued that rule 267 only requires that an application should be made to the Court for an adjudication upon notice to the debtor, not that a petition should be presented. But I think that it is not competent to apply the rules so as to take away any of the rights which are secured to an execution creditor upon the true construction of the Act. I think also that section 125 does not contemplate that a debtor who has filed a liquidation petition should be adjudged a bankrupt upon that petition, unless it be under the provisions of sub-section 12. But it is not necessary to decide that point now, for sub-section 12 evidently applies only to a case where the creditors have passed resolutions in favour of a liquidation. I am of opinion that the

Chief Judge has rightly held that an application under rule 267 should be made by petition. But, at any rate, the rights of an execution creditor cannot be affected by anything contained in the rules. I am of opinion that as soon as it became impossible that a trustee could be appointed under the liquidation petition, as it did when the creditors dispersed on the 16th of December without passing any resolution, the sheriff was justified in paying over the money to the execution creditor, and it cannot be recovered from him. I agree also in what the Lord Justice has said on the other point.

JAMES, L.J.—This seems a very proper case for the trustee to have his costs of the appeal out of the estate, but it is not our practice to make such an order. The appeal will be dismissed, but without costs.

Solicitors—Messrs. Chorley & Crawford, for the trustee; Messrs. Ravenscroft & Hills, for the creditor.

BACON, C.J. }
1874.
May 25. }

Ex parte BOSS;
Re WHALLEY.

Debtor's Summons—Adjudication—Tender of Amount due under Summons after Petition—Bankruptcy Act, 1869, ss. 8, 9, and 80, sub-section 10.

When an act of bankruptcy has been proved, and a petition for adjudication presented, the creditor is not bound to accept an offer of payment of the debt, but is entitled to an order for adjudication.

Under such circumstances an adjournment of the petition, in order to give the debtor time for payment was held not to be warranted by section 8 of the Bankruptcy Act, 1869.

This was an appeal from an order made by the Registrar of the County Court at Wrexham, sitting as Judge. Mr. Albert Boss, the appellant, is an army agent, carrying on business at No. 7, Sackville Street, Piccadilly. On the 7th of June, 1873, Mr. Hampden Whalley accepted a bill drawn by Boss, and payable three months after date, for 360*l*. On the 14th

of July, 1874, Hampden Whalley accepted another bill drawn by Boss, and payable in three months, for 75*l*. Interest under both bills was, in default of payment, charged at the rate of five per cent. per month. The bill for 75*l*. became due on the 17th of October, and as it was not paid, Boss on the 3rd of November, 1873, issued a debtor's summons against Hampden Whalley in respect of the amount due under that bill. On the 26th of November, the three weeks having expired without payment by the debtor of the amount due on the summons, an act of bankruptcy had been committed, and on the 29th of November, Boss presented a petition for adjudication.

The debtor went out of England, and therefore service of the petition could not be effected, and the hearing of the petition was from time to time adjourned. Several interviews took place between the father of the debtor, Mr. George Hammond Whalley, and the appellant, and efforts were made to arrange the debt. On the 31st of January, 1874, a clerk to Mr. G. H. Whalley's solicitors attended at the office of Messrs. Beyfus and Beyfus, the solicitors of the appellant, for the purpose of paying the amount claimed under the petition, but the partners were out, and the clerk not knowing the amount, declined to receive the sum offered. On the same day Mr. Beyfus called on Mr. G. H. Whalley's solicitors, and said that as an act of bankruptcy had been committed, he must decline to receive the amount due under the debtor's summons and the petition, and should insist on an adjudication, unless the claims of his client on the other bill were satisfied.

On the 31st of March the petition came on for hearing before the Registrar, and the Registrar declined to adjudicate the debtor bankrupt, but ordered that on payment to the petitioner within one month from that date of the 75*l*. and interest, at the rate reserved by the bill from the 17th of October, 1873, and the costs, the petition should be dismissed.

From this order Mr. Boss appealed.

Mr. De Gez and *Mr. R. Griffiths* for the appellant.—We are entitled to an adjudication *ex debito justitiæ*—

Ex parte Claxton, 41 Law J. Rep.

(*n.s.*) Bankr. 56; *s. c.* Law Rep. 7 Chanc. 532;

Ex parte Douthat, 4 B. & Ald. 67;

Ex parte Burnett, re Blake, 2 Mont.

Deac. & De Gez, 357; *s. c.* 11

Law J. Rep. (*n.s.*) Chanc. 180;

reversing *s. c.* 1 Mont. Deac. & De

Gez, 608; *s. c.* 10 Law J. Rep.

(*n.s.*) Bankr. 45;

Ex parte Thompson, 1 Ves. 157;

Davis v. Holding, 1 Mee. & W. 159;

s. c. 5 Law J. Rep. (*n.s.*) Exch. 102;

Ex parte Jay, re Powis, 43 Law J.

Rep. (*n.s.*) Bankr. 54; *s. c.* Law

Rep. 9 Chanc. 133.

We also contend that having regard to the express terms of section 8 of the Bankruptcy Act, 1869, the Registrar had no power, after the act of bankruptcy had been committed and the petition heard, to grant the debtor time to pay.

Mr. Winslow and *Mr. Outler*, for Hampden Whalley.—Notwithstanding the presentation of the petition for adjudication the debtor is entitled to pay the debt, and have the proceedings against him stayed—

Ex parte Jay, re Powis (ubi supra);

Ex parte Weir, re Weir, 41 Law J.

Rep. (*n.s.*) Bankr. 14; *s. c.* Law

Rep. 6 Chanc. 875.

The proceedings may be stayed where a bond for the sum claimed has been given—Bankruptcy Act, 1869, section 9, and Bankruptcy Rules, 1870, Form No. 19; they may, therefore, be stayed in such a case as this, where the whole sum claimed by the petition was tendered in payment.

It was clearly within the discretion of the Registrar to make an order for staying the proceedings for any sufficient reason—

Bankruptcy Act, 1869, section 80, sub-section 10.

BACON, C.J.—I am of opinion that the view taken of the 8th section in the Court below was not the correct one. The case is extremely simple. A petition for adjudication is presented by a creditor, who now says that a larger debt is due to him than the amount specified in the petition. In the petition and in the debtor's summons it is expressed that a debt larger in amount than 50*l*. is due from the debtor,

and this is enough to sustain a petition in bankruptcy. That is how the proceedings are launched, and it is incumbent upon the creditor to shew that not less than 50*l.* is due; but a much larger debt than the amount actually mentioned in the petition may be due. So the matter stands, and as the evidence of the service of the debtor's summons appears to be complete, for I have heard no suggestion to the contrary, as a consequence the act of bankruptcy was complete at the expiration of the period limited by the statute for a debtor to pay secure or compound the sum specified in the debtor's summons. For various reasons the petition was adjourned until the day when the order under appeal was made. Upon the hearing of the petition the creditor desired that the order of adjudication should, on the grounds specified in the 8th section, be made. That section prescribes that "At the hearing the Court shall require proof of the debt of the petitioning creditor, and of the trading if necessary, and of the act of bankruptcy, or if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and if satisfied with such proof shall adjudge the debtor to be bankrupt." Nothing can be more clear and distinct than that. It is the right of the creditor upon proving those requisites, the proof of his debt, and the default in payment, which constitute an act of bankruptcy, to call for an adjudication. The clause goes on to provide, "The Court may adjourn the petition, either conditionally or unconditionally, for the procurement of further evidence or for any other just cause, or may dismiss the petition with or without costs, as the Court thinks just." That means, I suppose, that if the Judge is not satisfied with the evidence he may adjourn the hearing, or he may dismiss the petition, such an order, like all other orders, being, I suppose, the subject of appeal. There is, however, nothing in the policy of the law to render it incumbent upon a creditor, after an act of bankruptcy has been committed by the debtor, to receive payment of his debt. Even if it is tendered to him he may say, "I will not accept the money tendered to me, and will for reasons good to me prosecute the law against you, for

in the period limited by the statute you might have paid the debt, or given security, or otherwise satisfied the debt, but you have allowed the time for doing that to go by." But here the evidence on the subject of what is called the tender is very unsatisfactory. The tender was made by one clerk to another, but the clerk to whom the tender was made was not competent to deal with the subject; and then on a subsequent occasion the same proposition is made, and the debtor, or the debtor's agent, is told plainly that the debt mentioned in the petition is not the only debt which the creditor by means of the proceedings in bankruptcy is desirous of enforcing; and in that state of things the matter remains until it comes before the Registrar, when the order appealed from is made. The Registrar then being satisfied that an intention existed on the part of the debtor to pay the debt gave him time to pay it; but what authority had he for doing so? If I were to admit the validity of Mr. Winalow's and Mr. Cutler's argument it would be in the power of a debtor to stop proceedings and stay the bankruptcy upon tendering the debt, after committing an act of bankruptcy. But what was the state of the proceedings before the Registrar? There was an act of bankruptcy committed, and no valid tender made to the creditor, but only a promise to pay, and the Registrar gave time to pay, and it has been suggested that this binds the creditor, because he consented to the time mentioned in the order being enlarged, but that had no sort of bearing on the legal question to be determined. The County Court Judge could only do that which the 8th section points out. He could require proof of the existence of the debt, and of the act of bankruptcy. Both these things were proved before him, because he refers in his order to the file of proceedings which contains proof of these requisites. Then, after the commission of an act of bankruptcy, the debtor says, "I tender the amount of the debt, and if you will give me time I will pay it," and the Registrar, instead of pronouncing judgment, gave time for payment and adjourned the petition, which I do not think he had any authority to do. The

case of *Ex parte Jay* (*ubi supra*) decides nothing on this subject. There the creditor, after the period limited by the statute, took proceedings in bankruptcy. That, according to the statute and rules, he was not entitled to do, and Lord Justice Mallish, in that case, distinguished it from others where no receiver had been appointed, but that case has no application to the one before me. The question before me is, whether the act of bankruptcy having been proved and a petition presented, and the creditor desires to have adjudication made, and is prepared with evidence to sustain the adjudication, it is competent for the Registrar to say, "I am so satisfied that the debtor is ready to pay that I give him a fortnight's time," such time being afterwards enlarged to a month. I consider there was no ground whatever for such an order, and it must be discharged, and the case must go back to Wrexham, and the proceedings be continued as if no such order had been made. The deposit will be returned.

Solicitors—Messrs. Beyfus and Beyfus, for the appellant; Mr. C. B. Hallward, for the respondent.

LOrds JUSTICES.

1874.

July 3.

Ex parte VAUX;
Re CONSTON.

Reputed Ownership—Order and Disposition—Goods in Bonded Warehouse to Order of Bankrupt Vendor—Custom of Trade—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, sub-sec. 5.

At the commencement of the liquidation of some wine and spirit merchants some whisky which they had sold was lying in the bonded warehouse of a third party to the order of the vendors. The delivery order was not sent to the purchaser till after the liquidation petition had been filed. It was shewn that it is the well known custom in the wine and spirit trade for goods after sale to remain in the bonded warehouse of the vendor, or in that of a third party to his order, till the purchaser requires them for use:—Held (reversing a decision of BACON, C.J.), that the custom excluded

reputation of ownership in the vendors, and that the purchaser was entitled to the whisky, the giving of the delivery order being immaterial.

Held also, that it was immaterial that the goods were in the warehouse of a third party, instead of being in the vendor's own warehouse, as in *Ex parte Watkins* (42 Law J. Rep. (N.S.) Bankr. 50).

This was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 26th of February, 1872, Conston, Thomson & Co., who were wine and spirit merchants at Liverpool, filed a liquidation petition, under which Mr. Bolland was afterwards appointed trustee of their property. On the 9th of January, 1872, they had sold to Messrs. Vaux & Son, of Sunderland, 5 butts, 2 hogsheads and 1 quarter cask of whisky for 89*l.* 3*s.* 7*d.* An acceptance of Vaux & Son was given for the purchase money, and was afterwards paid by them. An invoice was sent them in due course, and the particular butts, hogsheads and cask were transferred into their names in the stock book of the vendors. At the time of the petition the whisky was lying in the bonded warehouse of a Mr. Muir, at Leith, to the order of Conston, Thomson & Co., and it so continued up to the presentation of the liquidation petition, no notice of the sale having been given to Muir. At the time of purchase the purchasers did not know where the goods were. A delivery order for the goods was sent by the vendors to the purchasers on the 28th of February, 1872. After the commencement of the liquidation Vaux & Son claimed to have the whisky delivered to them, but the trustee refused to give it up, and an application was made by Vaux & Son to the Liverpool County Court.

There was evidence that "it is the usual custom in the wine and spirit trade for goods to remain in the bonded warehouse of the vendor, or in bonded warehouses of other persons, subject to the order of the vendor, in the vendor's name, until required by the purchaser for use. It is a very exceptional case for a purchaser to take delivery orders of goods purchased of a wine and spirit merchant until he is in want of them, and in very

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NEW SERIES, 43.—BANKR.

many cases goods remain in the possession or to the order of vendors, either in their own bonded warehouse or in the bonded warehouse of some other person, without the duty being paid on them, for many years, the duty (which in the case of spirits is generally more than the value of the goods) not being paid till the goods are removed from the bonded warehouse for consumption, and in the meantime the spirit by age acquiring a considerably greater value."

The evidence of the above custom which was given in

Ex parte Watkins, 42 Law J. Rep. (N.S.) Bankr. 50; s. c. Law Rep. 8 Chanc. 520,

was also relied upon by Vaux & Son. The Judge of the County Court refused their application, and on appeal to the Chief Judge this decision was affirmed (1).

(1) June 1, 1874.—BAOON, C.J., said—If this were the same case as *Ex parte Watkins* (*ubi supra*) of course I should be bound by that decision. It appears, however, to me, to be materially different in point of fact. In *Ex parte Watkins* (*ubi supra*) the purchaser had got the delivery order—an acknowledgement that the goods were his—before the liquidation petition was presented. Just the contrary is the fact here. On the 26th of February the petition was filed, and it was not until the 28th of February that the delivery order was sent to the purchasers. Now, between the 26th and the 28th there is an interval of the utmost importance as relates to the law in bankruptcy. This question, and every other question relating to this particular branch of the bankruptcy law, is a question of fact to be decided by a jury, if necessary. Before the present Act of Parliament it would have been necessary to have it decided by a jury. What is the question here to be submitted to a jury? On the 26th of February there were in the warehouse goods belonging to whom? To no other person in the world but the debtors. There had been a contract to sell them as between them and the vendees, but, as between the warehouseman and all the rest of the world, if on the 27th of February instead of on the 28th the debtors had come to the warehouse and had said "give us our goods," could there be any doubt that, notwithstanding the contract which had passed the legal right to the goods to the purchasers, the actual visible possession, the plain ownership, was in the vendors? Is there any other question for me to decide? I do not, nor would I if I could, decide or insinuate anything against what I find decided in *Ex parte Watkins* (*ubi supra*). I need not trouble myself in this case to consider anything about the custom which seems to have been the very ground of the decision in *Ex parte Watkins* (*ubi supra*). I confine my-

self to the facts in the case before me. I find, as a fact, that on the 26th and on the 27th of February, beyond all doubt the goods were in the possession of the Leith warehouseman, not only with the consent of the true owner, but in the plain apparent possession of the vendors, and that if they had gone down to Leith on the morning of the 27th they might have obtained possession of the goods, or they might have transferred any interest they had in them to any person who lent them money upon them. For all practical purposes there was only one visible owner of the property, and the right to the property at that time had actually become vested in the trustee of the debtors' estate under the liquidation, and was liable to be applied for the benefit of their creditors. This is clear as a matter of fact, and I wish it to be understood that I so decide it.

Mr. Herschell and *Mr. Wheeler*, for the appellants.—This case is governed by *Ex parte Watkins* (*ubi supra*). The distinction is that in the present case the goods were in the warehouse of a third party instead of in the vendors' own warehouse. That, however, makes no difference with regard to the effect of the custom of excluding the reputation of ownership of the vendors. The fact that the delivery order was not sent to the appellants till after the liquidation petition had been filed is immaterial; the appellants had no notice of the filing of the petition. Till they received the delivery order they did not know in what warehouse the whisky was, and therefore could give no notice to the warehouse keeper. Before the Chief Judge the trustee relied also upon the fact that the appellants had sought to prove in the liquidation for the price of the goods.

[MELLISH, L.J.—How could they prove for the price of goods which they had left in the order or disposition of the debtors?]

Mr. Milward and *Mr. W. Potter*, for the trustee.—The decision in

Ex parte Watkins (*ubi supra*) depended on the fact that the debtors were warehousemen, and that the goods had been transferred in their stock and bond books. The evidence shews that it is the custom of warehousemen to recognise as the owners of goods deposited with them, only the depositor or the person who holds a delivery order from them.

[MELLISH, L.J.—The vendors could deal with the goods in the same way as if they had been in their own warehouse.]

self to the facts in the case before me. I find, as a fact, that on the 26th and on the 27th of February, beyond all doubt the goods were in the possession of the Leith warehouseman, not only with the consent of the true owner, but in the plain apparent possession of the vendors, and that if they had gone down to Leith on the morning of the 27th they might have obtained possession of the goods, or they might have transferred any interest they had in them to any person who lent them money upon them. For all practical purposes there was only one visible owner of the property, and the right to the property at that time had actually become vested in the trustee of the debtors' estate under the liquidation, and was liable to be applied for the benefit of their creditors. This is clear as a matter of fact, and I wish it to be understood that I so decide it.

In

Ex parte Watkins (*ubi supra*) the delivery order had been sent. The question depends entirely on the name in which the goods are standing in the books of the warehouseman—

Jones v. Dwyer, 15 East, 21.

JAMES, L.J., said—I am of opinion that this case is entirely governed by the principle of the decision in *Ex parte Watkins* (*ubi supra*). I was not one of the Court which decided that case, but I desire to express my entire concurrence in the judgment then delivered. The Lord Chancellor (Lord Selborne) in his judgment said—“The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make enquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to shew that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer

the ownership to be in the person having actual possession.” That case occurred in this same liquidation, and there was this affidavit made—

“It is the custom and usual practice in the wine and spirit trade, in Liverpool, for goods sold in bond (that is, upon which the government duty has not been paid) to remain in the bonded warehouse in which they are stored at the time of sale, in the possession or under the control of the vendor, after they have been paid for by the purchaser; the vendor giving to the purchaser, when required by him, an authority to receive the goods from him or the warehouse keeper, called a delivery order or warrant. These delivery orders, if they are not applied for by the purchaser, are rarely if ever given to him at all, but the goods sold remain in the possession or under the control of the vendor, who charges warehouse rent for them to the purchaser. When the goods are required by the purchaser for use he generally sends to the vendor the amount of duty payable, and the vendor pays the duty to the Government, and forwards the goods to the purchaser or his order, making a small charge for so doing. In all cases, on the sale of goods, the same are transferred, in what is called the bond book of the vendor, into the name of the purchaser, the same being struck out of the stock book of the firm as assets of the firm. According to the custom of the trade in Liverpool, the giving of the delivery orders before referred to is equivalent to delivery of the goods, and a person holding any such delivery order would be in a position to raise money thereupon or obtain credit as a purchaser.”

That affidavit evidently referred to the two alternatives of the goods being in the vendor's own warehouse or in the warehouse of another person to the vendor's order. The Court was then of opinion that the facts were such as to exclude the reputation of ownership in the vendors arising by reason of their possession of the goods. The only difference here is that the goods were not in the vendor's own warehouse, but in that of a third party, the purchasers not knowing that the goods were, and not assenting to

their being, in that particular warehouse. That distinction appears to me to be wholly immaterial, no such question was adverted to in *Ex parte Watkins* (*ubi supra*). Then it is said that in that case the delivery order was given to the purchaser before the liquidation petition was filed, whereas here it was not given till afterwards. I am utterly unable to follow that argument; the giving of the delivery order is a matter entirely between the vendor and the purchaser. The fact that it was given before the liquidation would tell rather against than for the purchaser, inasmuch as, having it in his possession, he did not go to the warehouseman and present it. The question, however, which was decided in *Ex parte Watkins* (*ubi supra*) was as to the effect of the custom of the trade, and the decision applies equally to the present case. It is entirely governed by *Ex parte Watkins* (*ubi supra*).

MELLISH, L.J., said—I am entirely of the same opinion. The real principle of the decision in *Ex parte Watkins* (*ubi supra*) was this, that in determining the question whether, when goods which have been sold remain after the sale in the vendor's possession, then he is still the reputed owner of them, the Court is to have regard to the custom of the trade, and if it is shewn that there is a well established custom that goods shall so remain, it will prevent the possession of goods by a vendor from giving the reputation of ownership to him. The real question in *Ex parte Watkins* (*ubi supra*) was whether it was enough to prove the existence of a custom well known in the particular trade. We thought that was enough, upon the authority of several recent decisions in the Common Law Courts, which were based on this—that the creditors of a trader are mostly persons engaged in the same trade, or bankers and other persons very well acquainted with its customs. Does it then make any difference that the goods were not in the vendor's own warehouse, but in that of a third person? Certainly not as regards the purchaser. He bought the particular whisky simply as in bond. Then by the custom of the trade the whisky might remain for years after the sale in the actual possession of the vendor, or of some

person holding it for him. The reputation of ownership was as much prevented by the custom from arising when the goods were in a third person's warehouse as when they were in the vendor's own warehouse. Of course, persons who did not see the goods in the warehouse knew nothing about them, and would give no credit to the vendor by reason of them. Any one who did see the goods in the warehouse, such as the warehousekeeper, was acquainted with the custom of the trade, and knew therefore that the goods, though they stood in Conston & Co.'s name, did not necessarily belong to them. I think, therefore, that *Ex parte Watkins* (*ubi supra*) applies. The appellants are entitled to the whisky, and they must have their costs in the Court below.

Solicitors—Mr. W. W. Wynn, agent for Messrs. Barrall & Rodway, Liverpool, for the appellants; Messrs. Chester, Urquhart & Co., agents for Messrs. Laces, Bauner & Co., Liverpool, for the trustees.

JAMES, L.J. } *Ex parte* LOVERING;
1874. } *Re* JONES. (No. 2.)
June 19, 26. }

Reputed Ownership—Furniture—Hiring
—*Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), section 15, sub-section 5.

A trader in July, 1869, sold all his household furniture for 192l., and at the same time agreed with the purchaser to hire it back for 12s. 6d. per week. Under this agreement the trader remained in possession of the furniture until November, 1873, when he filed a liquidation petition:—

Held, that the debtor was the reputed owner of the furniture, and that it belonged to the trustee under the liquidation.

Lingham v. Biggs (1 Bos. & P. 82) and *Lingard v. Messiter* (1 B. & C. 308; s. c. 2 Dowl. & Ry. 495; s. c. 1 Law J. Rep. (o.s.) K.B. 121) are still binding authorities.

This was an appeal from a decision of Mr. Registrar Spring Rice, acting as Chief Judge in Bankruptcy.

On the 27th of November, 1873, Edward Jones, a draper, filed a liquida-

tion petition, under which Mr. J. F. Lovering was appointed trustee. The debtor had carried on his business at Nos. 36, 38, & 42, Fulham Road, at which premises he also resided. On the 30th of July, 1869, he entered into an agreement with G. J. Rook, a house agent, by which Jones agreed to sell, and Rook agreed to purchase all the household furniture on the premises, and also some furniture of the shop, for 192*l.* 12*s.* 6*d.*; and it was further agreed that Rook was to allow Jones to hold possession of the furniture, and for keeping possession of the same Jones agreed to allow Rook the sum of 12*s.* 6*d.* per week, to be paid every four weeks, commencing from the date of the agreement. And in default of any one payment Jones authorised and empowered Rook to make entry, forcibly (if required), and remove the furniture without any notice. And it was also agreed that Jones was not to remove or part with any portion of the furniture from the premises without the consent in writing of Rook first obtained. The purchase money was paid by Rook, and the furniture remained in the possession of Jones under the agreement until the filing of the petition. The trustee claimed the furniture for the creditors, as being at the commencement of the liquidation in the order or disposition of the debtor, as reputed owner, with the consent of the true owner. The registrar decided that Rook was entitled to the furniture. The trustee appealed.

Mr. De Gez and *Mr. Robertson Griffiths*, for the appellant.—These goods having been originally the debtor's own, and there being no indication of any change of ownership—

Lingham v. Biggs, 1 Bos. & P. 82,

and

Lingard v. Messiter, 1 B. & C. 308; s. c. 2 Dowl. & Ry. 495; s. c. 1 Law J. Rep. (o.s.) K.B. 121,

apply, and the trustee is entitled to the goods.

Ex parte Emerson, 41 Law J. Rep. (n.s.) Bankr. 20,

is distinguishable.

Ex parte Castle, 3 Mont. D. & De Gez, 117,

shews that the fact that the possession is

consistent with the agreement, will make no difference.

Mr. Winslow and *Mr. Brett*, for Rook.—*Lingham v. Biggs* (*ubi supra*),

and

Lingard v. Messiter (*ubi supra*),

would have been decided differently at the present day. It is notorious that furniture is now often hired, and therefore the possession of it affords no reputation of ownership. That is of as great effect as the existence of a well-known trade custom, such as was proved in—

Ex parte Watkins, 42 Law J. Rep. (n.s.) Bankr. 50; s. c. Law Rep. 8 Chanc. 520.

[JAMES, L.J.—Must you not go to this extent, that the possession of furniture in a man's house in no case gives him the reputation of ownership?]

We do say that.

Hamilton v. Bell, 10 Exch. Rep. 545,

shews the effect of a custom.

Joy v. Campbell, 1 Sch. & L. 328, 336,

shews the principle of the doctrine of reputed ownership. It is to prevent false credit. No one trusts a tradesman on the strength of his household furniture. In—

Jarman v. Woolton, 3 Term Rep. 618;

furniture was held not to be within the doctrine of reputed ownership. The only evidence of reputation in the present case, is, that the furniture was once the debtor's, and is now in his possession. It lies on the trustee to prove the existence of the reputation—

Shrubsole v. Sussams, 16 Com. B. Rep. N.S. 452.

In

Ex parte Watkins (*ubi supra*),

Lord Selborne said, "There is no inflexible rule of law that because a man who was once the owner of goods and has sold them, remains in possession of them, he must therefore be held to be the reputed owner." In

Priestley v. Pratt, 36 Law J. Rep. (n.s.) Exch. 89; s. c. Law Rep. 2 Exch. 101;

a notorious custom, that goods should after sale remain in the possession of the

vendor, was held to exclude the operation of the reputed ownership clause. In the present case the custom of hiring furniture is so notorious that no evidence of it is necessary—

Ex parte Emerson (ubi supra);

Ashton v. Blackshaw, 39 Law J. Rep.

(N.S.) Chanc. 205; s. c. Law Rep.

9 Eq. 510.

Mr. De Gex, in reply.—

Lingham v. Biggs (ubi supra),

and

Lingard v. Messiter (ubi supra),

have never been overruled.

Ex parte Watkins (ubi supra),

does not interfere with their authority.

June 26. JAMES, L.J., said—In this case the debtor was a draper carrying on business apparently in an extensive way at Nos. 36, 38, and 42 in the Fulham Road, and he had the usual living rooms above and under the trade part of the houses. He was possessed of the furniture of those rooms, which were furnished probably in the ordinary way, in which it may be supposed a reputable tradesman's house is furnished. [His Lordship stated the effect of the agreement of the 30th of July, 1869.] This agreement apparently was known only to the debtor and the respondent, and under it the debtor continued in possession of the furniture, having the wear and tear of it, and I suppose occasionally breaking the glass and other things of a fragile nature, up to and at the time of the presentation of the liquidation petition. A question arose in the liquidation between the trustee and the respondent, Mr. Rook, as to whether these goods were in the reputed ownership of the debtor, so as to pass to the trustee. The registrar was of opinion that they had not so passed, and hence this appeal, which was argued before me sitting alone, by Mr. De Gex on the one side and Mr. Winslow on the other, with a commendable brevity, and therefore with corresponding force and clearness.

The argument of Mr. De Gex was in substance this, that if the facts I have stated had been stated to any Judge thirty or forty, or even twenty years ago, there would not have been the slightest

hesitation whatever in answering the question in the affirmative, that the goods were in the reputed ownership of the debtor, and Mr. De Gex said that if he had been pressed for any authority, or to shew that any principle had been established on the subject, he would have referred to *Lingham v. Biggs (ubi supra)*, and *Lingard v. Messiter (ubi supra)*. He would have referred to those cases as containing the principle and giving unanswerably the reasons for so holding, and he would have also referred to the language of the Judges in the latter case as being unquestionable and conclusive authorities upon the point. Mr. Winslow did not in fact traverse that, but admitted that some years ago that would no doubt have been the law, but he said that a change had come over the spirit of the law in recent years, and that persons had begun to think there was a good deal of unjust nonsense in our law of reputed ownership by which the real owners of goods were sometimes deprived of their property upon an assumption, scarcely ever warranted by the facts, that credit had been given to a bankrupt on the faith of those goods, by people who probably never heard of the goods or thought of them at the time they gave the credit. My answer to that is this, the law of reputed ownership is altogether created by statute, and it has been continued in every bankruptcy statute from the time of James I. to the present time, and is part of the existing code of bankruptcy law. Then it was suggested by Mr. Winslow that a great change has taken place in the course of conduct in the world with regard to these matters, so that reputation of ownership no longer attaches as it formerly did, that persons are now in the habit of hiring goods, and that articles of furniture are now so frequently taken upon terms of hiring, that the mere possession of them is no longer the cause of a reputation of ownership, and he contended, secondly, with regard to the main principle of the decisions in both the cases to which I have referred, that there was a secret change of ownership, that both the cases have been overruled by more recent cases, and especially by *Ex parte Watkins (ubi supra)*.

No doubt it is very common now for persons to take furnished houses, and in many cases articles of furniture are taken upon terms of hiring, but I am not at all prepared to say that it is a common thing that a reputable tradesman, who is the owner apparently, or at all events the rated occupier, of a house, and who is in a large way of business, should not be the owner of the ordinary furniture and other goods which are being used and broken and chipped from day to day in his house, but that he should be merely renting them at an extravagant weekly rent. If it were known that that was the position of such a tradesman, it would certainly very seriously weaken his credit, both with wholesale dealers and with his bankers. This case before me comes in terms exactly within the common law cases to which I have referred, where the bankrupt had been the owner of the goods, and a change of ownership occurred which was not known to the world. That indeed was the case also in *Ex parte Watkins* (*ubi supra*). But *Ex parte Watkins* (*ubi supra*) was not intended in the slightest degree to weaken or overrule the other cases to which I have referred, and the constant practice based upon them. It simply decided that the authority of those cases might be countervailed by evidence of any known custom and practice in the particular trade in question, a custom known to the dealers in that trade, and known to the bankers and other persons accustomed to have dealings with the persons engaged in that trade. In that case it was perfectly well known as the universal practice in the trade of spirit merchants, that, after goods had been sold, the possession of them was retained by the vendor in his warehouse. In such a case the reputation of ownership did not necessarily flow from the possession of the goods in the warehouse. But that case could be no authority at all for the present case, unless it could be shewn, which no one has attempted, or would I apprehend attempt to shew, that there is a practice, known in London or anywhere else, that drapers or other persons, who are the owners of furniture in the rooms of the house in which they live, should sell their furni-

ture to a dealer and then take it back again upon the terms of paying a weekly rent for the use of it. I am of opinion that *Ex parte Watkins* (*ubi supra*) has no application, and that this present case is governed by the old law and by the old cases.

I think that the registrar's order is wrong and that the trustee's contention is right. The order of the registrar must therefore be discharged.

Solicitors—Messrs. Piesse & Son, for the appellant; Messrs. Newman & Payne, for the respondent.

LORDS JUSTICES. } *Ex parte WESTCOTT*;
 1874. } *Re WHITE*.
 July 3.

Proof by Partner—Joint and separate Estates—Executor—Devastavit.

A father and his son carried on business in partnership. The whole capital belonged to the father, the son having only an interest in the profits. The father died, and thereupon under the provisions of the partnership deed the partnership was dissolved, and all the profits became the property of the father. The father appointed the son his executor, and the son in that character received moneys belonging to the father's separate estate and employed them without any authority in the business. A suit was afterwards instituted to administer the father's estate, and the son filed a liquidation petition:—Held, that the receiver appointed in the suit could prove in the son's liquidation for the moneys thus received by the son as executor and misapplied.

This was an appeal from a decision of Mr. Registrar Pepps, acting as Chief Judge in Bankruptcy.

William White and his son, William Thompson White, carried on the business of carpet warehousemen in partnership. Under the provisions of the deed of partnership the whole of the capital, stock-in-trade, leasehold estates, assets and other effects employed in the business, belonged to William White alone, and William Thompson White was interested only in a

share of the profits. In the event of the death of William White the partnership was immediately thereupon to be dissolved, and the share of William Thompson White in the profits was thenceforth to belong to William White's personal representatives, and the business was thenceforth to be carried on by his personal representatives. William White died on the 19th of January, 1871. By his will he gave his real estate and the residue of his personal estate to trustees (of whom William Thompson White was one) upon certain trusts, and he authorized the trustees to delay the sale and conversion into money of such part of his real and personal estate as might at his decease be employed in his business, for any period not exceeding two years from the time of his death, and in the meantime to make such arrangements with William Thompson White for carrying on the business as the trustees should think fit. The testator appointed William Thompson White and two other persons executors. William Thompson White alone proved the will, and he took possession of the testator's real and personal estate and carried on the business till the 2nd of March, 1872, when he filed a liquidation petition. In December, 1871, a suit in Chancery was instituted by separate creditors of William White for the administration of his estate, and in that suit Mr. Westcott was appointed receiver of the estate. He sought to prove against the estate of William Thompson White for a sum of 1,965*l.* 3*s.* 3*d.*, which he alleged that William Thompson White had received after his father's death, as his executor, on account of his separate estate, and had misapplied by employing it in the business.

The Registrar refused to admit the proof, on the ground that the rule is well settled that a partner cannot prove against the estate of his co-partner till all the joint debts are paid.

Westcott appealed.

Mr. Hemming, for the appellant.—The general rule against proof by a partner on his co-partner's estate does not apply where, as here, the debt became due to the executor after the testator's death. If the other executors had proved the

will this question would never have arisen. The real question is, whether the *cestui que trust* of a trustee who has committed a breach of trust are to be excluded from proof. He cited—

Ex parte Garland, 10 Ves. 110.

Mr. De Gez, *Mr. Winslow*, and *Mr. Finlay Knight*, for the trustee in the liquidation.—The rule referred to has scarcely ever been departed from; it has been held to apply to a debt contracted after the dissolution of the partnership, and even when there was evidence that the joint estate was sufficient to pay the joint debts—

Ex parte Bass, 36 Law J. Rep. (N.S.) Bankr. 39.

[*JAMES, L.J.*—If there has been a *devastavit* surely the proof can be admitted? It is an accident that the liquidating debtor was the executor.]

[*MELLISH, L.J.*—It is not a debt due to the testator, but a debt which has become due to his executor since his death.]

The debt is a part of the deceased partner's estate. *Ex parte Garland* is adverse to the appellant.

[*MELLISH, L.J.*—This was a part of the private estate of the father, which ought never to have been used in the business. It is not answerable to the creditors of the business. The proof is really that of the persons beneficially interested under the father's will.]

The trust estate was in partnership with the bankrupt. The testator's legatees cannot prove in competition with the creditors of the trade.

They referred also to

Ex parte Butterfield; *re Butterfield*,
De Gez, 319, 570; s. c. 17 Law J.
Rep. (N.S.) Bankr. 10.

JAMES, L.J., said that the case must be remitted to the Registrar to ascertain the amount due, with a declaration that a proof could be admitted in respect of a *devastavit* committed by the son as executor by improperly employing the testator's estate in the business.

MELLISH, L.J., concurred.

Solicitors—Messrs. I. H. Tyas & Huntington, for the appellant; Mr. W. Bristow, for the trustee.

BACON, C.J.	} <i>Ex parte</i> NADEN ; <i>Re</i> WOOD.
1874.	
June 8.	
LOARDS JUSTICES.	
July 10.	

Proof—Annuity under Separation Deed
—Debt incapable of being fairly estimated
—Bankruptcy Act, 1869, s. 31.

W. went through the ceremony of marriage with S., his deceased wife's sister. In 1858 a deed of separation was executed, under which W. covenanted to pay to trustees for S. an annuity of 40l.; the deed described S. as the wife of W., and contained a proviso that if they came together again the annuity should cease. W. married again, and S. married and became a widow. In 1871 W. became bankrupt, and in the bankruptcy a proof was presented for the value of the annuity. The County Court Judge refused to admit the proof, because, it being impossible to say what was the probability of the parties coming together again, the value of the annuity was incapable of being fairly estimated:—Held (reversing the decision of the County Court Judge), that as the parties could never come together lawfully, that proviso ought to be disregarded, and the value of the annuity estimated in the usual way.

This was an appeal from a decision of the Judge of the County Court at Kingston.

William Randall Wood went through the ceremony of marriage with his deceased wife's sister, Mary, and lived with her as his wife. In the year 1858 they agreed to live separately, and a separation deed, in the ordinary form, was drawn up and executed on the 8th of October, 1858. By this deed, W. R. Wood covenanted to pay an annuity of 40l. to trustees for Mary Wood; and, besides the covenants as to living apart from each other, the deed also contained a proviso that if W. R. Wood and Mary Wood should at any time after, by mutual consent, live together again, then the deed should be null and void.

After the separation W. R. Wood married again, and Mary Wood also married a Mr. Spencer, and subsequently became a widow. The annuity was regularly paid by W. R. Wood till 1870, and the

NEW SERIES, 43.—BANKR.

covenants contained in the separation deed were kept by all parties.

On the 26th of June, 1871, W. R. Wood was adjudicated bankrupt. In the bankruptcy proceedings the trustees of the separation deed tendered a proof for 267l. 5s.; the sum of 250l. 10s. being for the computed value of the annuity, and the balance being for arrears. The trustee in the bankruptcy rejected the proof, on the ground that there was no consideration for the deed.

An application to have the proof admitted was then made to the County Court Judge, who held that there was a good consideration for the deed, and allowed the proof in respect of the arrears, but refused to allow the proof for the value of the annuity, on the ground that such value could not be fairly estimated, as it was impossible to say what was the probability of the parties coming together again.

From this decision the trustees of the separation deed appealed.

Mr. H. W. Lord, for the appellants.—There was sufficient consideration for the deed, because the bankrupt and Mary Wood lived together as husband and wife. It is well settled that past cohabitation is a good consideration.

The annuity is capable of valuation, and is a liability which could be assessed by a jury. It is a debt proveable in bankruptcy within the meaning of the Bankruptcy Act, 1869, sec. 31—

Ex parte Waters, re Hoyle, Law Rep. 8 Chanc. 562;

Ex parte Jackson, 27 Law Times Rep. N.S. 696.

It is most improbable, under the circumstances, that the parties will come together again. Also their doing so would be unlawful, and the law will not presume that anyone is going to do a thing contrary to law.

Mr. Wilkinson, for the trustee in bankruptcy.—There can be no presumption that these parties will not again live together, because they have already committed the unlawful act in question by previously doing so.

The deed of separation assumes that the parties were man and wife, but they were

R

not, and the deed was therefore void for want of consideration.

This is just such a debt as is contemplated by the first clause of section 31 of the Bankruptcy Act, and it is one on which it is impossible to place a valuation.

It is clear that it could not have been proved under the former bankruptcy law—

Parker v. Ince, 4 Hurl. & N. 53; s. c.

28 Law J. Rep. (N.S.) Exch. 189;

Mudge v. Rowan, 37 Law J. Rep.

(N.S.) Exch. 79; s. c. Law Rep. 3 Exch. 85.

BACON, C.J.—The mind of the County Court Judge seems to have been very much influenced by the Common Law decisions which have been referred to in the course of the argument, but these decisions were all on cases which occurred between husband and wife, and therefore they have no application to the present case. It is an essential part of the present case that the marriage, which at the time the deed of separation was executed was supposed and presumed to exist, was invalid. The parties to that deed never could have come lawfully together, neither can they ever do so in the future, whatever events may happen, and therefore the clause in the separation deed purporting to provide for this contingency is one which can have no effect on the present question, one way or the other. Then if that proviso is struck out of the separation deed, as for all essential purposes it must be, what is there then to prevent this annuity from being valued? I can see no difficulty at all in making such a valuation.

I concur with the learned Judge upon the first point, that there was a good consideration for the deed, and that the arrears of the annuity are a debt proveable under the bankruptcy, but I differ from him on the second point, for the reasons I have stated. The order must therefore be reversed, so far as it rejects the claim for the value of the annuity. There can be no difficulty in ascertaining the amount, and if the trustee wishes to dispute the amount claimed he must do so at his own expense.

July 10.—The trustee in bankruptcy appealed from the above decision, and the appeal came on for hearing this day.

Mr. Robertson Griffiths and *Mr. Wilkinson*, for the appellant, repeated the arguments adduced on his behalf before the Chief Judge, and cited—

Mudge v. Rowan (*ubi supra*);

Brett v. Jackson, 38 Law J. Rep.

(N.S.) C.P. 139; Law Rep. 4 C.P. 259.

Mr. H. W. Lord, for the trustees of the deed, was not called upon.

JAMES, L.J., was of opinion that the decision of the Chief Judge was quite right. The Judge of the County Court appeared not to have applied his mind to the proviso making the deed void; it was impossible that the parties could live together as man and wife unless the law was altered. The deed therefore remained a simple deed providing for the payment of an annuity during the joint lives of two persons, and such an annuity was capable of being easily valued. The appeal must be dismissed with costs.

MELLISH, L.J., concurred.

Solicitors—*Mr. E. M. Hore*, for the trustees of the deed; *Messrs. Wilkinson & Howlett*, Kingston-upon-Thames, for the trustee in bankruptcy.

LORDS JUSTICES.

1874.

July 3.

Ex parte JAY;
Re BLENKHORN.

Bill of Sale—Apparent Possession—Formal Possession—Bankruptcy—The Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), ss. 1, 7.

To defeat the title of the holder of an unregistered bill of sale of chattels as against the trustee under the liquidation of the mortgagor, it is sufficient that the chattels are, at the commencement of the liquidation, in the visible possession of the mortgagor, even though the mortgagee has taken possession, so as to prevent the goods being removed by any one else, and with the bona fide intention of himself removing them forthwith.

In order to defeat the title of the trustees in bankruptcy of the mortgagor, the Bills of Sale Act requires that much more should be done by the mortgagees than would be necessary with reference to the doctrine of reputed ownership.

*Two ladies executed, on the 16th of June, 1873, a bill of sale of all their furniture and other effects, including some cows and a pony, to secure the repayment of a loan of 144*l*. The bill of sale was never registered. On the 10th of February, 1874, the mortgagees put two men into possession. These men slept in the house, but the mortgagors continued to use the furniture and other articles just as before. They retained the keys of the premises and used the pony when they pleased, and the cows were milked by their servant. On the morning of the 14th of February the men in possession commenced removing the furniture and packing it into vans which had been brought there, the vans, while they were being loaded, standing on a drive inside the premises occupied by the mortgagors. In the afternoon the vans with the furniture and also the cows and the pony were taken away. But before this had been done, about noon the same day, the mortgagors filed a liquidation petition :—*

Held, that the mortgagees had done enough before the petition was filed to take the goods out of the possession or apparent possession of the mortgagors.

Held also, that up to the morning of the 14th of February, the mortgagees' possession was only a formal one, and inasmuch as the mortgagors had, on the 11th of February, committed an act of bankruptcy, by executing a second mortgage of their furniture and other effects (which formed substantially their whole property) to secure an antecedent debt, the trustees under the liquidation was entitled to the goods.

This was an appeal from a decision of the Chief Judge in Bankruptcy.

Sarah Anne Blenkhorn and Eleanora M. W. Blenkhorn, who were sisters, kept a ladies' school at Frieston House, at Caythorpe, in Lincolnshire, carrying on the business of the school in partnership. Their father, George Blenkhorn, lived with them. The house had some land attached to it, and was approached from the road

by a carriage drive. The ladies kept some cows and a pony, and their father assisted them by looking after the garden and the animals. He owned a few articles of furniture in one room in the house. On the 16th of June, 1873, the ladies executed a bill of sale to Barnett Cohen to secure the repayment of 144*l*. which they then borrowed of him. By this deed they assigned to Cohen all their household furniture and other effects belonging to them then being in and upon the house and premises called Frieston House, and all other articles of the like nature belonging to the mortgagors which should at any time during the continuance of the tenancy be on any part of the premises belonging to the mortgagors, and power was given to Cohen to seize the after acquired chattels. The father joined in this deed, assigning his own furniture. On the 26th of January, 1874, the ladies executed another bill of sale of all their household furniture and effects to John Kendall, to secure the repayment of 100*l*. then borrowed from him. On Tuesday, the 10th of February, 1874, Cohen sent an auctioneer named Hughes, with some assistants, to take possession of the property under his bill of sale. Two men were left in possession, and they continued there till Saturday, the 14th of February, sleeping in the house; but until the morning of the 14th of February nothing was done to interfere with the ladies' free use and enjoyment of the property. They retained the keys of the premises; they used the pony when they wished to do so; the cows were milked by their servant; the pupils slept in the beds and used the pianofortes and other furniture without any hindrance, and the whole business of the school was carried on in the ordinary way. On the 11th of February the ladies executed a bill of sale of all their household furniture and effects, present and future, to the Nottingham Equitable Loan Discount and Investment Company, to secure the repayment of a previously existing debt. On the morning of the 14th of February, about ten o'clock, Hughes and some assistants commenced taking out the furniture and other effects and packing them in some vans which they had brought there for that purpose.

The horses were taken out of the vans and were placed in the stables, and the vans remained standing on the carriage drive. Meanwhile, the ladies went to Nottingham and filed a liquidation petition at 12.30 p.m. Later in the afternoon the vans, with the furniture in them, were driven away, and the cows and the pony were also removed by Hughes and his assistants. The whole was afterwards sold by Cohen by arrangement with the trustee under the liquidation. The Judge of the Nottingham County Court decided that Cohen's bill of sale was void as against the trustee, and ordered the proceeds of the sale to be paid to the trustee. The Chief Judge held that the possession taken by Cohen on the 10th of February was sufficient to exclude the operation of the Bills of Sale Act, and discharged the order of the County Court Judge (1). The trustee appealed.

Mr. De Gez and Mr. Finlay Knight, for

Bacon, C.J. (May 25, 1874), said.—The question in this case is purely one of fact. It is simply whether at the time of the commencement of the liquidation, which is said to have been at half-past twelve o'clock on the 14th of February, the goods, of which possession had been taken on the 10th of February, four days before, were or were not in the apparent possession of the debtors. Well now, taking the facts which have been proved before me, in my opinion, no jury could hesitate on the subject for a moment. On the 10th of February a man comes armed with a bill of sale, lays hands upon all that is included in the bill of sale, and takes possession of it, and leaves two men in possession. That is not formal possession. That is positive, actual, legal possession. To what end were the two men put into possession? To prevent anybody else touching the goods. In my opinion it would be a most violent perversion of words to say that the possession then taken was a merely nominal or formal possession. It was the best possession that could be taken under the circumstances. The removal did not instantly follow, probably in consequence of the request of the debtors. That part of the case is not made very clear, and it is not of very great importance under what circumstances it was that Hughes, who had by his men taken possession, and who held possession, adversely to all the rest of the world, of the chattels comprised in the bill of sale, did not choose to enforce, or had not the means of enforcing the removal of them at once. The removal has nothing to do with it. The possession is the thing that is to be considered. Then on the morning of the 14th, there being no reason for forbearing any longer, the removal of the goods is commenced. Can any case be found (certainly none

the appellant.—No sufficient possession had been taken by Cohen before the liquidation petition was filed. The goods were then still upon the premises occupied by the mortgagors—

The Bills of Sale Act, 1854, sections 1, 7;

Ex parte Lewis, Law Rep. 6 Chanc. 626;

Gough v. Everard, 2 Hurl. & C. 1; s. c. 32 Law J. Rep. (n.s.) Exch. 210;

has been referred to) which would induce me to hold that where the actual possession is proved and the removal has commenced and is in progress, by the commission of an act of bankruptcy the completion of that which was so begun can be frustrated? None of the cases cited in the slightest degree affect that. Then I find that with reasonable diligence, with no circumstance that can at all call in question either the good faith or the prudence or propriety of what was done on the 14th of February, as soon as it could be effected the whole of the goods were removed, such of them as could be taken out from their places in the house were brought down on to the lawn, and the rest were in course of removal. The men who were put in never ceased to hold possession; they continued that possession until the things were brought down upon the lawn and loaded upon the vans. In my opinion the Bills of Sale Act does not in the slightest degree touch this case.

[His Lordship then referred to *Ex parte Hooman* (39 Law J. Rep. (n.s.) Bankr. 4); *Gough v. Everard* (32 Law J. Rep. (n.s.) Exch. 210); and *Vicarino v. Hollingsworth* (17 W.B. 613), and proceeded—]

The possession of the young woman in *Vicarino v. Hollingsworth* was infinitely more questionable than the possession which was taken here. Here it was all done in the ordinary course of business, exactly as such transactions would be conducted. The holder of the bill of sale sends his men to take possession, and never relinquishes that possession from that moment until the whole of the chattels comprised in the bill of sale and seized by them on the 10th of February are carried off the premises on the 14th. As a matter of fact, in my opinion, this case is one which does not admit of question for a moment.

The application of the Bills of Sale Act is also equally clear, and at the time of what is said to have been an act of bankruptcy, viz., the second bill of sale, the execution of that instrument on the 11th of February, the possession was actual, positive, and not completed by removal only because of the difficulty of carrying away the furniture otherwise than by means of a van or something of that kind. In my opinion the right of the bill of sale holder is clear, and is not to be questioned; and upon the facts I am of opinion that he is entitled to retain the proceeds of the goods which he removed, to an amount sufficient to satisfy the debt secured by the bill of sale.

Davis v. Jones, 10 W.R. 779.

At any rate an act of bankruptcy was committed on the 11th of February by the execution of the bill of sale to the Nottingham Company. It is admitted that it was made in consideration of an antecedent debt, and it is clear that the equity of redemption of the property comprised in Cohen's bill of sale was substantially all the property that the ladies had—

Ex parte Hooman, 39 Law J. Rep. (N.S.) Bankr. 4; s. c. Law Rep. 10 Eq. 63.

[MELLISH, L.J.—The question under the Bills of Sale Act as to possession is a different one from that which arises under the reputed ownership clause. Under the Bills of Sale Act the material question is, what is apparent to the public, not what the intention of the parties is.]

Mr. Little and *Mr. Robertson Griffiths*, for Cohen, were called upon with respect to the second point only.—Cohen having taken possession before the execution of the bill of sale to the Nottingham Company, there was nothing which the mortgagors could assign. The whole estate was vested in Cohen, and he had perfected his title by taking possession—

Carr v. Acraman, 11 Exch. Rep. 566; s. c. 25 Law J. Rep. (N.S.) Exch. 90.

At any rate Cohen is entitled to the benefit of the protection given by section 95 of the Bankruptcy Act, 1869.

[JAMES, L.J.—That would amount to repealing the Bills of Sale Act in every case in which the execution of a bill of sale is followed by the bankruptcy of the mortgagor.]

There should at least be an enquiry whether, as a matter of fact, the whole property of the debtors was included in the bill of sale to the Nottingham Company. There may have been other property not comprised in it.

JAMES, L.J., said—Subject to the further enquiry, which I will mention presently, I am of opinion that the decision of the County Court Judge is right, and that the decision of the Chief Judge cannot be sustained. The question is, whether the mortgagors had, at the commencement of the liquidation, the actual or ap-

parent possession of the goods comprised in the bill of sale. It is admitted that some four or five days before the 14th of February the mortgagors under the bill of sale put a man in possession. That man left two other persons in possession of the property, but, notwithstanding that, the property being in a ladies' boarding school, the school went on and the young ladies continued their usual studies, the furniture and the other goods were used, the beds were slept in, and so on; and it is plain that the whole apparent course and conduct of the school went on exactly in the same way as usual, the men being there for the purpose, no doubt, of preventing any removal of the goods. Now that is, in my view, exactly the kind of apparent possession which was aimed at by the Bills of Sale Act, exactly that sort of formal possession which was aimed at by the 7th section. It was apparent to all the world that the ladies held their school, and that they and their scholars had the use and enjoyment of the things which were the subject of the bill of sale. They used the cows and the pony and carriage in the same way. I agree that the possession ceased to be a formal possession and became an actual possession, not capable of being attacked by the Bills of Sale Act, on the morning of the 14th of February; for early on the morning of that day the persons in possession brought vans, and as rapidly as they could began packing up the furniture. They took the things out on to the lawn and put them as fast as they could into the vans, and were in the course of removing them when the act of bankruptcy was committed by the filing of the liquidation petition at half-past twelve o'clock. I cannot say that there was not as strong an assertion as possible of ownership—not formal, but real ownership—when the whole place was being stripped, particularly having regard to the character of the property and business.

That makes it important to ascertain whether there was any act of bankruptcy prior to the morning of the 14th of February. Certainly the strong probability and presumption is, having regard to the fact that there were these three bills of sale, to the occupation of the ladies, and

the way in which they were borrowing money, that the third bill of sale, which is alleged to have been an act of bankruptcy, did include the whole of their property, substantially the whole within the meaning of the cases. It seems to have been taken for granted, and the County Court Judge certainly came to the conclusion in terms, that the third bill of sale did include everything, and was therefore an act of bankruptcy. Still it is now suggested that the matter was not properly enquired into, and that there was really no positive evidence upon the subject. The Lord Justice is of opinion, and I agree with him, that in that state of things the creditor is entitled to have the matter more thoroughly investigated than appears to have been done hitherto. Of course this must be done at his own risk as to costs; and upon that one point the matter will stand over for the production of further evidence before us. If upon further consideration he abandons the enquiry, then the order of the Chief Judge will be simply reversed, and the appeal to the Chief Judge from the County Court will be dismissed with costs.

MELLISH, L.J., said—I am entirely of the same opinion. In *Ex parte Lewis (ubi supra)* the construction of the Bills of Sale Act in this respect was fully considered by this Court. I am of opinion that the proper construction was put upon it in that case, and it is the same construction which appears to have been put upon it by the Chief Judge himself in *Ex parte Hooman (ubi supra)*. The distinction between formal and real possession seems in those cases to have been grounded upon the authority of some recent decisions at law which were there fully considered. The distinction is this, that if a bailiff is simply put in and remains in possession so as to prevent the removal of the goods, but allowing everything to go on just as it did before, permitting everything to be used by the debtor and his family, then the goods still remain in the apparent possession of the debtor. There must be something done which, in the eyes of everybody who sees the goods or who is concerned in the matter, plainly takes the goods out of the apparent possession of the debtor. There is no reason for

departing from the distinction which is there laid down. The Chief Judge seems to have thought that the case depended on the fact that only a short time had elapsed between the time when the bailiff was put in possession and the time when he proceeded to remove the goods in order to sell them, and that he had entered with a *bona fide* intention to remove the goods and sell them, and had brought his vans within a reasonable time. With submission to the Chief Judge, I really think that that is wholly immaterial. This section is different from the order and disposition clause in the Bankruptcy Act, for there, if the true owner demands his goods, that at once prevents the order and disposition clause from applying. But, under the Bills of Sale Act, if the creditor does not choose to register his bill of sale, and the goods remain in the apparent possession of the debtor, and are so at the time when the act of bankruptcy is committed, it does not, in my opinion, signify in the least that the creditor has used due diligence in endeavouring to obtain a real possession. If, in point of fact, he has not got possession, has not taken the goods both out of the actual and out of the apparent possession of the debtor, then the Bills of Sale Act applies and the trustee in bankruptcy can come in.

NOTE.—On the 31st of July the case was in the paper of the Lords Justices for the purpose of taking the further evidence, but the matter was compromised.

Solicitors—Messrs. Andrew & Wood, agents for Mr. J. G. Williams, of Lincoln, for appellant; Messrs. Wilkins, Blyth & Marsland, agents for Messrs. Addleshaw & Warburton, of Manchester, for respondent.

LORDS JUSTICES.

1874.

April 17. }

Ex parte HOPKINS;
Re HART.

Liquidation by Arrangement—Removal of Trustee and Committee of Inspection—Summoning Creditors' Meeting—Bankruptcy Act, 1869, sect. 83, sub-sects. 4, 12—General Rules in Bankruptcy, 1870, rr. 120, 304, 305, 307.

In a liquidation by arrangement a meeting of creditors, for the purpose of removing the trustee and any member of the committee of inspection, and for appointing others, is properly summoned under rules 304 or 305 of the General Rules in Bankruptcy, 1870, and rule 120 is not applicable to such a case, but relates to cases of bankruptcy only.

The General Rules in Bankruptcy, 1870, comprise two distinct sets of rules; the one set relating to cases of bankruptcy, the other to cases of liquidation by arrangement.

This was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

A petition for liquidation by arrangement was filed by Henry Aaron Hart, and was agreed to on the 18th of June, 1873, by the requisite majority of his creditors, and a trustee of his estate and a committee of inspection, consisting of two creditors, were appointed. A subsequent general meeting of creditors was duly summoned under the 305th rule of the General Rules in Bankruptcy, 1870, by a creditor, with the concurrence of one-fourth in value of the creditors who had proved their debts, for the purpose of removing the trustee and the committee of inspection, and of appointing others in their places. The meeting was held on the 15th of December, 1873, and a resolution was duly passed for the removal of the trustee and the committee of inspection, and the appointment of a new trustee and new committee of inspection. One of the registrars refused to register this resolution, on the ground that it was irregular, because the meeting ought to have been summoned by a member of the committee of inspection, or by the Court, under the 120th rule. The ques-

tion then came before Mr. Registrar Brougham, sitting as Chief Judge, who held that the proceedings had been perfectly regular.

From this decision two of the creditors and the first appointed trustee appealed.

Mr. Willis Bund, for the appellants.—The meeting was irregularly summoned. It ought to have been called under the provisions of the Act relating to trustees and committees of inspection, sec. 83, and under rule 120, which had reference to that section.

The rules relating to proceedings in bankruptcy applied equally to a liquidation by arrangement, unless the application was especially excluded by the rule relating to a liquidation. There was no power under rules 304, 305 and 307 to remove the committee of inspection.

Mr. Winslow and *Mr. Marcy*, in support of the resolutions, were not called upon.

JAMES, L.J.—I think this case is free from doubt. There are two distinct sets of rules; the one applicable to cases of bankruptcy, the other to cases of liquidation by arrangement. In liquidation cases the creditors have more of the conduct of matters in their own hands; one-fourth in value of the creditors have power to summon a general meeting, and they need not apply to the Court under rule 120, as is done in bankruptcy, when it is desired to remove a trustee or a member of the committee of inspection. Sub-sections 4 and 12 of section 83 of the Act apply both to bankruptcy and liquidation, and provide that trustees and members of the committee of inspection may be removed by a special resolution at a general meeting; and the mode of calling a general meeting in liquidation is that provided by rules 304 and 305. I think, therefore, that Mr. Registrar Brougham was right, and the appeal must be dismissed with costs.

MELLISH, L.J., concurred.

Solicitors — Messrs. Mathews & Mathews, for appellants; T. W. Payne, for respondents.

BACON, C.J. }
1874. }
June 29. }

Ex parte WATERS ;
Re WATERS.

Contempt of Court—Order of Discharge—Conduct of Debtor—Committal—Bankruptcy Act, 1869, s. 19.

Debtors were employed by trustees in a liquidation to realise the stock and collect the book debts, and it appeared that one of them had, after they had received their order of discharge, applied some of the partnership assets obtained in this way in payment of his private creditors :—Held, on appeal, that the County Court Judge had authority to commit him for contempt of Court.

This was an appeal from an order made by the Judge of the Norfolk County Court.

The debtors, Henry Augustus Sheaves and Robert Waters, were in partnership as coal and coke merchants. In September, 1873, they filed their petition for liquidation, and on the 8th of October the creditors passed a resolution in favour of liquidation by arrangement, and Messrs. Beeby & Baldry were appointed trustees. On the same day resolutions were passed in favour of liquidation of the separate estates of both debtors, and the same gentlemen were appointed trustees. The resolutions were duly registered and the trustees proceeded to realise the partnership estate. For this purpose they engaged the debtors to act for them in realising the stock and collecting the book debts, and agreed to pay them 1*l.* per week each for their services.

At the second meeting of creditors, held on the 5th of November, the debtors received their order of discharge.

In December, 1873, the trustees discovered that Waters had received considerable sums, part of the partnership assets, and had expended them in payment to his private creditors, who had proved against his separate estate, of the amounts in which he was indebted to them. The sums he had paid in this way amounted to 11*l.*, and the trustees after investigating the books discovered that Waters had also received 77*l.* which he refused to account for, making a total of 188*l.* which had been withheld by Waters from the trustees.

On the 18th of March an application was made by the trustees to the County Court Judge for an order that the debtors should pay the 188*l.* to the trustees, and on the hearing of this application on the 13th of April, the County Court Judge ordered payment by Waters of the 188*l.* Waters did not pay, and upon a further application being made on the 28th of May, the County Court Judge ordered Waters to be committed to Norwich Castle for contempt.

From this order Waters appealed.

Mr. Bagley, for the appellant.—All the transactions in dispute were subsequent to the order of discharge. The real question is, whether, under the circumstances, a trust was created? I contend there was not—

Ex parte Hooson; re Chapman, 42 Law J. Rep. (N.S.) Bankr. 19; s.c. Law Rep. 8 Chanc. 231.

Is any servant who misappropriates money belonging to his master to be held to be a trustee and to be committed accordingly? This would be stretching the law of contempt.

The respondents rely upon the latter part of section 19 of the Bankruptcy Act, 1869, but this does not apply as the debtors have received their order of discharge.

Mr. Finlay Knight, for the trustees, was not called upon.

BACON, C.J.—This case is one of importance in itself and also as it relates to the liberty of the subject. The 19th section clearly describes the duty of the debtor whose estate is being administered in bankruptcy, and in this respect there is no difference between bankruptcy and liquidation. The fact that the debtor was employed as the servant of the trustees does not, in my opinion, make any difference whatever. The case might very probably have been one in which the trustees would have been justified in proceeding against the debtor, Waters, for embezzlement, and yet it may also have been a case in which it is proper to proceed against him for contempt of Court. I am of opinion that the County Court Judge had clear authority under the 19th section to commit the debtor for contempt, and that he was quite right in making the

order he did. It was a gross breach of trust for the debtor to use the moneys which came to his hands as he did. The appeal must be dismissed.

Solicitors—Mr. A. Storey, for appellant; Messrs. Sharpe, Parkers & Co., agents for Mr. Joseph Stanley, Norwich, for respondents.

LOORD JUSTICES.

1874.

May 8.

Ex parte BROWNING;
Re MARKS.

Liquidation by Arrangement—First Meeting of Creditors—Resolutions—Dealings with Assets—Composition—Ultra Vires.

A petition for liquidation by arrangement having been filed by a debtor trading in partnership, a resolution was passed at the first meeting of his creditors, that his affairs should be liquidated by arrangement, for the appointment of a trustee and committee of inspection, and the discharge of the debtor. The resolution also purported to authorise the trustee to sell a specific part of the debtor's property for such a sum as would pay the costs of the liquidation, and a composition of 1s. in the pound to be paid to his separate creditors. This resolution was registered:—Held, that so much of the resolution as authorised the trustee to sell and make a composition was *ultra vires* and void, but that the rest of the resolution was valid, and the liquidation must proceed thereunder.

This was an appeal from a decision of Mr. Registrar Spring Rice, sitting as Chief Judge in Bankruptcy.

On the 22nd of November, 1873, a petition for liquidation by arrangement was filed in the Greenwich County Court by K. I. Marks, who was carrying on business in partnership with his brother at Greenwich, and had both joint and separate debts.

On the 15th of December, 1873, the first meeting of creditors was held, at which the following resolution was carried and signed by the requisite majority of joint and separate creditors—

"1. That the affairs of the said K. I. Marks shall be liquidated by arrangement, and not in bankruptcy.

NEW SERIES, 43.—BANKR.

"2. That Mr. T. F. Carter be appointed trustee.

"3. That Mr. C. C. Turnbull and Mr. H. Myers be appointed a committee of inspection.

"4. That the trustee be authorised to sell to the mother of the debtor his reversionary interest under his father's will for such a sum as will pay the costs and expenses of the liquidation, and a composition of 1s. in the pound to all the separate creditors of the said K. I. Marks other than her claim against the debtor separately.

"5. That the discharge of the said K. I. Marks be and is hereby granted forthwith.

"6. That Messrs. Spyer & Son be entrusted with the negotiation of this special resolution, and it is hereby directed that the proceedings in this matter be transferred to the London Bankruptcy Court."

On the 20th of December, 1873, the above resolution was registered, no objection having been taken to it.

The appellants, Mr. Browning and Messrs. Manners, Sutton & Graham, were, it appeared, the only separate creditors of the debtor, with the exception of Mrs. Marks, his mother. But while the amount due to Mrs. Marks was 3,000*l.* or thereabouts, that due to all the appellants together was not above 142*l.* The debtor had no available separate estate, except a reversionary interest under his father's will in property of which his mother was the tenant for life.

The appellants, who disputed the validity of the resolution, commenced actions against the debtor for their debts, but these had been stayed by an injunction obtained by the trustee. The appellants then applied to the Court for a declaration that the whole resolution was fraudulent and invalid, and not binding on the debtor's separate creditors, and that the 4th clause of the resolution was *ultra vires*, and passed in fraud of the separate creditors, and that the resolution might be taken off the file, and that the liquidation proceedings might be remitted to the Greenwich County Court.

The Registrar declined to accede to the

application, and thereupon this appeal was brought.

Mr. De Gez and *Mr. Cooper Willis*, for the appellants.—The resolution was *ultra vires*. The creditors had tried to do at one meeting what the Legislature intended to be done by two. A resolution in the terms of the 4th clause of the resolution in this case could only be passed by a meeting of separate creditors summoned for that purpose under the 20th section of the Bankruptcy Act, 1869. That clause was practically a resolution for a composition and not a liquidation, and was void on that account—

Ex parte Lovering, cited in *Rochs and Hazlitt's Law and Practice in Bankruptcy*, 2nd ed. p. 433.

That clause being invalid, the whole resolution was void and irregular, and was not protected by registration under section 127. Besides the arrangement proposed was fraudulent as being for the benefit of the debtor and not of all the creditors—

Ex parte Cobb; *Re Sedley*, 42 Law J. Rep. (N.S.) Bankr. 63; s. c. Law Rep. 8 Chanc. 727.

Mr. Winslow and *Mr. Bagley*, for the debtor.—The registration cured any defect in the resolution. In

Ex parte Pooley, 40 Law J. Rep. (N.S.) Bankr. 41; s. c. Law Rep. 5 Chanc. 722,

at a similar meeting to this, a resolution was passed which amounted to a composition. The 4th clause merely specified, under section 20, the manner in which the trustee might sell the property; and if it was irregular he need not follow it. There was no fraud, and the irregularity of one clause would not invalidate the rest of the resolution.

Mr. Finlay Knight, for Mrs. Marks.

Mr. Romer, for Thomas Fuller Carter, the trustee.

Mr. De Gez in reply as to costs only.

JAMES, L.J.—I am of opinion that the order cannot stand, and that the present application must be granted so far as declaring the 4th clause in the resolution to be void. There is no ground for upsetting the resolution in other respects or for alleging fraud. The 4th clause was in my opinion *ultra vires*; it must therefore be entirely removed, and the

trustee can deal with the debtor's separate estate at his discretion, summoning a meeting for directions from the creditors, if he desires it. It would be dangerous if creditors could direct property to be sold at the first meeting, when no notice had been given that they intended to go into that kind of question. The 4th clause was also clearly void as being a resolution for a composition; it was therefore waste paper, and must be taken off the file, but the rest of the resolution will remain as before. That being done, the liquidation will proceed in the ordinary course. Each party must pay his own costs, both in the Court below and here, for the object of the appellants was evidently to get the whole resolution set aside as void and fraudulent. The trustee will take his costs out of the estate.

MELLISH, L.J., concurred.

Solicitors—*Mr. R. S. Mason*, for appellants;
Messrs. *Spyer & Son*, for respondent.

BACON, C.J. } *Ex parte HIRST*;
1874. } *Re HIRST*.
July 27. }

Liquidation Petition—First Meeting of Creditors—Notice—Signature by Debtor's Attorney—The Bankruptcy Rules, 1870, 255, 256—The Bankruptcy Forms, 1870, 108, 110.

The notices summoning the first general meeting of the creditors under a liquidation petition were signed with the name of the debtor's attorney, but the signature was affixed by the clerk of the attorney by his direction:—Held (reversing the decision of the Judge of the County Court), that the rules had been sufficiently complied with, and that the resolutions ought to be registered.

This was an appeal from the refusal of the Judge of the Sheffield County Court to direct the registration of resolutions for liquidation by arrangement, passed by the creditors of George Hirst at their first general meeting.

The debtor filed his petition on the 11th of June, 1874. The first meeting of the

creditors was summoned for the 8th of July, and on that day the resolutions in question were passed. The notices summoning the meeting were signed with the name of Mr. W. Fretson, who was the debtor's attorney. The signature was, however, not written by Mr. Fretson himself, but was written by his clerk under his directions. The registration of the resolutions was opposed by one of the creditors, and the Registrar was of opinion that the signature must, in order to satisfy the acquirements of the rules and forms, be subscribed by the debtor's attorney himself. The Registrar, therefore, declined to register the resolutions, and the Judge affirmed this decision. Hirst appealed.

Mr. Finlay Knight, for the appellant, contended that the personal signature of the attorney was unnecessary—

Bankruptcy Rules 1870, rules 255, 256; Bankruptcy Forms, 1870, Nos. 108, 110.

Mr. Bagley for the creditors.

BACON, C.J., held that the rules and forms had been properly complied with, and that the resolutions ought to be registered.

Solicitors—Messrs. Pitman & Lane, agents for Mr. W. Fretson, Sheffield, for the debtor; Mr. Butcher, agent for Mr. W. E. Tattershall, Sheffield, for the creditors.

LORDS JUSTICES. }
 1874. } *Ex parte* ANGERSTEIN;
 April 17. } *Re* ANGERSTEIN.

Bankruptcy—Practice—Trustee's Costs.

A trustee in bankruptcy making an unsuccessful application to the Court will, in the absence of special circumstances, be ordered to pay the costs of it, and if the assets are insufficient he will have to pay such costs personally, unless he has obtained an indemnity from the creditors.

This was an appeal by Mr. W. Angerstein, the father of the bankrupt, from a decision of Mr. Registrar Pepys, sitting as Chief Judge.

Mr. W. Angerstein had agreed with his son, the bankrupt, to appoint to him a sum of 5,000*l.*, to be applied in pay-

ment of the son's debts. After this agreement, but before the appointment was executed, the son was adjudicated bankrupt. On the application of the trustee in bankruptcy, the Registrar ordered that the 5,000*l.* should be paid to him.

Mr. Angerstein, the father, who claimed the fund, appealed from this decision.

Mr. Fry, *Mr. Thesiger*, *Mr. Winslow* and *Mr. F. H. Linklater*, for the appellant.

Mr. Roxburgh and *Mr. Douglas Straight*, for the trustee.

THEIR LORDSHIPS discharged the order of the Registrar, and ordered that the appellant's costs of the application to the Registrar must be paid by the trustee, and that he might recover them out of the bankrupt's estate.

Mr. Roxburgh said that would amount in this case to ordering the trustee to pay the greater part of the costs, the estate being insufficient for the purpose.

MELLISH, L.J.—Applications of this kind to the Court of Bankruptcy have been substituted for actions at law, and the trustee is as liable in the one case as he would have been in the other. If the trustee knows that there are no assets out of which he can be paid if he fails in his application, he ought to obtain an indemnity as to costs from the creditors beforehand. An official liquidator has, under similar circumstances, been recently held liable (1), and I can see no difference between a trustee in bankruptcy and an official liquidation for this purpose.

JAMES, L.J.—Mr. Angerstein has been brought into Court to meet an application which has failed and he has a clear right to be indemnified against the costs. The rule has been (rightly or wrongly) established that no costs are given of a successful appeal, but in all other cases, in the absence of special circumstances, the costs ought to follow the event.

Solicitors—Messrs. Linklater, Hackwood, Addison & Brown, for the appellant; Messrs. Lumley & Lumley, for the trustee.

(1) See *Littledale's case*, 43 Law J. Rep. (n.s.) Chanc. 529; s. c. Law Rep. 9 Chanc. 257; *Beck's Case*, 43 Law J. Rep. (n.s.) Chanc. 531; s. c. Law Rep. 9 Chanc. 392.

CAIRNS, L.C. }
 MELLISH, L.J. } *Ex parte LOWENTHAL* ;
 1874. } *Re LOWENTHAL.*
 Feb. 27. }

Debtor's Summons—Particulars of Demand—Registered Officer of Banking Company—Bankruptcy Act, 1869, s. 7—Bankruptcy Rules, 1870, r. 15.

Decision of BACON, C.J., reported ante, p. 81, affirmed.

Emil Lowenthal appealed from the decision of Bacon, C.J., reported *ante*, p. 81.

Mr. Little and Mr. Yate Lee, for the appellant, cited—

Chapman v. Milvain, 5 Exch. Rep. 61; s. c. 1 L. M. & P. 209; s. c. 19 Law J. Rep. (N.S.) Exch. 228;

Ex parte Leathley; *re Hodges*, 42 Law J. Rep. (N.S.) Bankr. 56; s. c. Law Rep. 8 Chanc. 204;

Ex parte Wood; *re Wood*, 4 De Gex, M. & G. 875; s. c. 23 Law J. Rep. (N.S.) Bankr. 3;

Ex parte Wier; *in re Wier*, 41 Law J. Rep. (N.S.) Bankr. 14; s. c. Law Rep. 6 Chanc. 875; *ibid.* 7 Chanc. 819;

Ex parte Roche; *in re Bickerstaff*, 37 Law J. Rep. (N.S.) Bankr. 16; s. c. Law Rep. 3 Chanc. 238.

Mr. De Gex and Mr. G. W. Lawrence, for the banking company, cited—

Allen v. Thompson, 1 Hurl. & N. 15; 2 Jur. N.S. 451; s. c. 25 Law J. Rep. (N.S.) Exch. 249.

Mr. Little was heard in reply.

[In the course of the argument MELLISH, L.J., referred to—

Ex parte Torkington; *in re Torkington*, Law Rep. 9 Chanc. 298,

before Lord Selborne and the Lords Justices, in which a debtor's summons in the form given in the schedule to the general rules of the 1st of January, 1870, was served upon the debtor for payment of a sum of money to John Parker, one of the registered public officers of the banking company called the National Bank. In the heading of the affidavit Parker's description was given as one of the registered public officers of the bank, but it was not expressly sworn that he was such public officer. In the same

affidavit the debtor was stated to be indebted to Parker in the sum of 1,526l. 10s. 7d., due from the debtor to the bank, but there was no statement that Parker was authorised to sue out the debtor's summons. Their Lordships held in that case that the 15th rule of January, 1870, had not been sufficiently complied with, and the summons must be dismissed.]

THE LORD CHANCELLOR, after expressing his opinion that there was sufficient evidence of the debt to justify the County Court Judge in requiring the security which he ordered the debtor to give, proceeded as follows—Then there are two objections to the summons of a technical kind. First, it is said that the affirmation does not expressly state that Parker was the public officer. I think that as he is described as the public officer, the fact is sufficiently stated. If he was not really the public officer, he would be liable on that affidavit to an indictment for perjury. Secondly, it is said that the affirmation does not state he was authorised to sue out the debtor's summons. That point does not appear to have been argued before the County Court Judge, but I am of opinion that the objection is not tenable, and that the deponent does substantially state that he was authorised to take the proceeding, for he states that he is authorised to make this affirmation, that is, to take the initiative in this proceeding, and I think that would carry with it the authority to sue out the summons. But if there were any doubt upon the point, I think it is covered by the principle laid down in the 19th of the General Rules of 1870, which provides that no objection shall be allowed to the particulars, unless the Court shall consider that the debtor has been misled by them. The appeal must therefore be dismissed with costs.

MELLISH, L.J.—I am of the same opinion. The first question is, whether there were materials before the County Court Judge on which it was right for him to issue the debtor's summons; for although the creditor is required to make the affidavit in support of his application, yet the debtor may object that there were no materials on which the Court could issue the debtor's summons. First, it is

said that this summons is taken out in the name of the banking company instead of the public officer. It is really a debt to the bank, although the summons is *de facto* sued out by the public officer; and as there is no form given in the schedule for suing out a summons for a debt due to a company, I think they were justified in not altering the form given in the Act for ordinary cases.

It is also objected that there was no sufficient affidavit of the debt. It is true that the affirmation does not go through all the details which are set out in a declaration at law, but it states that the debtor was indebted on a bill of exchange, the particulars and amount of which are given, and I think that is sufficient.

Then it is objected that the affirmation did not comply with the 15th rule, which says that the public officer is to make an affidavit stating that he is such public officer; on the authority of *Allen v. Thompson* (*ubi supra*) there is no doubt that it is sufficient that he described himself in the affirmation as the public officer of the bank. That case was not cited in *Ex parte Torkington* (*ubi supra*), in which case there were also other irregularities in the affidavit, upon which the decision of the Court was founded.

Then it is said that it is not stated in the affirmation that he was authorised to sue out the summons. But the deponent says that he was authorised to make this affirmation. It appears to me very probable that the word "affirmation" is simply a mistake for "application;" but however that may be, it is impossible that he should be authorised to make the affirmation without being also authorised to sue out the summons. I think, therefore, that is sufficient.

Then, was the debtor entitled to call upon the Judge to dismiss the summons without requiring him to give security? If the alleged debtor proves absolutely that there is no debt, the summons is to be dismissed; but if he does not do this, and if there is a question to be tried, the Judge has a discretion; and if on the balance of evidence he thinks there is a probability that a good defence will be made out, usually no security is required; but if this is not made out to his satisfaction, it is right that he should require security.

In the present case the affidavit of the debtor was manifestly insufficient. No one can present a petition for adjudication in bankruptcy on this summons, except the Sheffield Banking Company; and when the petition is tried, the question of the debt will have to be tried. Therefore no injury will be done to him even if he is unable to give security.

Solicitors—Mr. H. G. Field, agent for Mr. T. Etty, Liverpool, for appellant; Messrs. Phelps & Sidgwick, agents for Messrs. Sale & Co., Manchester, for respondents.

BACON, C.J. }
1874.
July 20, 27. }

Ex parte NANSON;
Re DIXON.

Proof of Executors of Partner against Co-partner—Joint Debts Unpaid—Deceased Partner's Share of Capital.

A firm of five partners carried on business under a deed which provided that in case any partner should die his shares in the capital should be taken by the surviving partners, at their value, according to the stock-taking immediately preceding his death, with interest thereon, and that the amount found due to the deceased partner should be paid by the surviving partners to the executors or administrators of the deceased partner by fourteen equal annual instalments, with interest until payment, and that the punctual payment of the instalments and interest should be secured by the joint and several bond of the surviving partners.

One of the partners died in April, 1866, having by his will appointed executors, whom he authorised to permit his share of the capital to remain in the hands of his partners at interest. The executors allowed their testator's share to remain at interest. Its value was duly ascertained at the stock-taking preceding his death, but no bond was given to the executors by the surviving partners. In July, 1868, another partner retired. In July, 1870, two Chancery suits were instituted to administer the testator's separate estate. In July, 1872, the three remaining partners

filed a liquidation petition. On the 30th of July, 1872, the executors of the deceased partner tendered a proof in the liquidation for the amount of his share in the capital as ascertained at the stock-taking preceding his death. The trustee admitted the proof, but afterwards applied to have it expunged, on the ground that some of the debts due by the firm when the testator was a member of it, were still unpaid:—Held (reversing the decision of the County Court Judge), that the value of the testator's share was a mere debt due from the surviving partners to his executors, and that the proof ought to be retained.

This was an appeal from an order of the Judge of the Carlisle County Court, directing a proof which had been admitted in the liquidation of Peter James Dixon, John Dixon, and Joseph Forster to be expunged.

The debtors, who were cotton spinners at Carlisle, filed their liquidation petition on the 11th of July, 1872.

The firm originally consisted of five persons, viz., the three debtors and two others, Peter Dixon and Robert Stordy Dixon. The deed of partnership was dated the 13th of April, 1858. It provided that the partnership should continue until dissolved by mutual consent, notwithstanding the previous death of any one or more of the partners, and that any partner might retire on giving twelve months' notice in writing.

The 32nd clause provided that in case any partner should retire or should die, the shares of such retiring or deceased partner should be taken by the continuing or surviving partners, at their value, according to the stock-taking of the 1st of July immediately preceding such retirement or death. The 33rd clause provided that the amount found due to the retiring or deceased partner should be paid by the continuing or surviving partners to the retiring partner, or to the executors or administrators of the deceased partner by fourteen equal annual instalments, with interest until payment, and that the punctual payment of such instalments and interest should be secured by the joint and several bond of the continuing or surviving partners.

Peter Dixon died on the 28th of April,

1866. By his will he gave his executors, John Dixon, John Nanson and Henry Hall Dixon, power to permit his share of the capital of the business to remain in the hands of his partners at interest. His executors exercised this power, and the testator's share of the capital was allowed to remain accordingly. No bond to secure its payment was given by the continuing partners to the executors, the same solicitors acting for all parties. In July, 1868, R. S. Dixon retired. In 1870 two Chancery suits were instituted to administer Peter Dixon's estate, one by the executors, the other by a creditor.

On the 30th of July, 1872, Peter Dixon's executors tendered a proof in the liquidation for 36,094*l.* 7*s.* 8*d.*, the value of his share in the business, as ascertained at the stock-taking of the 1st of July preceding his death, with interest. This proof was admitted.

On the 6th of April, 1874, the trustee under the liquidation applied to the Court to have this proof expunged, on the ground that there were debts of the original firm of five partners still remaining unpaid when this application was made. No dividend had been paid under the liquidation. There were due from the liquidating debtors debts to a large amount which had been contracted after Peter Dixon's death. The Judge of the County Court ordered the proof to be expunged.

Mr. A. G. Marten and *Mr. Colt* for the appellants.—The application to expunge was made too late—

The Bankruptcy Rules, 1870, 72, 73.

At any rate the ordinary rule, that a partner cannot prove against the estate of his copartner while there are any of the joint debts unpaid, does not apply. By the partnership deed the value of the deceased partner's share became, immediately on his death, a mere debt due to his executors by the surviving partners—

Ex parte Edmonds, 4 De Gex, F. & J. 488; s. c. *sub nom. Ex parte Coster*; *In re Beator*, 31 Law J. Rep. (N.S.) Bankr. 15;

Ex parte Topping, 4 De Gex, J. & S. 551; s. c. 34 Law J. Rep. (N.S.) Bankr. 13;

Ex parte Westcott, ante, p. 119;

Ex parte Grazebrook, 2 Deac. & C. 186.

The comparative amounts of the debts in this case are such that the admission of the proof will benefit the creditors of the original firm, who will obtain a larger dividend from Peter Dixon's separate estate. The refusal of the proof will hand over a large portion of the testator's estate to creditors subsequent to his death, who have no claim at all against his estate. To extend the rule to this case would be contrary to the well settled rule that the Court does not allow the rights of creditors to interfere with any *bona fide* partnership arrangement as to capital—

Ex parte Ruffin, 6 Ves. 119, 127;

Ex parte Fell, 10 Ves. 347;

Ex parte Williams, 11 Ves. 3.

Mr. De Gex and Mr. Horace Davey, for the trustee.—The delay in making this application is of no importance, as no dividend has been paid.

The general rule applies to the case of a proof by the executor of a deceased partner—

Ex parte Carter, 2 Glyn & J. 233.

Ex parte Westcott (*ubi supra*), was the case of a proof for a *devastavit* committed by the executor of the deceased partner. The debt in the present case arises upon a contract made between the deceased partner himself and his copartners. In

Ex parte Edmonds (*ubi supra*), the report shews that there were no joint debts remaining unpaid. In

Ex parte Topping (*ubi supra*), it was clear that there could be no surplus of the separate estate of the debtor partner.

The general rule is always strictly applied, even though to relax it would benefit the joint creditors—

Ex parte Collinge, 4 De Gex, J. & S. 533; s. c. 33 Law J. Rep. (N.S.) Bankr. 9;

Ex parte Bass, 36 Law J. Rep. (N.S.) Bankr. 39;

Ex parte Robinson, 4 D. & C. 499.

BACON, C.J.—I think the case is reasonably clear, and that the order of the County Court Judge must be discharged. There is no doubt about the general rule in bankruptcy, that a man cannot be permitted to prove in competition with his own creditors, but such is not the case

here. This is a case in which by a contract contained in the partnership deed, when a partner dies, his right, or the right of every one in his place, to the actual possession of the property is to cease. The executors cannot take the share of the deceased partner, but are bound to sell it to the continuing partners at the price and on the terms indicated by the partnership deed. That price was ascertained many years ago, so that there is no longer any joint estate in which the creditors were interested, or in which the executors could be interested as continuing partners. The original partner was dead, and there remained nothing but a separate joint estate, if I may so call it, which has been bought and partially paid for by the continuing partners, and the only thing which existed was a debt on the part of the continuing partners to the executors, as in *Ex parte Westcott* (*ubi supra*). Although it was there called a *devastavit*, it was a debt as between the continuing partner and the executor, a debt which the continuing partner was perfectly competent to contract, just as much as if it had been a debt arising upon a bill of exchange or out of the simplest transaction. The executors are not liable to any joint creditors, but are holders of a right which comes to them under the partnership deed, and are entitled by virtue of that deed to prove. There is no debt on the part of the original partner, for he is dead and gone, and the payment to be made arises by virtue of a contract begun in his lifetime, but which is ratified and confirmed after his death by the continuing partners. At the moment of his death no question could arise as to the rights of the continuing partners, and it was in their power to file a bill for the purpose of enforcing the original contract, but such a proceeding did not become necessary. The contract has existed between the executors and the continuing partners ever since, without reference to any joint debts; the relation of debtor and creditor has continued to exist between the executors and the continuing partners, irrespective of any joint debts. But Mr De Gex and Mr. Horace Davey relied upon *Ex parte Carter* (*ubi supra*). That, however, was a case in which a man lent to his partners on their own personal

security certain moneys and took bonds from them. The joint estate remained the same, and the partners had separate estate. He died in 1817, but the partnership went on, the business being continued down to 1819, when it became bankrupt. The debts were partnership debts to the year 1819, for which the dead man's estate was liable, and it was so held, and also, that a proof could not be admitted upon the separate bonds in competition with the joint creditors. In *Ex parte Westcott* (*ubi supra*), notwithstanding all that Mr. De Gex has said about the *devastavit*, I cannot distinguish that case from this. A *devastavit* no doubt there was, but the only person to whom the debt was due was the receiver appointed by the Court of Chancery. It was a debt and nothing but a debt, and there were outstanding debts due by the firm. I cannot find the slightest distinction between that case and the present. Although Mr. De Gex said it must be assumed that in *Ex parte Edmonds* (*ubi supra*) there were no joint debts existing, yet, with all respect to him, I cannot adopt that suggestion, as I find the attention of the Court was there directed to an entirely different question. I am not aware of any other case except that of *Ex parte Carter* (*ubi supra*), in which a proof has been made by representatives. If there had been joint estate to administer in the present case that would have made some difference, but it is unnecessary for me to say what difference. Since 1866, when Peter Dixon died, there has existed no joint estate in which his representatives had a particle of interest. There was no amount of his capital in the hands of the liquidating firm. The liquidating firm had bought, and in a sense had paid for, that which they bought, and it was no longer the capital of Peter Dixon. The amount had been calculated and, to some extent, ascertained from the preceding stock-taking; the amount had, in fact, been ascertained, and it became a simple debt, contracted by means of a purchase. The continuing partners had made the purchase, and no joint estate whatever remained. The Court of Chancery has pronounced a decree for the administration of the whole of Peter Dixon's estate, and this proof was then made on behalf

of his estate, the estate which is to be distributed under the decree of the Court of Chancery among all his creditors, including those of the partnership. I do not say that any benefit is gained by this mode of administration, but I am satisfied that no wrong has been done by that decree, and that in this liquidation there is a right on the part of the executors to prove, and a right to receive, dividends, and I find also that no creditor who is interested under the liquidation as a joint creditor of the old firm can be debarred from a participation in the benefit of the proof which is made on behalf of Peter Dixon's estate. He will have the benefit of any dividends from Peter Dixon's estate. I mention that only because I am satisfied full justice will be done. The ground, however, upon which I decide this question is, that there is a debt to the executors wholly separate and distinct from any liability with respect to the joint estate, and which debt, therefore, must be absolved from all liability with respect to the joint debts. On the ground that there is no joint estate, and that there is nothing but a plain, distinct contract, a contract plainer than that which existed in *Ex parte Edmonds* (*ubi supra*), I am of opinion that the proof must be admitted. I am of opinion that this case is not affected in the slightest degree by the authority of *Ex parte Carter* (*ubi supra*), or any of those other cases which have been so often referred to, as shewing that a proof by a partner against the estate of his copartner cannot be made while any of the joint debts remain unpaid. In my opinion it is clear that the executors are entitled to retain their proof, and that the order expunging it must be discharged.

Solicitors—Messrs. Pattison, Wigg & Co., agents for Messrs. Andrews, Barrett, & Andrews, Weymouth, for the executors; Messrs. James, Curtis & James, agents for Messrs. Nanson & Clutterbuck, Carlisle, for the trustee.

LORDS JUSTICES.
1874.
May 1, 8. }

Ex parte BARCLAY;
Re JOYCE.

Bankruptcy—Mortgage by Underlease—Trade Fixtures—Bills of Sale Act (17 & 18 Vict. c. 36)—Registration—Power of Sale.

The lessee of a public-house who under a covenant in the lease was bound to deliver up to the lessor all the fixtures on the premises, tenant's fixtures put up for trade excepted, demised by way of mortgage the leasehold premises (including tenant's fixtures) to a mortgagee for the residue of the term less three days.

The mortgage deed contained a power of sale by which it was provided that in case of default the mortgagee might sell the demised premises or any part thereof either for the term thereby granted, or for the whole term granted by the original lease, and either together or in parcels, with a proviso that after any sale the mortgagor should stand possessed of the last three days of the original term in trust for the purchaser:—Held, that the mortgage deed did not empower the mortgagee to take the fixtures and sell them separately from the public-house, and that consequently it was not requisite that the deed should be registered under the Bills of Sale Act.

The test whether the Act applies in such a case is, whether the mortgage deed gives power to the mortgagee to sever the fixtures and sell them separately from the house.

Ex parte Daglish; *re* Wilde (42 Law J. Rep. (N.S.) Bankr. 102; s. c. Law Rep. 8 Chanc. 1072) considered and distinguished.

This was an appeal from a decision of Mr. Registrar Brougham, sitting as chief Judge.

A public-house known as the Bell and Anchor Tavern, in the North Woolwich Road, Plaistow, with the yard, outbuildings and appurtenances, was demised by a lease dated the 15th of June, 1859, to Richard Norden, his executors, administrators and assigns, for the term of fifty years, from the 25th day of June, 1859.

The lease contained a covenant by the lessee that he, his executors, administra-

tors or assigns, would at the expiration or other sooner determination of the term, peaceably and quietly yield up the said messuage, outbuildings and premises, together with all doors, wainscots, shelves, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, chimney-jambes and slabs, windows, sashes, shutters, partitions, sinks, pumps, wells, drains, cesspools, cisterns, and all things which then were or which at any time during the said term should be fixed or fastened to or set up in or upon the said premises, or any part thereof or belonging thereto, unto the lessor, his trustees, and assigns (tenant's fixtures put up for trade excepted).

The lease also contained a covenant that the lessee, his executors, administrators and assigns, would, during the term, keep open and use the messuage as a public-house, and use his and their best endeavours to obtain a license for that purpose.

Besides the ordinary tenant's fixtures, the lessee had put up trade fixtures of various kinds, with a view to carrying on his business as a publican.

Two cottages were subsequently built upon part of the demised property.

On the 2nd of September, 1863, Norden assigned the leasehold premises to H. J. Joyce, a licensed victualler, for the whole residue of the fifty years' term; at the same time Joyce executed a mortgage of the premises to Messrs. Barclay, Perkins & Co., to secure 3,000*l*.

The mortgage was made by deed in the form of an under-lease of the house and premises comprised in the original lease of 1859, including the two cottages and their appurtenances, and "all and every the tenant's fixtures in, upon or about the premises," for the residue of the term of fifty years, less the last three days.

The mortgage deed contained a power of sale, by which it was provided that in case of default the mortgagee might sell the demised premises or any part thereof either for the term thereby granted or for the whole term granted by the original lease, and either together or in parcels, with a proviso that after any sale the mortgagor should stand possessed of the

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last three days of the original term in trust for the purchaser.

Joyce, in November, 1873, filed a petition for the liquidation of his affairs by arrangement, and a Mr. E. Moore was appointed trustee under the liquidation.

On the 6th of January, 1874, Messrs. Barclay, Perkins & Co., the mortgagees, entered into an agreement to sell the public-house and cottages to a Mr. Emms, for the residue of the term of fifty years, and it was thereby also agreed that Emms should purchase at a valuation the fixtures and other effects on the premises, or such part of them as the vendors or the trustee of the property of H. J. Joyce might be disposed of or have a right to sell. A question then arose between the mortgagees and the trustee as to the title to the purchase-money for the fixtures, which had been valued at 170*l*. The trustee asserted that by reason of the mortgage deed not having been registered under the Bills of Sale Act (17 & 18 Vict. c. 36), the mortgagees were not entitled to any of the fixtures. The 170*l*. at which the fixtures had been valued was accordingly paid into Court, and on the 12th of March, 1874, the mortgagees applied to the Court for a declaration that they were entitled to this sum, and for an order for the trustee to pay it over to them.

The Registrar thought that, according to the decision in the case of

Ex parte Daglish; *re Wilde*, 42 Law J. Rep. (N.S.) Bankr. 102; s. c.

Law Rep. 8 Chanc. 1,072,

he was bound to hold that the mortgage deed should have been registered under the Bills of Sale Act, and, that not having been done, the trustee was entitled to the proceeds of sale of the tenant's fixtures, he therefore dismissed the application, with costs.

Messrs. Barclay & Co., the mortgagees, appealed.

Mr. Winslow, Mr. Bardswell and Mr. R. B. Webster (of the Common Law Bar) for the appellants.

This case is different from

Ex parte Daglish (*ubi supra*).

In that case the fixtures were treated as chattels. Here the mortgagees could only sell the fixtures with the house and

cottages, the object being to insure the house being kept open as a public-house. The parties in this case never intended to deal with the fixtures as chattels, and that is really the test whether a mortgage of fixtures is a bill of sale requiring registration or not. If the mortgagees had only taken an equitable mortgage by deposit, they would have had a charge on the fixtures as well as the house; how then can this Court, which always favours contracts in writing, decide that the having taken a formal legal mortgage is to be prejudicial to them?

They cited—

Waterfall v. Penistone, 6 E. & B. 876; s. c. 26 Law J. Rep. (N.S.)

Q.B. 100;

Hawtry v. Bullin, 42 Law J. Rep. (N.S.) Q.B. 163; s. c. Law Rep.

8 Q.B. 290;

and

Tebb v. Hodge, 38 Law J. Rep. (N.S.) C.P. 217; (Ex. Ch.) 39 *ibid.* 56;

s. c. Law Rep. 5 C.P. 73.

Mr. Roxburgh and Mr. Finlay Knight, for the trustee in liquidation, supported the Registrar's order.—There is nothing to take this case out of the ordinary rule. The decision in

Ex parte Daglish (*ubi supra*)

applies. The mortgagees had power to dispose of the trade fixtures separately, for the property "or any part thereof" may be sold "either together or in parcels."

LORD JUSTICE JAMES.—I am of opinion that the Registrar's decision in this case cannot be affirmed, although I am not at all surprised at the Registrar's considering himself bound by the decision said to have been come to by us in *Ex parte Daglish* (*ubi supra*). There is a fine but substantial distinction between the two cases.

The question here is, whether there really has been any separate sale of the fixtures, or any authorisation for taking the fixtures and selling them? I am of opinion that there has not.

The mortgage was by way of underlease; an underlease includes fixtures, whether they are mentioned or not, and it appears to me that the right of the

under-lessee to enjoy the property with the fixtures is absolute.

In this case, what do the mortgagees get? They get the original term *minus* three days, with a power of sale. Mr. Roxburgh has insisted that the words in the power of sale "or any part thereof" and "either together or in parcels" gave a right to the mortgagees to go in and sell the fixtures separately; but it appears to me that those words may have been put in on account of the cottages, to enable them to be sold separately from the public-house. I do not think that under the power of sale the mortgagees would have any right to go in and dismantle the house, and take away the fixtures and sever them from the property. They would only have a right to sell what pertained to the term. I am of opinion that the trustee would have had no right to interfere with the mortgagees' enjoyment of the fixtures if they had remained in possession, because the fixtures were, it seems to me, a part of the property comprised in the term, and had passed to the mortgagees by reason of the sale of the term to them by the debtor. Then the question is, does the fact that the original mortgagor is to be a trustee of the three last days of the term for the purchaser affect the matter? In my opinion it does not affect it at all, because those three days would be in the trustee, for the benefit of the owner of the rest of the term, and not for the benefit of the owner of anything treated as separate property. It seems to me, therefore, that the framer of this mortgage deed has contrived to give a sufficient security to the brewers, without being hit by the Bills of Sale Act.

LORD JUSTICE MELLISH.—I am of the same opinion. If a lessee who has put in trade fixtures makes a mortgage of the property and the fixtures, the test whether that mortgage, so far as it concerns fixtures, need be registered under the Bills of Sale Act is, whether it empowers the mortgagee to sell the fixtures separately; if it does it must be registered, as we decided in *Ex parte Daglish* (*ubi supra*), if it does not, it need not. It had been decided in *Hawtry v. Bullin* (*ubi supra*), affirming the decision of Vice-Chancellor

Malins in *Begbie v. Femwick* (1), that where a lessee makes a mortgage by way of under-lease, and then by a separate testatum assigns the fixtures, such assignment is a bill of sale of the fixtures under the Act. In *Ex parte Daglish* (*ubi supra*) we carried the same principle a step further, because although there was no assignment of the fixtures in that case yet there was as we thought a power to take possession of the fixtures separately as security for the debt, but in the present case the mortgagees had no power, in my opinion, to sever the fixtures from the premises, and therefore the instrument is no bill of sale. I agree that the expression "to sell the same either together or in parcels" refers only to the distinction between the public-house and the cottages, and was not intended to enable a sale of the fixtures to be made apart from the premises.

I do not think that this deed violates the provisions of the Bills of Sale Act, and therefore the order of the Registrar must be reversed.

Solicitors—Messrs. Marson & Dadley, for appellants; Mr. E. J. Layton, for respondent.

BACON, C.J. }
1874.
June 8.

Ex parte PARKE;
Re POTTEE AND FERRIGE.

Attornment by Mortgagors—Tenants in Common—Distress—Seizure of Chattels on Partnership Property—Bankruptcy Act, 1869, s. 34.

P. and F. were in partnership as brick-makers, and they mortgaged certain lands which they used for their partnership purposes, and of which they were seized as tenants in common, and also each of them separately attorned as tenants to the mortgagees in respect of a moiety of the property which was in their joint occupation and at a separate rent. Subsequently the mortgagees took out separate distresses against

(1) 24 Law Times, N.S. 59; s. c. Law Rep. 8 Chanc. 1075 n.

the mortgagors for six years' rent due from each for his one equal undivided moiety of the premises, and they seized chattels on the partnership premises. The mortgagors became bankrupt, and the receiver in the bankruptcy claimed the goods as against the mortgagees:—Held (affirming the decision of the County Court Judge), that the mortgagees having in both cases distrained on goods which were the joint partnership property of the bankrupts had exceeded their rights, and that they could not distrain on goods in which the tenant and another person had an undivided interest.

This was an appeal from a decision of the Judge of the Croydon County Court.

The bankrupts, Messrs. Henry Potter and William Ferrige, were in partnership as brickmakers, and by an indenture of the 29th of October, 1867, they mortgaged certain freehold hereditaments of which they were seized as tenants in common, to Parke and others to secure 2,000*l.* and interest at five per cent. The mortgage contained a power of sale, and also each of the mortgagors attorned to the mortgagees in respect of one equal undivided moiety of the premises in their occupation at the yearly rent of 50*l.* And the deed contained a proviso that the mortgagees might enter at any time, and determine the tenancies created by the respective attornments.

Default was made in the payment of principal and interest, and on the 10th of February, 1874, the mortgagees made two separate distresses for 300*l.* each, the warrants being in the following terms—

“To A. B., our bailiff. We do hereby authorise and require you to distrain the goods and chattels of Henry Potter on the premises in the possession of the said Henry Potter and W. Ferrige, situate at Sutton, in the county of Surrey, for 300*l.*, being six years' rent due to us by the said H. Potter for his one equal undivided moiety of the said premises on the 31st day of December, 1873, and to proceed thereon for the recovery of the rent as the law directs. Dated 7th February, 1874.”

A similar warrant was issued on behalf of the mortgagees as to Ferrige's undivided moiety. Under these two warrants the bailiff seized certain bricks and ma-

chinery on the premises of the two partners. On the 13th of February, 1874, Potter & Ferrige were adjudicated bankrupts, and on the 16th of February the bricks and machinery were condemned under the distress warrants. On the 17th of February the receiver under the bankruptcy applied for and obtained an interim injunction to restrain the mortgagees from proceeding on the distresses. This injunction was on the 30th of March made perpetual by the County Court Judge, on the ground that the mortgagees were only entitled to a qualified distress for each rent on the goods of the tenant in common out of whose moiety such rent was reserved, and that as they had in both cases distrained on goods which were the joint partnership property of the bankrupts they had exceeded their rights.

From this decision the mortgagees appealed.

Mr. Winslow and *Mr. Oswald* appeared for the appellants, and contended that the property which was seized on their behalf was clearly within the power of distress—

Viner's Abridgement. Joint-tenants (u), p. 500.

If the beasts of a stranger be upon the land the lord may distrain them for rent—

Gilbert's Distresses, 36.

Any joint tenant may demise his portion so as to give his landlord a right to distrain for rent in arrear—

Cowper v. Fletcher, 6 B. & S. 464; s. c. 34 Law J. Rep. (N.S.) Q.B. 187;

Morton v. Woods, 37 Law J. Rep. (N.S.) Q.B. 242; s. c. 9 B. & S. 632; s. c. Law Rep. 3 Q.B. 658 (Ex. Ch.); s. c. 38 Law J. Rep. (N.S.) Q.B. 81; s. c. 9 B. & S. 650; s. c. Law Rep. 4 Q.B. 293;

Kempe v. Cory, 2 Vent. 228, 283.

Mr. Benjamin and *Mr. Willis*, for the receiver.—If one of these mortgagors had paid his rent and the other had not, it would have been unjust to the former that the landlord should seize goods of which he was a part owner. It is a fallacy to consider that a distress and an execution are at all the same thing; the elementary notion of a distress is the taking of a personal chattel without legal process—

Sweet's Blackstone, 21st ed. vol. ii. p. 194;
Fanshaw's Case, 40 Law J. Rep. (N.S.) Bankr. 52; s. c. Law Rep. 11 Eq. 615.

The right of distress can only be exercised by virtue of the common law, and if you take under the common law you must be bound by the technicalities of the common law; you can, therefore, under each distress take only the goods which belong solely to the person distrained upon.

Mr. Winslow in reply.—If one party had paid his rent and the other had not, the other could not complain that goods in which he was part owner had been taken, because he was a party to the deed, and had put his goods on the land with knowledge of the terms of the deed. You can take Potter's goods on the land, and you can take those of a stranger; you can therefore take those of Potter and a stranger—

Pinhorn v. Souster, 8 Exch. Rep. 763; s. c. 22 Law J. Rep. (N.S.) Exch. 266;

Bullen on Distress, p. 79.

A technical objection like this ought not to interfere with the rights of the parties. The very object of the attornment was to give the mortgagees a right of distress over these goods.

BACON, C.J.—A more ridiculously technical case than this can hardly be conceived at the present day, if I may use the word ridiculous applying it to what is as much the law as any other point of law which may be technical; but it is most purely technical. If I could introduce into the decision of this case, or enter into the contemplation of what are called equitable principles or principles of common justice and common sense, I should have no doubt whatever in saying that both of these distresses were perfectly good distresses upon the chattels which were then taken. But the law forbids me to say so, and the contract and conduct of the parties prevent me from saying so.

The attornments constituted the relation of landlord and tenant between the mortgagors and mortgagees in each case as to one undivided moiety of the pre-

mises comprised in the mortgage deed, and the right of distress is a consequence of that attornment, and is a right to distrain upon all or any the chattels of Potter or Ferrige that can be found upon the land, and take them without process, without authority other than that which the deed and the law give to the distrainer. Now I should like to know how it can be said that the mortgagees, in exercising their right to distrain upon the goods of Potter, could take away a brick in which at law Potter & Ferrige were jointly interested, and in which in equity Potter may have no interest whatever; because if it be joint property, first of all it is subject to the payment of the joint debts, and until the partnership obligations have been satisfied nobody can say what is the interest of either partner in those chattels, so that not only you cannot practically take any one of those chattels and say it belongs to Potter, but you cannot even satisfy yourself that he really has such an interest in it as would make it liable for the debt which he owes to the landlord.

The authorities which have been referred to, in my opinion, do not in the slightest degree touch this case, except that which Mr. Winslow very properly relied upon, the dictum that cattle of a stranger being upon land which is held in joint tenancy may be distrained for rent due from one of the joint tenants. But I cannot follow that. Before I adopted that as an exposition of the law I must find it distinctly stated and have the authority of some case for it. I can see reasons against it, for the stranger, the owner of the beast which they wanted to distrain, would say, "It is not upon your land at all. Shew me which is your land. You cannot say, it is upon Potter's land till you shew which is Potter's land. The *onus* is upon you to shew that this beast which you want to possess yourself of to pay Potter's debt is upon Potter's land, for it is only upon that condition that you can take it." That would be utterly impossible. The contract between the parties, and the law which follows upon the contract, give the landlord a right to take everything upon the entire estate which belongs to Potter. He may roam

over the whole of the joint estate, and if the title of Potter to any goods on the estate can be plainly made out he has a right to take them. But it is a totally different question whether he has a right to take chattels in which Potter, if he has any interest—he may have none—cannot have more than half at the most; it would be directly against the contract, and it would be directly against the law, if you said the creditor may come in and take another man's property to pay Potter's debt.

I do not in the least forget it is a joint debt, that they both of them owe a debt, and that the property belongs to both of them in some sense or other. But I cannot resort to that for the purpose of deciding the question. I must treat them as if they were totally and entirely distinct and apart, and every reason which I have been considering why the mortgagees cannot distrain upon anything but Potter's separate estate or chattels applies also to Ferrige. You can do no more in one case than in the other. They have a right, as I have said, to take into possession, to lay hands upon, and to remove everything that was Potter's; that is to say, everything that Potter could remove. But Potter could with no justice remove these bricks. They were partnership property, he could not take them away, his position as partner would not give him any right so to deal with them.

The distress must be limited to chattels which belonged to Potter, and in seizing the bricks—I speak of the bricks only for distinction and explanation—I think the mortgagees exceeded the rights of a landlord in distraining upon the chattels of a joint tenant of the lands in question. If they can find a brick that belongs to Potter they may take it. But if they try to take a brick in which there is any joint possession, then it is like the case of Shylock—cut as much as you like but shed no drop of blood. You must not take anything that belongs to Ferrige, and you cannot take the joint property without taking something that does belong to Ferrige. I come to this conclusion reluctantly, because it is directly against the common sense and justice of the case, but as I feel it is according to law, I have

no option but so to decide. I am of opinion, therefore, that the order of the learned Judge of the County Court must be sustained, but it is not a case in which there should be any order as to costs.

Solicitors—Messrs. Chauntrell & Pollock, for the appellants; Mr. W. Foster, for the respondents.

BACON, C.J. }
1874. }
July 20. }

Ex parte ASHWORTH;
Re HOARE.

Adjudication of Bankruptcy—Subsequent Liquidation—Jurisdiction to annul Bankruptcy—Secured Creditor—Non-production of Security—Right to Vote—Ultra vires Resolutions—Registration—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), secs. 16, sub-secs. 4, 5, 28, 40, 80, sub-secs. 10, 84, 125—Bankruptcy Rules, 1870, Nos. 260, 266, 271, 272, 275, 295.

The Court of Bankruptcy has power, under its general jurisdiction, to annul an adjudication, independently of any express power given to it by statute.

After a creditor had filed a bankruptcy petition against his debtor, the debtor himself filed a liquidation petition. An adjudication was made on the creditor's petition, and after this the creditors resolved upon a liquidation:—Held, that, either under rule 266 of 1870, or under its general jurisdiction, the Court had power to annul the adjudication.

The creditors of a debtor at their first meeting resolved on an adjournment. Some of the creditors who voted in favour of the adjournment held bills of exchange and bonds of the debtor which they did not produce. If their votes had been rejected the adjournment would not have been duly carried. At the adjourned meeting these creditors produced their bills of exchange and bonds, and a liquidation was then resolved upon:—Held, that the production of the bills and bonds at the adjourned meeting was sufficient.

A secured creditor, who votes without producing his security, by so doing gives up

the benefit of his security, but his vote is not invalidated.

The Registrar can reject such of the resolutions tendered to him for registration as are ultra vires, and register the rest.

In this case there were two appeals from two orders made by the Deputy Judge of the Southampton County Court, by one of which he affirmed the registration by the Registrar of certain resolutions passed by the creditors of Mr. P. M. Hoare, and by the other of which he annulled an adjudication of bankruptcy which had been made against Mr. Hoare.

The bankruptcy petition was presented in the County Court, on the 11th of March, 1874, by Mr. E. Ashworth, and it was founded upon non-compliance with a debtor's summons. A receiver of the debtor's property was appointed.

On the 31st of March the debtor filed a liquidation petition in the London Court, and the first meeting of the creditors was fixed for the 30th of April.

The hearing of the bankruptcy petition was twice adjourned by consent, on the second occasion to the 24th of April, and on that day an adjudication of bankruptcy was made against Hoare, but it was arranged that the advertisement of the adjudication should be stayed till after the 30th of April.

On the 30th of April the first meeting of the creditors under the liquidation petition was held, when it was resolved—

1st. That a committee be appointed to investigate the debtor's affairs, and to report to the adjourned meeting.

2nd. That the proceedings be transferred to the Hampshire County Court.

3rd. That the meeting be adjourned to the 22nd of May.

4th. That application be made to the Court at Southampton for a stay of the proceedings under the bankruptcy for a month.

These resolutions purported to be carried by the proper statutory majority, but they would not have been so carried if the votes of some of the creditors, whose proofs were objected to at the meeting, had been rejected.

The proofs which were objected to were three—

The proof of William Day for 13,443*l.* was objected to, because, in his affidavit, he stated that he held as security a deed of covenant executed by the debtor, two bills of exchange accepted by him, and a bond signed by him, and these securities were not produced.

The proof of the debtor's father, Mr. P. R. Hoare, for 52,400*l.*, was objected to on the ground that he held bonds of the debtor as security for his debt, and his affidavit stated that he held no security. The bonds were not produced.

The proof of Messrs. Hoare, the bankers, in which firm the debtor's father was a partner, was objected to for a similar reason.

The chairman of the meeting made a note of the objection in each case upon the back of the proof.

On the 1st of May an order was made in the County Court, staying all proceedings under the adjudication till after the 29th of May.

On the 22nd of May the adjourned meeting of the creditors under the liquidation petition was held. Mr. P. R. Hoare then withdrew his former proof, and tendered an amended one, in which he stated that he held nine bonds and a promissory note of the debtor, and that he had no other security for his debt, except a lien which he claimed upon an annuity of 500*l.*, which was payable by him during the joint lives of himself and the debtor to the trustees of the debtor's marriage settlement, for the debtor's benefit. The value of this lien was estimated at 3,000*l.* The bonds and promissory note held by Mr. P. R. Hoare were produced at this meeting, as were the several documents held by way of security by Mr. Day and by the bank.

The following resolutions were passed at the meeting by the proper majority—

1st. That the affairs of the debtor be liquidated by arrangement and not in bankruptcy.

2nd. That C. L. Nichols and W. H. Davis be appointed trustees.

3rd. That the adjudication of bankruptcy made against the debtor by the County Court be forthwith annulled.

The creditors also passed the following separate resolutions—

1st. That the trustees be authorised to sell and assign the whole of the property of the debtor to his father, Mr. P. R. Hoare, upon payment of 10,000*l.*, which the said P. R. Hoare, in consideration of the discharge of the debtor being granted, offered to pay to the trustees for the benefit of the creditors other than the said P. R. Hoare and the firm of Hoare & Co., bankers, whose claims are to be released.

2nd. That upon the payment of such sum of 10,000*l.*, and execution of a release of their claims by the said P. R. Hoare and Hoare & Co., the trustees shall certify to the Court that the debtor is entitled to his discharge.

On the 27th of May an application was made to the County Court for the further stay of the advertisement of the adjudication, but was refused, and on the 2nd of June the advertisement was published.

When the resolutions passed at the meeting of the 22nd of May were taken in for registration, the registration was opposed by Ashworth, who attended under protest. On the 2nd of June the Registrar decided that the first three resolutions must be registered, but he rejected the other two, on the ground that they were *ultra vires*. On the 18th of June the Deputy Judge affirmed the Registrar's decision, and by another order he annulled the adjudication of bankruptcy.

Ashworth appealed.

Mr. De Gex and *Mr. Yate Lee*, for the appellant.—When the adjudication was made all the bankrupt's property became vested in the trustee under the bankruptcy, and the creditors could not then resolve on liquidation. Section 125 could have no application then—

Ex parte Treherne, 2 De Gex, F. & J. 656 ; s. c. 30 Law J. Rep. (N.S.) Bankr. 6.

After the appointment of a receiver a petitioning creditor cannot come to terms with the debtor—

Ex parte Jay, ante, 54 ; s. c. Law Rep. 9 Chanc. 133.

Under the present Bankruptcy Act there is no power to annul an adjudication, except in cases to which section 28 or section 84 apply. Neither of those sections applies to the present case, nor does section 80, sub-section 10, apply.

The votes of those creditors who did not produce the bonds, bills of exchange, and promissory notes which they held at the meeting on the 30th of April, ought not to have been counted—

Ex parte Jacobs, ante, 46 ; s. c. Law Rep. 17 Eq. 575 ;

and if these votes had not been counted the adjournment of the meeting would not have been properly carried. The adjournment being invalid, all that was done at the meeting on the 22nd of May was also invalid—

Ex parte Orde, 40 Law J. Rep. (N.S.) Bankr. 60 ; s. c. Law Rep. 6 Chanc. 881.

If some of the resolutions of the meeting of the 22nd of May were *ultra vires* the Registrar had no right to register the others alone. He had power only to register all or reject all—

Bankruptcy Act, 1869, sec. 125, sub-sec. 4 ;

Bankruptcy Rules, 1870, Nos. 275, 295.

[THE CHIEF JUDGE said that he desired to hear the respondents only as to the validity of the resolutions.]

Mr. Little and *Mr. Bagley*, for the debtor.—Persons who hold bonds, or bills of exchange, or promissory notes of the debtor, are not secured creditors ; it is quite sufficient if the documents which they hold are produced before the resolutions are registered—

Bankruptcy Act, 1869, sec. 16, sub-sec. 5, 125, sub-sec. 4.

Bankruptcy Rules, 1870, No. 295.

The Registrar has to deal with all the objections when the application to register the resolutions is made. A creditor who really holds security upon the debtor's estate will forfeit it if he does not produce it, but his vote will remain good.

Mr. Benjamin and *Mr. Northmore Lawrence*, for the trustees under the liquidation.—The Registrar was right in rejecting the *ultra vires* resolutions and registering the others—

Ex parte Browning, ante, p. 129 ; s. c. Law Rep. 9 Chanc. 583.

Rule 266 of 1870 gave the Court power to annul the adjudication. At any rate, section 82 of the Act prevents the pro-

ceedings from being invalidated by any mere informality.

Mr. De Gz., in reply.—Rule 266 does not apply. The Registrar's duty is to decide whether objections taken at the meeting were valid objections at the time when they were taken.

A petitioning creditor's legal right to an adjudication ought not to be interfered with—

In re Dimond, 39 Law J. Rep. (N.S.) Bankr. 47; s. c. Law Rep. 5 Chanc. 743.

BACON, C.J.—There are two appeals in this case. One is against the order of the learned Judge of the County Court, who approved of the act done by the Registrar in registering the resolutions. That, in my opinion, is the first thing to be considered, and on it the case almost wholly, if not entirely, depends.

Now at the meeting on the 30th of April there were creditors present representing *prima facie* a very large majority in favour of the proceedings for liquidation. An objection was taken to the proof by the father of the debtor for a very large sum, about 50,000*l.* (it does not matter what), and a note is taken of that by the chairman of the meeting, who says it appears that a solicitor objects to the father's proof, on the ground that "bonds are held and not produced." That note is written upon the proceedings, and the effect of that is, that hereafter, when the Registrar comes to discharge his duty—that of registering the resolutions or refusing to do so—that objection will be dealt with by him. That I take to be the law distinctly upon the statute as to the registration of resolutions. Another meeting was held, at which the father, finding there had been an objection made to his proof, amends his deposition by stating in the schedule that he has securities, as they are called, and he inserts in the schedule certain bonds and a promissory note of the debtor. That appears upon the proceedings of the second meeting, and is one of the things which is tendered to the registrar on the application for registration. The father says, moreover, that besides that he claims a lien upon a cer-

NEW SERIES, 43.—BANKR.

tain annuity payable to trustees under a marriage settlement for the benefit of the debtor, and that annuity may in some sense be said to be a part of the debtor's estate.

Now what is the meaning of saying that creditors holding security shall not prove without either producing their securities and having them valued, or giving up or forfeiting them? It means that the estate which is administered for the benefit of the creditors shall not be diminished by some one creditor holding security taking part of that estate and coming to take his dividend out of what remains. The securities in this case are bonds, which are no security at all in the proper sense of the word. They are engagements by the debtor to pay his debts, and are in no other sense security. As to the lien which the father believes he has upon the annuity, it is not unreasonable to suppose that he had been advised since he made the first proof that he might make some claim in respect of that. But, inasmuch as he has exercised his right of voting upon the first occasion, that security, if it be a valuable security, has been parted with for the benefit of the debtor's estate. The creditors get the benefit of it, but this in no respect impairs the right of the father to prove or vote. He proves for the whole debt that is due to him, as he has a right to do, but he gives up that security which ought to have been stated in the first instance, if there is any value in it. But the not setting out the bonds was, in my opinion, no objection whatever.

Then, with respect to Mr. Day's proof, it is quite clear he had no security. He had a bill of exchange, and a deed containing covenants, by which the debtor was supposed to be bound. That is no security. The case of the bank is the same thing. They held bills of exchange, and did not produce them.

Now it is quite clear that, for the purpose of that first meeting, unless there was some misrepresentation by the creditors proving, which would be detected when it went before the Registrar, there is no objection to any of the proofs. If there was any objection capable of being raised before the Registrar, I must as-

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sume that it was raised in this case, perhaps not very fully or formally; but the present appellant attended before the Registrar by his solicitor, and objected to the registration, and it was not only competent to, but it was the duty of the Registrar, to deal with any objection that had been taken to the proofs upon the evidence before him. I think he came to a right conclusion, and that no objection could be sustained against the right of these creditors whose debts were unobjectionable to vote as they did at the first meeting and at the second. The whole scope and meaning of the Act of Parliament, and of the rules, which form a part of the Act, and are to be read with it, is evidently that the creditors should have it in their power to decide how the affairs of the debtor are to be dealt with. Here, by an overwhelming majority, the creditors resolved that there should be liquidation and not bankruptcy. I cannot consider that they came to that resolution otherwise than with regard to their own pecuniary interest. I could not assume that, under any circumstances. But here I cannot fail to notice, that the real substance of the arrangement was that the debtor possessing no assets, in comparison with the large amount of his debts, the creditors were told, on the part of the father, that he would sacrifice 10,000*l.* of his own money, and relinquish his own large debt, and the debt of the bank in which he was a partner, which debts would, if they were substantiated, diminish greatly the dividend coming to the general creditors, and that, instead of getting a dividend out of the small assets which existed, he would relieve the estate of those large claims, and contribute a donation of 10,000*l.* I am asked, under such circumstances, to decide upon what are called informalities in the proceedings, for the objections are no better than that—substance there is none in any one of them—to decide against the creditors who have an opportunity of getting 10,000*l.* to divide amongst them, and to make a dividend, and not an unreasonable dividend, as times go, and to decide in favour of the appellant, who says he insists upon having the bankruptcy go on. It would be against the meaning of the Act of Parlia-

ment, against all the provisions of the Act, and directly opposed to the procedure which is established under the Act, if I were to entertain any such objection. I am of opinion that the objections are wholly unsubstantial. The Registrar performed his duty properly, and I think the learned Judge made the only order which he ought to have made in the case.

Then there is another point. It is said that the proceedings are irregular, because an adjudication of bankruptcy having been obtained there is no reason why the rights of the petitioning creditor, as they are called, should be interfered with by the subsequent proceedings for liquidation. I say that it was the intention of the statute that the rights of a petitioning creditor, either before or after adjudication, should be interfered with, if it is for the interest and for the benefit of the creditors that they should be interfered with. And here I find the facts are so plain that there can be no question. I find, too, that the 266th rule has a very direct application to this part of the case. The 266th rule provides, in substance, that if, after liquidation proceedings have commenced, the Court thinks, for any reason, that the estate of the debtor should be in the hands of the law—should be taken away from him and put into safe custody—the Court may at once adjudicate him bankrupt, in order only to accomplish that end, but if afterwards the proceedings for liquidation, which are not interrupted by that adjudication, should be carried to a conclusion, and the wishes of the creditors should be ascertained by their resolutions, then the Court may annul the bankruptcy.

Mr. De Gex told us that there were only two sections in the Act of Parliament in which the power to annul an adjudication is vested in the Court. Not only is the power vested in the Court by the 266th rule, but, without any special enactment, I do not entertain the slightest doubt about the Court of Bankruptcy having power at any time, for good reasons, to annul any bankruptcy in which an adjudication may have been made.

In my opinion, that part of the case is

wholly unsubstantiated, and, for the reasons I have given, both these appeals must be dismissed with costs. I forgot to say, with respect to the two *ultra vires* resolutions, that the recent decision in *Ex parte Browning* (*ubi supra*) is conclusive upon the question of registration, and if I had not the authority and assistance derived from that decision I should have held that it was competent for the Registrar to reject from any number of resolutions brought to him those which he thinks *ultra vires* of the creditors, and to register the others.

Solicitors—Messrs. Gregory, Rowcliffes & Rawle, agents for Messrs. Rushton & Co., Bolton, for the appellant; Messrs. Lawrance, Plews & Co., and Messrs. E. F. & Benn Davis, for the respondents.

LOORDS JUSTICES.
1874.
July 10, 24. }

Ex parte TINKER;
Re FRANCE.

Liquidation—Sale of the whole of Debtor's Estate—Order of Discharge—Earnings of Debtor after Liquidation—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 13 and 125, sub-sec. 9—Bankruptcy Rules, 1870, r. 260.

Creditors resolved to dispose of the whole of a debtor's estate to a purchaser, in consideration of a sum agreed to be paid by the purchaser in instalments, the debtor himself agreeing to pay a small part of such sum. The debtor's business was then continued by the purchaser and himself. All the instalments were duly paid, but the creditors having become hostile to the debtor, refused to grant him his order of discharge, and attempted to possess themselves of the profits he had acquired in his business since the agreement for sale:—Held (affirming the decision of the Chief Judge in Bankruptcy), that it would be inequitable to allow the creditors to claim the profits of the business merely because the debtor's order of discharge had not been formally granted.

An injunction was accordingly awarded to restrain the creditors from interfering with the profits of the business.

This was an appeal from a decision of the Chief Judge in Bankruptcy, which is reported *ante*, p. 91, where the facts are fully stated.

Mr. De Gez and *Mr. Jordan*, for the appellants, repeated the arguments which they used before the Chief Judge, and referred to

Ex parte Piercy, *ante* 9; s. c. Law Rep. 9 Chanc. 33,

and

The Bankruptcy Act, 1869, s. 125, sub-sec. 9.

Mr. Roxburgh and *Mr. Beaumont*, for the debtor, were not called on.

JAMES, L.J.—The contention of the appellants is against all good faith and common honesty. They have sold to the debtor and his friends the business from which it was intended that he should derive profits, and they now want to take those profits away from him. The meaning of the creditors' resolutions is clear; from the very nature of the transaction future estate must have been included in the purchase, inasmuch as the profits of the business were necessarily included. The decision of the Chief Judge was right, and the appeal must be dismissed.

MELLISH, L.J.—I am entirely of the same opinion.

Solicitors—Messrs. Shum, Crossman & Co., agents for Messrs. Sykes & Son, Huddersfield, for appellants; Messrs. Learoyd, Learoyd & Peace, London and Huddersfield, for respondent.

LOORDS JUSTICES.
1874.
April 24. }

Re SIMPSON;
Ex parte FURNESS.

Partnership—Death of Partners—Continuation of Business—Bankruptcy of Surviving Partners—Priority of Creditors—Joint and Separate Estate.

Four brothers carried on business together in copartnership under articles which provided, that if either or any of the partners should die, the share of the partner so dying should be ascertained at the half yearly stock-taking next after his death, and

one-half of such share should remain in the partnership business for three years, and the other half for five years, from such partner's decease. Two of the partners died, and the surviving partners continued the business for some time; after which they filed their petition for liquidation. The shares of the deceased partners had not been ascertained:—Held (affirming the decision of the Chief Judge in Bankruptcy), that the creditors of the four partners had no priority over the creditors of the surviving partners, but that the joint assets of the four which remained in specie must be distributed amongst all the creditors rateably.

This was an appeal from a decision of Bacon, C.J., reported *ante* p. 43, where the facts and authorities are given at length.

Mr. De Gez and Mr. Ford North appeared for the appellants, the creditors of the four partners, as distinguished from the creditors of the surviving partners.

Mr. A. G. Marten and Mr. Ambrose for the respondents, the creditors of the two surviving partners.

LORD JUSTICE JAMES said he thought the decision of the Chief Judge right, and concurred with his judgment.

LORD JUSTICE MELLISH said — The question before us is, whether, according to the true construction of the articles of partnership, the interest of a deceased partner in the assets did not pass immediately on the death of such partner. I am of opinion that it did. The articles provided that, in case either or any of the partners should die, such event should not dissolve the partnership; that is to say, the survivors were to continue partners

inter se. It clearly does not mean that the executors were to be partners, but that the survivors should continue to be partners, and might deal with the assets as they pleased for the purposes of the continuing business, and not for the purpose of winding it up, as in the ordinary case they must have done. The share of a partner dying is to be ascertained at the succeeding half-yearly stock-taking after his death, and the balance then found to be due is to be paid in a particular way.

That, in my opinion, shews clearly that what is meant by "the share" is the sum to be paid to the executors in respect of the share of the deceased. The construction is rendered still more clear by the subsequent stipulation; that 200*l.*, part of the purchase money, is to be paid one month after the death, whether the stock-taking has then been made or not. I am of opinion that the whole interest in the assets passed immediately upon the death of one partner to the survivors, and the right of the executors was to have the value ascertained in a particular way, and then to receive the amount in a particular way. The ascertaining of the value of the share was not, as it appears to me, a condition precedent to the passing of the property in the assets, but they passed directly and immediately upon the death to the surviving partners. The appeal must be dismissed.

Solicitors—Messrs. Gregory, Rowcliffe & Co., agents for Messrs. Cooper & Sons, Manchester, for the appellants; Messrs. Pritchard & Englefield, agents for Messrs. Boote & Edgar, Manchester, for the respondents.

INDEX

TO THE SUBJECTS OF THE

CASES IN BANKRUPTCY,

BEFORE THE

CHIEF JUDGE IN BANKRUPTCY,

AND IN

THE COURT OF APPEAL IN CHANCERY.

NEW SERIES, VOL. XLIII.

ACT OF BANKRUPTCY—*fraudulent conveyances:*

past consideration: bill of sale: costs]—In August, 1870, two brothers, trading as grocers, in consideration of 500*l.*, previously advanced by their father and brother, as to the greater part upon a verbal agreement for the security, executed an agreement to assign on demand their business, with the lease of their premises (which was deposited), stock-in-trade, fixtures, utensils and book debts, with a proviso that if the 500*l.* with any further advances and interest was repaid, the agreement should be void, but if not, providing for the sale of the property to the mortgagees at a valuation, and payment of the balance (if any) to the traders. In March, 1873, the brother making the advance, and who was employed in the business, informed his father that the traders were in difficulties, and thereupon demand for payment was made. On the 4th of April the property was valued at 688*l.*, and on the 5th, 123*l.*, the balance over the amount due, was paid by the father and brother upon an assignment of the property, which comprised all the traders' property except furniture worth 30*l.*, which was purchased by the father and brother at the same time. The deed was not registered as a bill of sale, but possession was forthwith taken, and a circular issued to the wholesale dealers who were the principal creditors, informing them of the sale of the business. The 123*l.* and the 30*l.* were spent in paying two creditors, and on the 16th of April the traders presented a petition in liquidation, stating their assets to be nil, and their debts 1,833*l.*:—*Held* (affirming the decision of the Registrar sitting as Chief Judge), that the transaction could not be impeached as an act of bankruptcy, nor (possession having been taken) under the Bills of Sale Act. The transaction, however, being one that required investigation, the trustee's appeal was dismissed without costs. *Ex parte Isard; re Cook*, 31

— See Composition—*Ex parte Hoare; re Walton*.

ADJUDICATION—*tender of amount due under summons after petition*]—When an act of bankruptcy has been proved, and a petition for adjudication presented, the creditor is not bound to accept an offer of payment of the debt, but is entitled to an order for adjudication. *Ex parte Boss; re Whalley*, 110

Under such circumstances an adjournment of the petition, in order to give the debtor time for payment, was held not to be warranted by section 8 of the Bankruptcy Act, 1869. *Ibid*.

— *subsequent liquidation: jurisdiction to annul bankruptcy: secured creditor: right to vote: registration of ultra vires resolutions*]—The Court of Bankruptcy has power, under its general jurisdiction, to annul an adjudication, independently of any express power given to it by statute. *Ex parte Ashworth; re Hoare*, 142

After a creditor had filed a bankruptcy petition against his debtor, the debtor himself filed a liquidation petition. An adjudication was made on the creditors' petition, and after this the creditors resolved upon a liquidation:—*Held*, that, either under rule 266 of 1870, or under its general jurisdiction, the Court had power to annul the adjudication. *Ibid*.

The creditors of a debtor at their first meeting resolved on an adjournment. Some of the creditors who voted in favour of the adjournment held bills of exchange and bonds of the debtor, which they did not produce. If their votes had been rejected the adjournment would not have been duly carried. At the adjourned meeting these creditors produced their bills of exchange and bonds, and a liquidation was then resolved upon:—*Held*, that the production of the bills and bonds at the adjourned meeting was sufficient. *Ibid*.

A secured creditor, who votes without produc-

his security, by so doing gives up the benefit of his security, but his vote is not invalidated. *Ibid.* The Registrar can reject such of the resolutions tendered to him for registration as are *ultra vires*, and register the rest. *Ibid.*

— Priority of English over Irish adjudication. See Partnership—*Ex parte James; re O'Heardon*.

— See Execution Creditor—*Ex parte James; re Condon*.

— See Petitioning Creditor.

APPEAL—to House of Lords, when allowed. See Fraudulent Preference.

BANKRUPTCY—*pending proceedings for liquidation: costs of liquidation out of estate*—For the purposes of the 292nd Rule in Bankruptcy, whereby if bankruptcy occurs "pending proceedings for or towards liquidation by arrangement," the costs in relation to such proceedings are made payable out of the debtor's estate, the proceedings will be deemed to be pending so long as the Court can make any order thereunder, and the creditors under the subsequent bankruptcy can derive a benefit from them. Therefore where upon a petition for liquidation the creditors refused to pass a resolution for liquidation and bankruptcy ensued next day, but the receiver, who had taken possession under the liquidation, had not been discharged before the trustee in bankruptcy was appointed, it was held that the proceedings in liquidation were for the purposes of the above rule pending when the bankruptcy occurred. *Ex parte Jeffery; re Hawes*, 27

The decision below affirmed. See page 1.

— Who may be a bankrupt. See Married Women's Property Act.

BANKRUPT'S PROPERTY—*marriage settlement: covenant by husband to settle after acquired property: shares registered in name of bankrupt*—C. by a settlement made before his marriage assigned a policy and some furniture to trustees for the benefit of his wife and the children of the marriage, and also covenanted that all other real or personal estate of which he should become seized, possessed or entitled during the coverture, should be transferred to the trustees upon trusts thereby declared. No trusts of the after acquired property were declared in the settlement. After the marriage and when C. was still solvent he purchased some shares; the shares were registered in his name and he held the certificates. Subsequently he filed a petition for liquidation, and the trustee in the liquidation claimed these shares, as against the trustees of the settlement:—*Held* (reversing the decision of the County Court Judge), that C. could not be allowed in this way to withdraw the whole of his property from his cre-

ditors, and that the shares must be handed to the trustee in the liquidation. *Ex parte Bolland; re Clint*, 16

Harvey v. Green (12 Beav. 182; s. c. 18 Law J. Rep. (N.S.) Chanc. 480), and *Lewis v. Madocks* (8 Ves. 150 and 17 Ves. 48), considered. *Ibid.*

— Lien for Freight. See Charter-party.

— When it passes to the assignees, See Stoppage in Transitu.

— apparent possession. See Bill of Sale.

— See Inspectorship Deed.

BILL OF EXCHANGE. See Foreign Bill of Exchange. Stamp.

BILL OF SALE—*condition to be written on same instrument: payment by instalments*—A parcel arrangement to repay by instalments a loan secured by a bill of sale is a condition within the meaning of the 2nd section of the Bills of Sale Act, and as such must be reduced into writing and appear on the registered copy of the bill of sale, otherwise the latter will be void against a trustee in bankruptcy. *Ex parte Southam; re Southam*, 39

— *apparent possession: formal possession*—To defeat the title of the holder of an unregistered bill of sale of chattels as against the trustee under the liquidation of the mortgagor, it is sufficient that the chattels are, at the commencement of the liquidation, in the visible possession of the mortgagor, even though the mortgagee has taken possession, so as to prevent the goods being removed by any one else, and with the *bona fide* intention of himself removing them forthwith. *Ex parte Jay; re Blenkhorn*, 122

In order to defeat the title of the trustee in bankruptcy of the mortgagor, the Bills of Sale Act requires that much more should be done by the mortgagee than would be necessary with reference to the doctrine of reputed ownership. *Ibid.*

Two ladies executed, on the 16th of June, 1873, a bill of sale of all their furniture and other effects, including some cows and a pony, to secure the repayment of a loan of 144*l.* The bill of sale was never registered. On the 10th of February, 1874, the mortgagee put two men into possession. These men slept in the house, but the mortgagors continued to use the furniture and other articles just as before. They retained the keys of the premises and used the pony when they pleased, and the cows were milked by their servant. On the morning of the 14th of February the men in possession commenced removing the furniture and packing it into vans which had been brought there, the vans, while they were being loaded, standing on a drive inside the premises occupied by the

mortgagors. In the afternoon the vans with the furniture and also the cows and the pony were taken away. But before this had been done, about noon the same day, the mortgagors filed a liquidation petition:—*Held*, that the mortgagee had done enough before the petition was filed to take the goods out of the possession or apparent possession of the mortgagors. That up to the morning of the 14th of February, the mortgagee's possession was only a formal one, and inasmuch as the mortgagors had, on the 11th of February, committed an act of bankruptcy, by executing a second mortgage of their furniture and other effects (which formed substantially their whole property) to secure an antecedent debt, that the trustee under the liquidation was entitled to the goods. *Ibid*.

— *mortgage by under-lessee of trade fixtures: power of sale: registration*—The lessee of a public-house who under a covenant in the lease was bound to deliver up to the lessor all the fixtures on the premises, tenant's fixtures put up for trade excepted, demised by way of mortgage the leasehold premises (including tenant's fixtures) to a mortgagee for the residue of the term less three days. The mortgage deed contained a power of sale by which it was provided that in case of default the mortgagee might sell the demised premises or any part thereof either for the term thereby granted, or for the whole term granted by the original lease, and either together or in parcels, with a proviso that after any sale the mortgagor should stand possessed of the last three days of the original term in trust for the purchaser:—*Held*, that the mortgage deed did not empower the mortgagee to take the fixtures and sell them separately from the public-house, and that consequently it was not requisite that the deed should be registered under the Bills of Sale Act. *Ex parte Barclay; re Joyce*, 137

The test whether the Act applies in such a case is, whether the mortgage deed gives power to the mortgagee to sever the fixtures and sell them separately from the house—*Ex parte Daglish; re Wilde* (42 Law J. Rep. (N.S.) Bankr. 102) considered and distinguished. *Ibid*.

— See Act of Bankruptcy.

CHARTER-PARTY—*lien for freight: voyage not commenced*—It was provided by a charter-party that 250*l.*, part of the freight, should be advanced in cash on signing bills of lading and clearing at the Custom-house, and that for the security and payment of all freight, dead freight, demurrage and other charges, the master or owners should have an absolute lien and charge on the cargo. The ship was loaded and cleared at the Custom-house, but the 250*l.* was not paid, and consequently the captain did not sign bills of lading, and the ship never started on her voyage. The charterer having become insolvent, his trustee in liquidation gave

notice to the owner that he disclaimed all interest under the charter-party. The owner claimed a lien on the cargo for the 250*l.* as freight, but it was held, affirming the decision of the Chief Judge in Bankruptcy, that the ship never having earned or commenced to earn freight, no lien arose. *Ex parte Nyholm; in re Child*, 21

COMPOSITION—*power of creditors to reduce: dissentient creditors*—Creditors have power by means of an extraordinary resolution to reduce the amount payable under a composition; and creditors who had agreed to the original resolution, but dissented from the resolution for the reduction, are nevertheless bound by the latter resolution when duly passed. *Ex parte The Radcliffe Investment Co.; re Glover*, 4
The word "persons" in the 126th section of the Bankruptcy Act, 1869, does not include creditors. *Ibid*.

— *tender: mistake of trustee: injunction to stay action*—When under a composition arrangement a trustee is appointed by the creditors, the debtor is not liable for any default of the trustee in paying the composition. *Ex parte Waterer; re Taylor*, 25

A creditor holding a security of uncertain value, was inserted in the debtor's statement for an estimated balance. The trustee did not pay or tender the composition on the amount, but (wrongly) required the creditor to prove his debt. The creditor having commenced an action for his original debt against the debtor,—*Held*, that it ought to be restrained. *Ibid*.
The trustee under a composition is not bound to tender the composition, *semble*. *Ibid*.

— *act of bankruptcy: adjudication*—In 1870 W. mortgaged a lease of certain premises to H. to secure 600*l.* In November, 1872, W. filed a petition for liquidation, and in December the creditors passed a resolution for composition, which was duly confirmed and registered, but the composition was not paid. In March, 1873, W. again mortgaged the lease to H. to secure 700*l.*, which included the 600*l.*, &c., then owing to H. In May, 1873, W. was adjudicated bankrupt, the act of bankruptcy alleged being the presentation of the above petition. An application by H. to the County Court to have the mortgage declared a valid security, and for an account, was dismissed:—*Held*, on appeal, that the debtor having been left master of his affairs by the composition, the second mortgage, which was merely in substitution of the first, was not invalidated by the petition for liquidation, and the order of the County Court was discharged. *Ex parte Hoare; re Walton*, 38

— *disputed debt: failure to pay composition. action at law*—In February, 1871, H. effected a composition with his creditors. The proof of one of the creditors, K., was disputed, and

was only settled by the Judge on the 29th of July, 1873. The composition on the amount as settled was not then paid at once, but the solicitors of both parties waited till the order was drawn up and signed by the registrar. On the 22nd of August, 1873, the debtors asked to be allowed to pay the composition partly in cash and partly in bills at two and four months. This request was refused, and K. then said that the composition not having been paid he should commence an action for the whole debt. On the 27th of August the registrar signed the order, and on the same day the debtors tendered payment of the composition in cash. This was refused, and an action for the original debt commenced on the 29th of August:—*Held* (affirming the decision of the County Court Judge), that it would be inequitable to allow K. to proceed with the action. *Ex parte King*; *re Harper*, 41

COMPOSITION (*continued*)—*benevolent motives: order of discharge: dissentient creditor*—All the creditors of H., except one, agreed to accept a composition, and, having the necessary majority, gave the debtor his discharge. The dissentient creditor applied to the County Court to have the order of discharge rescinded, on the ground that it had been granted without proper care and from motives of benevolence. From the evidence it appeared that the creditors did not wish to see the debtor ruined, and also that the main part of the debtor's property consisted of an equity of redemption which might have taken time to realize. No case of fraud having been proved the County Court Judge refused the application, and this decision was affirmed both by the Chief Judge and on appeal by the full Court. *Ex parte Lindsey*; *re Harper*, 84

—*deposit of deeds: collateral security: jurisdiction as to forfeiture*—A bank allowed T. and J., partners, to overdraw their account, having good security from deposit of deeds relating to separate property of T. The two partners presented their petition, and the bank voted in favour of resolutions for composition, the resolutions saying nothing about their security. Afterwards, in accordance with the resolutions, a deed was executed, and this distinctly reserved to the bank their collateral security. The composition was paid to all the creditors, including the bank. On the application of T. the County Court Judge declared the securities forfeited, and directed the bank to deliver them up to T.:—*Held*, on appeal (reversing the decision of the County Court Judge), that in a composition the County Court Judge had no jurisdiction to make such an order, and that the bank were entitled to retain their securities. *Ex parte The Manchester and Liverpool District Banking Co.*; *re Littler*, 73

—*right to take proof off the file*—W. tendered a proof of a debt, and voted at a

first meeting in favour of a composition. At the second meeting, being advised that his proof might prejudice a security he held, he desired to withdraw it. The composition fell through, and therefore the vote at the first meeting had no effect. The registrar declined to allow the proof to be taken off the file:—*Held*, that under the circumstances the proof might be taken off the file. *Ex parte Williams*; *re Williams*, 105

— See Liquidation—*Ex parte Browning*; *re Marks*.

CONTEMPT OF COURT—*order of discharge: conduct of debtor: committal*—Debtors were employed by trustees in a liquidation to realise the stock and collect the book debts, and it appeared that one of them had, after they had received their order of discharge, applied some of the partnership assets obtained in this way in payment of his private creditors:—*Held*, on appeal, that the County Court Judge had authority to commit him for contempt of Court. *Ex parte Waters*; *re Waters*, 128

COSTS—of liquidation where bankruptcy occurs afterwards. See Liquidation.

— See Practice.

DEBTOR SUMMONS—*petition for adjudication by summoning creditor: receiver: payment to summoning creditor*—A petition for adjudication of bankruptcy in default of compliance with a debtor's summons having been presented by the summoning creditor and a receiver appointed under the 13th sec. of the Bankruptcy Act, 1869, such receiver is an officer of the Court, and has no power to authorise the payment of any money of the debtor except under the authority of the Court. Therefore, where under such circumstances the debtor, with the knowledge and consent of the receiver, paid a sum of money to the summoning creditor and the petition for adjudication was dismissed, but before such dismissal the debtor had been adjudicated bankrupt upon the petition of another creditor,—*Held*, affirming the decision of the registrar, that the payment to the summoning creditor was a fraud upon the rights of the trustee in the bankruptcy, and he was ordered to pay to such trustee the money he had received, with interest at 4l. per cent. *Ex parte Jay*; *re Powis*, 54

—*particulars of demand: registered officer of banking company*—B. filed an affidavit, on which a debtor's summons was issued, and therein stated that he was the public registered officer of a company, and that he was duly authorised by the company to make the affidavit, but he did not say that he was authorised to sue out the summons; an objection was taken to this, but the Court held that rule 13 of the Bankruptcy Rules, 1870, had been suffi-

ciently complied with, and dismissed the appeal.
Ex parte Lowenthal; re Lowenthal, 81
 This decision affirmed. See page 132.

— *disputed claim: part of debt claimed admitted: dismissal of summons: staying proceedings: affidavit*—When the person summoned by a debtor's summons merely denies by his affidavit that he is indebted to the summoning creditor in the amount claimed, but it appears that he admits a debt of more than 50*l.*, there being a *bona fide* dispute as to the amount, the summons ought not to be dismissed, but the proceedings upon it ought to be stayed pending the trial of the validity of the debt claimed.
Ex parte Rowan; re Kiddell, 96

An affidavit in the above form, though not strictly in accordance with the provisions of section 7 of the Bankruptcy Act, 1869, yet, as it is in accordance with No. 8 of the Bankruptcy Forms, 1870, is sufficient to give the person summoned a *locus standi* upon an application to dismiss the summons. *Ibid.*

— See Adjudication.

DISCLAIMER OF LEASE—*extension of time for disclaimer*—Where an extension of the twenty-eight days after request within which a trustee must (under section 24 of the Bankruptcy Act, 1869), declare his option of disclaiming a lease, is required in order to obtain the sanction of the Court under the rules of 1871 (rule 28), the practice of the Court is to grant the extension if the application is made within the twenty-eight days, but not otherwise. *Ex parte Lovering; re Jones*, 94

The Court can extend the time afterwards. *Semble*; but it would only do so under very special circumstances. *Ibid.*

Circumstances under which such an order was refused. *Ibid.*

EVIDENCE—Unstamped order to pay. See Stamp.

EXECUTION CREDITOR—*seizure before act of bankruptcy: debt under 50*l.**—The sheriff seized under a writ for a judgment debt exceeding 50*l.*; subsequently he seized under another writ for a judgment debt under 50*l.*; no sale was made under either. The debtor presented his petition for liquidation, and the trustee applied for an injunction to restrain the judgment creditors from proceeding to execute their writs:—*Held*, that no injunction could be granted against the creditor whose debt was under 50*l.* *Ex parte Lovering; re Peacock*, 58

— *payment to sheriff before execution levied: payment by sheriff to execution creditor before notice of bankruptcy*—Money paid by a trader to a sheriff's officer in part payment of the execution creditor's debt and in order to prevent the levying of execution is not within the 87th section of the Bankruptcy Act, 1869, relating to

proceeds of sale of goods taken in execution, and if accepted by the creditor, may be retained by him notwithstanding the bankruptcy of the debtor within fourteen days. Decision below (reported *ante*, page 35) overruled. *Ex parte Brooke; in re Hassall*, 49

— *seizure and sale: refunding proceeds of execution paid to creditor after fourteen days*—Where the sheriff has paid to the execution creditor the proceeds of an execution for a sum of more than 50*l.* against the goods of a trader, after retaining the same for fourteen days, according to the provisions of section 87 of the Bankruptcy Act, 1869, the creditor is entitled to retain the amount notwithstanding the bankruptcy of the debtor within a year from the seizure and sale. *Ex parte Villars; re Rogers*, 76

— *liquidation petition: notice to sheriff: failure of creditors to pass resolutions: trustee in bankruptcy: payment to, under mistake of law*—Execution for a debt above 50*l.* was levied on the goods of a trader on the 17th of November. On the 18th of November the debtor filed a liquidation petition. On the 22nd of November the sheriff sold, and the same day notice of the petition was served on him. On the 16th of December the creditors met, and separated without passing any resolutions. On the 17th of December the sheriff paid the proceeds of the sale to the execution creditor. On the 19th of December a petition in bankruptcy was presented against the debtor, stating the filing of the liquidation petition and the proceedings thereunder, and on the 10th of January an adjudication was made:—*Held*, that the proceedings under the liquidation petition came to an end on the 16th of December, and that, consequently, the execution creditor was entitled to the proceeds of the sale. *Ex parte James; re Condon*, 107

On the 23rd of February the execution creditor, upon the authority of a decision of the Court of Appeal, which was afterwards reversed, paid the proceeds of the sale to the trustee under the bankruptcy:—*Held*, that though this was a voluntary payment made under a mistake of law, yet the trustee, being an officer of the Court, was bound to repay the money to the person properly entitled to it. *Ibid.*
 An application for an adjudication under rule 267 ought to be made by petition. *Ibid.*

FOREIGN BILL OF EXCHANGE—*notice of dishonour*—Though a foreign bill of exchange must be presented by a notary public and protested, to render the drawer liable, notice to the drawer that the bill has been "duly presented for payment and dishonoured," is sufficient without specific notice of protest. *Ex parte Lowenthal; re Lowenthal*, 83

FRAUDULENT CONVEYANCE. See Act of Bankruptcy.

X

NEW SERIES, 43.—BANKER,

FRAUDULENT PREFERENCE—*payee in good faith: appeal to House of Lords*—The concluding words of section 92 of the Bankruptcy Act, 1869 (as to fraudulent preferences), which protect the rights of "a purchaser, payee or incumbrancer in good faith, and for valuable consideration," apply to persons preferred by the bankrupt, who are ignorant that they are being preferred, and not merely to third parties dealing for value with persons so preferred. *Ex parte Butcher; re Meldrum*, 98

This construction is not to exclude from protection third parties innocently dealing for value with persons who have knowingly accepted a preference. *Ibid.*

Appeal to House of Lords not allowed in the case of a small debt on the ground that it would determine the right to larger sums. *Ibid.*

INSPECTORSHIP DEED—*estate and effects of debtor: expectant interest not enforceable: after acquired property*—By a deed of inspectorship, registered under the Bankruptcy Act, 1861, s. 192, it was provided that all the estate and effects of P., the debtor, should be administered in accordance with the bankrupt law. At the date of the deed there was in existence an agreement between railway companies, to which P. was no party, by which it was agreed that the contract for the execution of the works therein referred to should be let to P. or his nominee. P. afterwards and during the continuance of the inspectorship nominated contractors, and received from them a sum of 3,500*l.* for so doing:—*Held*, that this sum was no part of the estate and effects of the debtor at the date of the deed; also, that upon the construction of the deed, after acquired property was not included therein. *Ex parte Piercy; in re Piercy*, 9

INTEREST. See Trustee.

JURISDICTION—*of court of bankruptcy to set aside a sale of partnership assets by order of Court of Chancery: partnership: book debts*—The 72nd section of the Bankruptcy Act, 1869, does not give the Court of Bankruptcy jurisdiction over property or the owners of property not vested in the assignee and not originally subject to the administration in bankruptcy. Still less does it authorise that Court when a decree for sale and accounts has been made in a Chancery suit against solvent partners of a bankrupt to treat such a decree as giving rights to be worked out in bankruptcy and not in Chancery, and the Court being of opinion on the merits that the sale was *bona fide*, but not being satisfied that there was not material error in the mode in which the value of the bankrupt's interest had been arrived at, directed, with the consent of the purchaser, an enquiry whether any further sum ought to be paid by him to make up the proper value of the bankrupt's interest. *Ex parte Maule; re Motion. Maule v. Davis*, 59

The 137th of the Bankruptcy Law Consolidation

Act, 1861, which makes it necessary that an assignee should have the sanction of the Court of Bankruptcy to justify him in selling by private contract all or any of the book debts due or growing due to the bankrupt, and the books relating thereto and the goodwill of his trade or business, relates to the sale of book debts, &c., belonging to the bankrupt only, and not to the book debts, &c., of a dissolved partnership, of which only one partner is bankrupt, such book debts, &c., not being assets distributable or saleable in the bankruptcy. *Ibid.*

LEASE. See Disclaimer of Lease.

LIEN—for freight. See Charter Party.

LIQUIDATION—*sale by trustee of the whole of debtor's estate: earnings of debtor after liquidation*—Creditors agreed to dispose of the whole of a debtor's estate to a purchaser in consideration of a sum agreed to be paid by the purchaser by instalments, the debtor himself agreeing to pay a small part of such sum out of his future earnings. The debtor's business was then continued by the purchaser and himself. All the instalments were duly paid, but the creditors having become hostile to the debtor, refused to grant him his order of discharge, and attempted to possess themselves of the profits he had acquired in his business since the agreement:—*Held* (affirming the decision of the County Court Judge), that it would be inequitable to allow the creditors to claim the profits of the business merely because the order of discharge had not been formally granted. *Ex parte Tinker; re France*, 91

Affirmed, on appeal. See page 147.

—*right to money paid into court*—The defendants in an action upon a bill of exchange paid a sum of money into Court to abide the event. The matters in dispute were subsequently referred to arbitration; and before any award had been made by the arbitrator, the defendants went into liquidation of their affairs by arrangement. The trustee in the liquidation claimed the money in Court:—*Held*, that the plaintiff in the action was entitled to be paid thereout the amount of his debt and costs, and there must be an inquiry to ascertain this amount. *Ex parte Tate; re Kayworth*, 102

—*removal of trustee and committee of inspection: summoning creditors' meeting: rules*—In a liquidation by arrangement a meeting of creditors, for the purpose of removing the trustee and any member of the committee of inspection, and for appointing others, is properly summoned under rules 304 or 305 of the General Rules in Bankruptcy, 1870, and rule 120 is not applicable to such a case, but relates to cases of bankruptcy only. *Ex parte Hopkins; re Hart*, 127

The General Rules in Bankruptcy, 1870, comprise two distinct sets of rules; the one set relating to cases of bankruptcy, the other to cases of liquidation by arrangement. *Ibid.*

— *first meeting of creditors dealing with assets: composition*—A petition for liquidation by arrangement having been filed by a debtor trading in partnership, a resolution was passed at the first meeting of his creditors, that his affairs should be liquidated by arrangement, for the appointment of a trustee and committee of inspection, and the discharge of the debtor. The resolution also purported to authorise the trustee to sell a specific part of the debtor's property for such a sum as would pay the costs of the liquidation, and a composition of 1s. in the pound to be paid to his separate creditors. This resolution was registered:—*Held*, that so much of the resolution as authorised the trustee to sell and make a composition was *ultra vires* and void, but that the rest of the resolution was valid, and the liquidation must proceed thereunder. *Ex parte Browning; re Marks*, 129

— *liquidation petition: first meeting of creditors: notice: signature by debtor's attorney*—The notices summoning the first general meeting of the creditors under a liquidation petition were signed with the name of the debtor's attorney, but the signature was affixed by the clerk of the attorney by his direction:—*Held* (reversing the decision of the Judge of the County Court), that the rules had been sufficiently complied with, and that the resolutions ought to be registered. *Ex parte Hirst; re Hirst*, 130

— bankruptcy pending liquidation. See Bankruptcy, and see Bankrupt's Property.

— See Execution Creditor.

MARRIED WOMEN'S PROPERTY ACT—debt contracted before marriage: separate estate—A married woman having no separate estate is not liable under the 12th section of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), to be made bankrupt in respect of debts contracted before marriage. Whether if she had separate estate she could be made bankrupt, *quære*. *Ex parte Holland; re Heneage*, 85

MORTGAGE. See Composition.

ORDER AND DISPOSITION. See Reputed Ownership.

ORDER OF DISCHARGE—from benevolent motives. See Composition—*Ex parte Lindsey; re Harper*. And see Contempt of Court.

PARTNERSHIP—separate and joint adjudication: English and Irish adjudication: priority—R., carrying on business in London, in partnership with M. in Dublin, committed an act of bankruptcy by executing an assignment of all his estate and effects to trustees for the benefit of his creditors. He was afterwards adjudicated bankrupt, and property belonging to the firm

having been sold by order of the trustees of the deed of assignment, the purchase money was by the London Court of Bankruptcy ordered to be placed to a deposit account in the bank in certain names. In the meantime a separate adjudication was made against M. in Ireland, and was followed by a joint adjudication in Ireland against R. and M., the assignees under M.'s separate adjudication being also assignees under the joint adjudication. Upon the application of the assignees under the Irish bankruptcies for an order directing payment to them of the money produced by the sale,—*Held*, that the separate adjudication in England not having been either superseded or impounded, the joint assets were vested in the English trustee under R.'s separate bankruptcy, and the Irish assignees under M.'s separate bankruptcy as tenants in common; that the Irish assignees had no better title to the joint assets by reason of the joint adjudication, and it being more convenient that the assets should be distributed in England, the order was refused. *Ex parte James; in re O'Reardon*, 13

— *construction of partnership deed: capital to belong to one partner: death of that partner: continuance of business by survivor: joint and separate assets*—Business was carried on by W. & T., in partnership under a partnership deed which provided that all the capital in the business should belong to W., and that in case of his death the share of T. in the profits should thenceforth belong to W.'s representatives or nominees, and the business should thenceforth be carried on by his personal representatives or nominees, and that T. should continue in it for six months to assist such representatives or nominees. W. died, having appointed T. his executor. The business, which was greatly in debt at W.'s death, was continued by T. for fourteen months. T. then filed a petition for the liquidation of his affairs. The stock in trade at the time of the liquidation consisted partly of things which had belonged to W. & T. during their partnership and remained *in specie*, partly of things acquired by T. after W.'s death:—*Held*, that the partnership deed meant only that the capital, subject to the payment of the debts, should belong to W., and that the proceeds of such part of the stock in trade as had been in existence during the partnership formed joint assets applicable to the payment of the joint debts of the partnership, and that so much of the stock in trade as had been acquired by T. since W.'s death, was separate assets of T. applicable to the payment of his separate debts. *Ex parte Morley; re White*, 28

— *attornment by mortgagors: tenants in common: distress and seizure of chattels on partnership property*—P. and F. were in partnership as brickmakers, and they mortgaged certain lands which they used for their partnership purposes, and of which they were seized as

tenants in common, and also each of them separately attorned as tenants to the mortgagees in respect of a moiety of the property which was in their joint occupation and at a separate rent. Subsequently the mortgagees took out separate distresses against the mortgagors for six years' rent due from each for his one equal undivided moiety of the premises, and they seized chattels on the partnership premises. The mortgagors became bankrupt, and the receiver in the bankruptcy claimed the goods as against the mortgagees:—*Held* (affirming the decision of the County Court Judge), that the mortgagees having in both cases distrained on goods which were the joint partnership property of the bankrupts had exceeded their rights, and that they could not distrain on goods in which the tenant and another person had an undivided interest. *Ex parte Parke*; *re Potter*, 139

PARTNERSHIP (continued) — death of partner: continuation of business by surviving partners]

—Four brothers were in business together as cotton spinners. By articles of partnership it was agreed that accounts and balance sheets should be taken half-yearly, and that in case of death of either of the partners the capital of the deceased partners should not be withdrawn from the business, but that the amount should be ascertained at the succeeding half-yearly stock taking, and should remain secured by promissory notes at interest in the business half for three and the other half for five years from his decease. Two of the partners died within a few months of each other, and within a year from the death of the one who last died, the two surviving partners filed a petition for liquidation. Part of the assets consisted of machinery which had belonged to all four partners. On question raised on special case to decide whether the machinery belonged to the creditors of the four in priority to the other creditors:—*Held* (reversing the decision of the County Court Judge), that the creditors of the four had no priority, but that the assets must be distributed amongst all the creditors rateably. *Ex parte Furness*; *re Simpson*, 43

Affirmed, on appeal—*Re Simpson*; *ex parte Furness*, 147.

— See Proof of Debt.

PAYMENT OF DEBTS IN FULL—wages and salaries of workmen: trustee's costs of investigating debtor's affairs]—Under the liquidation of B. five workmen claimed debts of less than 50*l.* each. The County Court Judge, after several adjournments, ordered the trustee to pay these debts. The trustee appealed on the ground that if he paid the debts he should have no funds to enable him to investigate the affairs of the debtor:—*Held* (dismissing the appeal), that the claimants were entitled to have their debts paid at once in full. *Ex parte Powis*; *re Bowen*, 24

PETITION—adjournment of. See Adjudication.

PETITIONING CREDITOR—first petition dismissed by arrangement: special leave to file second petition]

—L. took out a debtor's summons and filed a petition to adjudicate J. bankrupt. J. promised to pay L. fifteen shillings in the pound and to satisfy his other creditors, and on this understanding the petition was, with the consent of all parties, dismissed. J. made no payment, and L. obtained special leave from the Registrar of the County Court to file a second petition founded on the same act of bankruptcy. This petition was heard before the County Court Judge, and by him dismissed on the ground that a debtor could not be adjudicated a bankrupt upon an act of bankruptcy on which a former petition had been founded:—*Held* (discharging the order appealed from), that the second petition was properly filed, and that the creditor was entitled to have it heard upon the merits. *Ex parte Love*; *re Jagger*, 37

PRACTICE—rehearing]—A registrar sitting as Chief Judge has a discretion to rehear a case even after an appeal from his decision, if the point upon which a rehearing is desired is unaffected by the appeal. But an application for a rehearing ought, in ordinary cases, to be made within the time fixed by the 143rd of the Bankruptcy Rules of 1870 for entering an appeal; and where a long delay is unaccounted for a rehearing will not be granted. *Ex parte Mackay*; *re Jeavons*; and *Ex parte Brown*; *re Jeavons*, 105

— **trustee's costs]**—A trustee in bankruptcy making an unsuccessful application to the Court will, in the absence of special circumstances, be ordered to pay the costs of it, and if the assets are insufficient he will have to pay such costs personally, unless he has obtained an indemnity from the creditors. *Ex parte Angerstein*; *re Angerstein*, 131

PRIORITY. See Partnership.

PROOF OF DEBT—bills of exchange: production of security]—Where a creditor of a bankrupt tenders proof of a debt due to him on bills of exchange, the bills must, unless there be some special reason to the contrary, be produced before the proof can be admitted. In case of their non-production, the creditor will not be entitled to vote as to the appointment of a trustee. *Ex parte Jacobs*; *re Carter*, 46

— **two estates: two trades: settlement affecting one: proof by joint and separate creditors]**—A., a liquidating debtor, at the date of filing his petition, was carrying on a trade at Brighton in his own name, and a completely distinct trade under another name in London. Three-fourths of the profits of the London business were settled

upon A.'s wife for her separate use free from his debts. The other fourth of the profits belonged to A. The Brighton business was hopelessly insolvent:—*Held*, that the assets of the two businesses constituted distinct estates, the one the separate estate of the debtor, the other the joint estate of him and the trustee of the settlement, and that accordingly the ordinary rule in bankruptcy for the payment of the joint and separate creditors out of the debtor's joint and separate estates respectively would apply, and the London creditors were entitled to be paid the full amount of their debts out of the assets of the London business before the separate creditors of the debtor received anything out of that estate. *Ex parte New*; *re Childs*, 89

— *joint and separate estates: proof by partner: executor: devastavit*—A father and his son carried on business in partnership. The whole capital belonged to the father, the son having only an interest in the profits. The father died, and thereupon under the provisions of the partnership deed the partnership was dissolved, and all the profits became the property of the father. The father appointed the son his executor, and the son in that character received moneys belonging to the father's separate estate and employed them without any authority in the business. A suit was afterwards instituted to administer the father's estate, and the son filed a liquidation petition:—*Held*, that the receiver appointed in the suit could prove in the son's liquidation for the moneys thus received by the son as executor and misapplied. *Ex parte Westcott*; *re White*, 119

— *annuity under separation deed: debt incapable of being fairly estimated*—W. went through the ceremony of marriage with S., his deceased wife's sister. In 1858 a deed of separation was executed, under which W. covenanted to pay to trustees for S. an annuity of 40*l.*; the deed described S. as the wife of W., and contained a proviso that if they came together again the annuity should cease. W. married again, and S. married and became a widow. In 1871 W. became bankrupt, and in the bankruptcy a proof was presented for the value of the annuity. The County Court Judge refused to admit the proof, because, it being impossible to say what was the probability of the parties coming together again, the value of the annuity was incapable of being fairly estimated:—*Held* (reversing the decision of the County Court Judge), that as the parties could never come together lawfully, that proviso ought to be disregarded, and the value of the annuity estimated in the usual way. *Ex parte Naden*; *re Wood*, 121

— *of partner against co-partner: joint debts unpaid: deceased partner's share of capital: proof by executors*—A firm of five partners carried on business under a deed which provided that in case any partner should die his

shares in the capital should be taken by the surviving partners, at their value, according to the stocktaking immediately preceding his death, with interest thereon, and that the amount found due to the deceased partner should be paid by the surviving partners to the executors or administrators of the deceased partner by fourteen equal annual instalments, with interest until payment, and that the punctual payment of the instalments and interest should be secured by the joint and several bond of the surviving partners. One of the partners died in April, 1866, having by his will appointed executors, whom he authorised to permit his share of the capital to remain in the hands of his partners at interest. The executors allowed their testator's share to remain at interest. Its value was duly ascertained at the stock-taking preceding his death, but no bond was given to the executors by the surviving partners. In July, 1868, another partner retired. In July, 1870, two Chancery suits were instituted to administer the testator's separate estate. In July, 1872, the three remaining partners filed a liquidation petition. On the 30th of July, 1872, the executors of the deceased partner tendered a proof in the liquidation for the amount of his share in the capital as ascertained at the stock-taking preceding his death. The trustee admitted the proof, but afterwards applied to have it expunged, on the ground that some of the debts due by the firm when the testator was a member of it, were still unpaid:—*Held* (reversing the decision of the County Court Judge), that the value of the testator's share was a mere debt due from the surviving partners to his executors, and that the proof ought to be retained. *Ex parte Nanson*; *re Dixon*, 133

— taking proof off file. See Composition.

— See Partnership.

RECEIVER—*action by debtor: registration of resolutions*—M. filed his petition for liquidation and a receiver was appointed. At the first meeting of creditors the principal debtor, T., was not allowed to vote, because M. stated that T. was indebted to him in a larger sum than he owed to T. The registrar refused to register the resolution passed at this meeting because T. had not been allowed to vote. M. then brought an action against T. for the amount of his debt. T. applied to the County Court to restrain the action, but the application was refused because the liquidation proceedings were at an end. T. appealed:—*Held*, that, as the receiver had not been discharged, the proceedings were still pending. *Held*, also, that the injunction to restrain the action would be granted, but only on T.'s undertaking to revive the proceedings. *Ex parte Taylor*; *re Morris*, 103

— Authority of. See Debtor Summons.

REPUTED OWNERSHIP—choses in action: debts due]—The word debts in section 15, sub-section 5, of the Bankruptcy Act, 1869 (the reputed ownership clause) which is not to include "things in action other than debts due to the bankrupt in the course of his trade or business" (though it would include debts payable in future) does not include debts depending on a contingency. *Ex parte Kempe*; *re Fastledge*, 50

On discounting bills of a firm of merchants drawn on their consignees, the bankers gave (according to the usual custom) marginal notes to represent the balance of the price of the bills which was retained by them till the bills were paid, and which was to be then paid over, subject to any claim by the bankers. These notes were deposited by the merchants as security, and were so held when the merchants went into liquidation, the bills of exchange not having then been paid:—*Held*, that the notes did not represent "debts" within the meaning of the above clause, but that they were excepted from the operation of the clause as choses in action. *Ibid*.

— **furniture: hiring**—A trader in July, 1869, sold all his household furniture for 192*l.*, and at the same time agreed with the purchaser to hire it back for 12*s.* 6*d.* per week. Under this agreement the trader remained in possession of the furniture until November, 1873, when he filed a liquidation petition:—*Held*, that the debtor was the reputed owner of the furniture, and that it belonged to the trustee under the liquidation. *Lingham v. Biggs* (1 Bos. & P. 82) and *Lingard v. Messiter* (1 B. & C. 308; s. c. 1 Law J. Rep. (o.s.) K.B. 121) are still binding authorities. *Ex parte Lovering*; *re Jones* (No. 2), 116

— **order and disposition: choses in action: declaration of trust of shares**—F. became indebted to B. in 1,690*l.*, and gave him a letter in which he promised to hold some shares in trust for him, subject, however, to a debt for which they were pledged to the Bank of Ireland. The shares were registered in the name of an officer of the bank. F. filed a liquidation petition:—*Held* (reversing the decision in the County Court), that the interest in the shares was a thing in action, and that the order and disposition clause did not apply. B. was therefore entitled to security, subject to the interest of the bank.—*Ex parte The Union Bank of Manchester* (40 Law J. Rep. (n.s.) Bankr. 57), distinguished. *Ex parte Barry*; *re Fox*, 18

— **order and disposition: goods in bonded warehouse to order of bankrupt vendor**—At the commencement of the liquidation of certain wine and spirit merchants some whisky which they had sold was lying in the bonded warehouse of a third party to the order of the vendors. The delivery order was not sent to the purchaser till after the liquidation petition had been filed. It was shown that it is the well known

custom in the wine and spirit trade for goods after sale to remain in the bonded warehouse of the vendor, or in that of a third party to his order, till the purchaser requires them for use:—*Held* (reversing a decision of BACON, C.J.), that the custom excluded reputation of ownership in the vendors, and that the purchaser was entitled to the whisky, the giving of the delivery order being immaterial. *Held*, also, that it was immaterial that the goods were in the warehouse of a third party, instead of being in the vendor's own warehouse, as in *Ex parte Watkins* (42 Law J. Rep. (n.s.) Bankr. 50). *Ex parte Vaux*; *re Conston*, 113

SECURED CREDITOR—action on bill of exchange: deposit of money in Court to abide the event: arbitration: bankruptcy before award—T. commenced an action against K. on a bill of exchange. K. obtained leave to defend upon terms of paying 880*l.* into Court to abide the event. The matter was submitted to arbitration, but before any award was made K. became bankrupt. On the application of the trustee in the bankruptcy the County Court Judge ordered the 880*l.* to be paid to him for distribution amongst the creditors:—*Held*, on appeal (reversing the decision in the County Court), that T. was a creditor holding a security. *Ex parte Tate*; *re Keyworth*, 55

— See Composition—*Ex parte The Manchester, &c., Bank v. Lüttler*.

SET-OFF—mutual credits: lien—Section 39 of the Bankruptcy Act, 1869, enacting that where there have been mutual credits, &c., between the bankrupt and any other person claiming to prove under the bankruptcy, the sum due from one party shall be set off against any sum due from the other party and the balance only shall be claimed or paid, establishes an absolute statutory rule, and the fact that one party holds a lien or security for his debt will not affect the operation of the rule. *Ex parte Barnett*; *re Devere*, 87

SHARES—registered in name of bankrupt. See Bankrupt's Property.

STAMP—unstamped order to pay money out of a particular fund—A document given by A. to S., which was an order for the payment of money at a future date out of moneys payable at a future time to A. by third persons was not stamped:—*Held*, that the document ought to have been stamped as a bill of exchange, and that, not having been stamped at the time, it could not be received in evidence.—*Diplock v. Hammond* (23 Law J. Rep. (n.s.) Chanc. 550), distinguished. *Ex parte Shellard*; *re Adams*, 3

STOPPAGE IN TRANSIT—reclamation of letter from post-office—C., a banker at Lyons, posted a letter containing bills of exchange to D. in London, but before the departure of the mail he received a telegram from D., telling him to

remit nothing. C. accordingly sent to the post-office to reclaim his letter which by the regulation of the French post-office he was entitled to do on complying with certain formalities. By mistake the formalities were not observed and the letter was forwarded to its destination. In the meantime D. had filed a petition for liquidation:—*Held*, that the property in the bills did not pass to the trustee. *Ex parte Cote*; *re Devese*, 19

TENDER. See Composition—*Ex parte Waterer*; *re Taylor*.

TRUSTEE—*interest on moneys in hands of, in Bank of England: accounts*—Creditors at a first meeting resolved on liquidation and appointed O. trustee. At the same meeting O. stated to the creditors that he should open an account in his own name, as trustee of the debtor, at the P. Bank, of which he was manager, and should

pay into that account all moneys received by him from the debtor's estate. The creditors assented to this arrangement, but no formal resolution was passed confirming it:—*Held* (reversing the decision of the County Court Judge) that, the estate being under liquidation, the creditors had sufficiently prescribed the bank into which the money was to be paid, and that the trustee could not be charged with interest for not having paid it into the Bank of England. *Held also*, that it is the duty of an inspector to see that accounts are filed by the trustee every three months. *Ex parte Old*; *re Bright*, 47

— See Stoppage in Transitu.

WORDS—"debts," 50

— "persons" 4

TABLE OF CASES.

Ex parte Angerstein, re Angerstein, 131

— Ashworth, re Hoare, 142

— Barclay, re Joyce, 137

— Barnett, re Devese, 87

— Barry, re Fox, 18

— Bolland, re Clint, 16

— Boss, re Whalley, 110

— Brooke, re Hassall, 35, 49

— Brown, re Jeavons, 105

— Browning, re Marks, 129

— Butcher, re Meldrum, 98

— Cote, re Devese, 19

— Furness, re Simpson, 43, 147

— Hirst, re Hirst, 130

— Hoare, re Walton, 38

— Holland, re Heneage, 85

— Hopkins, re Hart, 127

— Isard, re Cooke, 31

— Jacobs, re Carter, 46

— James, re Condon, 107

— — re O'Reardon, 13

— Jay, re Blenkhorn, 122

— — re Powis, 64

— Jeffery, re Hawes, 1, 27

— Kemp, re Fastnedge, 50

— King, re Harper, 41

— Linaley, re Harper, 84

— Love, re Jagger, 37

— Lovering, re Peacock, 58

— — re Jones, 94; (2), 116

— Lowenthal, re Lowenthal, 81, 83, 132

— Mackay, re Jervons, 105

— Manchester and Liverpool District B. C.,
re Littler, 73

— Maule, re Motion, 59

— Morley, re White, 28

— Naden, re Wood, 121

— Nanson, re Dixon, 123

— New, re Childs, 89

— Nyholm, re Child, 21

— Old, re Bright, 47

— Parke, re Potter, 139

— Piercy, re Piercy, 9

— Powis, re Bowen, 24

— Radcliffe Investment Co., re Glover, 4

— Rowan, re Kiddell, 96

— Shellard, re Adams, 3

— Southam, re Southam, 39

— Tate, re Keyworth, 55, 102

— Taylor, re Morris, 103

— Tinker, re France, 91, 147

— Vaux, re Conston, 113

— Villars, re Rogers, 76

— Waterer, re Taylor, 25

— Waters, re Waters, 128

— Westcott, re White, 119

— Williams, re Williams, 105

In re Simpson, ex parte Furniss, 147

Maule v. Davis, 59

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